

CO-NEUTRALS' BASELINE AND 2020 ANNUAL REPORT

Kevin S., et al. v. Blalock and Scrase



CO-NEUTRALS

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**Center for the
Study of
Social Policy**
Ideas into Action



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Policy and Practice Consulting, LLC

Kevin S., et al. v. Blalock and Scrase
Co-Neutrals' Baseline and 2020 Annual Report

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I. Introduction

A. Report Structure

This report provides a current summary of efforts made by New Mexico’s Children, Youth, and Families Department (CYFD) and Human Services Department (HSD) as they work to fulfill the commitments outlined in the *Kevin S., et al. v. Blalock and Scrase*¹ Final Settlement Agreement (FSA, also referred to herein as Agreement)². This report includes a validated summary of the State’s baseline and annual reports, as submitted to the Co-Neutrals and Plaintiffs’ team on December 1, 2020, June 1, 2021, and August 2, 2021, including an assessment of the State’s progress toward achievement of the Performance Standard³ for Implementation Targets and Target Outcomes⁴ due on those dates. This report also provides the Co-Neutrals’ validation of some CY2020 State data, noting that data that could be validated were only available for this time period on a limited number of metrics.

The report is structured as follows:

- Section I provides sources of information used and activities completed by the Co-Neutrals to prepare and compile this report.
- Section II outlines the original *Kevin S., et al. v. Blalock and Scrase* complaint, resulting Agreement, and the definition and role of the Co-Neutrals.
- Section III summarizes the State’s progress as of September 1, 2021, on *Kevin S.* commitments due by December 1, 2020 or June 1, 2021.
- Section IV provides an overview of the demographics of children in state custody in New Mexico for CY2019 and CY2020.

¹ When the lawsuit was filed, it named the current Secretaries for the Children, Youth, and Families Department (CYFD) and Human Services Department (HSD) – Secretary Jacobson for CYFD and Secretary Earnest for HSD. Both Secretaries have since left, and the case caption has been updated to reflect the Secretaries at the time the Final Settlement Agreement was reached. For the period of time covered within this report, Secretary Brian Blalock was Secretary of CYFD, and was succeeded by Secretary Barbara Vigil as the new CYFD Secretary on October 1, 2021. Secretary Scrase continues to preside over HSD at the time of this report.

² Exhibit A to the Joint Stipulation of Dismissal (Dkt. No. 62)

³ The FSA pgs. 2-3 defines the Performance Standard as, “making good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target or Target Outcome. A finding of good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target and Target Outcome shall be based on whether Defendants have made all reasonable efforts to achieve each Implementation Target or Target Outcome. This standard is not intended to assess Defendants’ subjective intentions, plans, or promises.”

⁴ The FSA defines Implementation Targets as process commitments that CYFD and HSD agreed to undertake as intermediary and necessary steps toward reaching Target Outcomes. Target Outcomes are defined as performance commitments that CYFD and HSD agree to reach in consideration for Plaintiffs’ agreement to dismiss the *Kevin S.* litigation.

- Section V provides a narrative discussion of the State’s performance on all FSA commitments due by December 1, 2020 or June 1, 2021, organized by each of the Agreement’s subject area Appendices (a summary table of performance is included as Attachment B to this report).

B. Methodology

During this period, the Co-Neutrals held regular meetings and communicated with CYFD and HSD Secretaries, leadership, and staff, and provided review and feedback to the State on draft deliverable documents relevant to each commitment. The Co-Neutrals also met with the Plaintiffs’ team, community advocates, interested parties, and other local and national subject-matter experts as part of the Co-Neutrals’ assessment of information and materials provided by the State.

The Co-Neutrals, their staff, and contractors collaborated with the State’s data team and program leadership to identify and refine the methodologies described in the Data Validation Plan (DVP). They also reviewed, analyzed, and where possible, validated cohort and performance data submitted by the State.

II. Summary of *Kevin S., et al. v. Blalock and Scrase*

The *Kevin S., et al. v. Blalock and Scrase* (“*Kevin S.*”) lawsuit was filed in the U.S. District Court for New Mexico on September 22, 2018,^{5,6} on behalf of a class of children in the custody of New Mexico’s child welfare system (“Plaintiffs”) by Disability Rights New Mexico,⁷ the Native American Disability Law Center,⁸ Public Counsel, Pegasus Legal Services for Children and associated counsel.

The complaint against two of New Mexico’s cabinet agencies, CYFD and HSD, alleged systemic and structural failures resulting in harm to children in foster care and their families, including:

- Lack of a system to ensure stable placements for children in safe and supportive home environments, resulting in children cycling through inappropriate and overly restrictive placements that lack the support and capacity to meet the individual needs of children.
- Lack of a functioning system to meet the medical, mental health, and behavioral health needs of children in state custody, resulting in denial of access to necessary services

⁵ Case 1:18-cv-00896, Dkt. No. 1

⁶ An Amended Complaint was filed on December 28, 2018 (Dkt. No. 16), and included one additional Named Plaintiff.

⁷ Disability Rights New Mexico (DRNM) is a 501(c)(3) non-profit New Mexico corporation, designated as New Mexico’s protection and advocacy organization whose mission is to protect, promote, and expand the rights of persons with disabilities.

⁸ The Native American Disability Law Center (NADLC) is a 501(c)(3) nonprofit organization that advocates for the legal rights of Native Americans with disabilities, and is authorized by federal statutes to initiate legal action designed to protect the rights of persons with disabilities, including children in the foster care system.

including medical, mental health, and behavioral health screenings and services to which children in foster care are entitled.

- Failure to implement trauma-sensitive practices to address the needs of children in foster care who are impacted by complex trauma, including child abuse, abandonment or neglect, and separation from their birth families and caregivers.
- Lack of capacity within the child welfare system to provide necessary support and training to children in foster care, resource families, and relatives due to understaffing, insufficient behavioral health services and expertise in-house, and failure to properly train and support staff.

Following months of negotiations among the *Kevin S.* parties, on March 17, 2020, the parties executed a Final Settlement Agreement (“FSA,” also referred to herein as “Agreement”),⁹ and on March 26, 2020, filed a Joint Stipulation of Dismissal¹⁰ of the lawsuit. In reaching this Agreement, the parties acknowledged their mutual commitment to the development of a trauma-informed system of care that meets the needs of New Mexico’s diverse children and youth and their families.

The FSA is organized in five sections. The first section enumerates the goals of the Agreement,¹¹ which provide a guiding focus on the desired outcomes of the reform, specifically:

1. Develop and implement a system of care that utilizes collaborative decision-making to guide interagency efforts to coordinate delivery of care to children in state custody¹² in a trauma-responsive manner.
2. Improve services and outcomes for families and youth.
3. Increase collaboration among child-serving agencies in order to reduce fragmentation of services and avoid duplication and waste.
4. Ensure sufficient human resources to meet the needs of children in state custody including trained caseworkers, resource parents, kin resource parents, and behavioral health providers.

⁹ Exhibit A to the Joint Stipulation of Dismissal (Dkt. No. 62)

¹⁰ Dkt. No. 62

¹¹ FSA, pg. 4.

¹² Children in state custody are defined in the FSA as, “child(ren) and youth in the legal custody of CYFD’s Protective Services division, including Native Children and children never removed from the Respondent’s home or children returned to the Respondent’s home following a removal.” FSA II.

5. Set up practices and procedures to enable the State to comply with the Indian Child Welfare Act (ICWA)¹³ and provide culturally appropriate and relevant care to children in state custody and their families.
6. Develop and implement trauma-responsive training and coaching for caseworkers, resource parents, kin resource parents, out-of-home providers, and respondents¹⁴/parents.
7. Establish a consistent screening, assessment, and referral procedure statewide that will facilitate access to medically necessary services for all children in state custody.
8. Improve the delivery of intensive home and community-based services to eligible children in state custody.
9. Minimize congregate care and maximize the potential of children in state custody to grow into healthy and independent adults.
10. Identify and measure quality management tools to report on, provide, and improve the quality of care provided to children in state custody, and to provide transparency and accountability.
11. Provide due process to the Proposed Class.

The first section of the Agreement also summarizes the purpose and objectives, provides definitions of terms, and outlines processes, including the appointment and role of the Co-Neutrals, FSA implementation, Performance Standard, and reporting of performance.

The remaining sections of the Agreement are organized by the primary subject areas alleged as deficient in the *Kevin S.* complaint (codified as Appendices). Specifically,

- Appendix A, titled *Trauma-Responsive System of Care*, requires CYFD and HSD to make good faith efforts to achieve substantial and sustained progress toward the development and support of a trauma-responsive system of care for all children in state custody.
- Appendix B, titled *Least-Restrictive and Appropriate Placements*, requires CYFD and HSD to make good faith efforts to achieve substantial and sustained progress toward the development of a system for placing children in out-of-home care in stable, safe, appropriate, community-based placements in the least-restrictive environment.

¹³ The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63, is a federal law passed in 1978 that governs the removal and out-of-home placement of Native children. ICWA established standards for the placement of Native children in foster and adoptive homes, and enabled Tribes and families to be involved in child welfare cases.

¹⁴ As defined on pg. 3 of the FSA, Respondents are, “defendant(s) in an abuse or neglect case under the New Mexico Children’s Code.” In most instances, it is the child’s parent or guardian from whom they were removed.

- Appendix C, titled *Indian Child Welfare Act*, requires CYFD and HSD to make good faith efforts to achieve substantial and sustained progress to serve Native American families, build a relationship with each of the New Mexico Tribes and Pueblos,¹⁵ and comply with the Indian Child Welfare Act in its letter and intent.
- Appendix D, titled *Behavioral Health Services*, requires CYFD and HSD to make good faith efforts to achieve substantial and sustained progress to build a statewide, community-based mental health system that all children and families will be able to access.

Each Appendix includes a set of Implementation Targets (ITs) and Target Outcomes (TOs) toward which the State has committed to make good faith efforts to achieve substantial and sustained progress toward meeting. The FSA defines ITs as process commitments that CYFD and HSD have agreed to undertake as intermediary and necessary steps toward reaching TOs.¹⁶ TOs are defined as performance commitments toward which CYFD and HSD agree to make good faith efforts to achieve substantial and sustained progress in consideration for Plaintiffs' agreement to dismiss the *Kevin S.* litigation.¹⁷

Implementation of the State's obligations within the FSA are validated and monitored by three Co-Neutrals. The parties appointed Judith Meltzer,¹⁸ Pamela Hyde,¹⁹ and Kevin Ryan²⁰ to serve in this role. The Co-Neutrals function in a neutral capacity, and have the authority to validate, evaluate, and audit progress toward achievement of the ITs and TOs. The Co-Neutrals are also responsible for assessing and providing approval of certain policies, plans, and efforts the State must complete related to specific ITs and TOs, as identified in the FSA. One of the ITs that requires the Co-Neutrals' approval is the Data Validation Plan (DVP), which sets forth a process with specific methodologies and data sources to assess the State's baseline performance, and for

¹⁵ The FSA defines NM Tribes and Pueblos to be inclusive of all Tribes, Pueblos, and Nations in New Mexico. The Co-Neutrals use of this term within this report is consistent with the FSA definition.

¹⁶ ITs need not be monitored once they have been achieved. Pursuant to the FSA, if the Co-Neutrals find that the Defendants have met the Performance Standard for a specific IT, the IT will not be reassessed in further reports. FSA, pg. 8.

¹⁷ Each TO shall be monitored until Defendants have met the Performance Standard continuously for a period of at least 24 months. FSA, pg. 8.

¹⁸ Judith Meltzer is the President of the Center for the Study of Social Policy, a national non-profit policy organization that connects community action, public system reform, and policy change to create a fair and just society in which all children and families thrive. Ms. Meltzer has been appointed as court monitor or has served as a member of a technical assistance team in other state and federal class action lawsuits involving child welfare systems, including in Washington DC, New Jersey, Tennessee, South Carolina, Kansas, and Humboldt County, CA.

¹⁹ Pamela Hyde is the principal in Hyde & Associates – Policy and Practice Consulting, LLC. Ms. Hyde previously served as Administrator of the Substance Abuse and Mental Health Services Administration (SAMHSA), and before that, as Secretary of New Mexico's HSD. Ms. Hyde has served as secretary or director of other State and City agencies, and has consulted nationwide providing technical assistance for governmental agencies and agencies utilizing government funding to provide health and human services for their populations.

²⁰ Kevin Ryan is the former commissioner of the New Jersey Department of Children and Families, former New Jersey State Child Advocate, and, through Public Catalyst, supports U.S. District Court Judges overseeing child welfare reform across the country.

validating the State's progress toward achieving the ITs and TOs. See Section V of this report for further discussion of the DVP.

The primary public accountability mechanism for validating, evaluating, and auditing the State's progress is through issuance of public reports. The State and Co-Neutrals are each required to produce a baseline and subsequent annual reports to assess CYFD and HSD's achievement of ITs and TOs. The baseline report assesses the State's progress toward achievement of the ITs (the process commitments and intermediary steps toward achieving the identified outcomes), and describes the State's baseline performance on TOs in CY2019. The annual report – due from the State in August for each year that the FSA is in effect – provides an assessment of the State's progress in the prior calendar year (CY), and describes efforts the State has made to achieve the designated Performance Standard for each IT and TO. For example, the annual report due from the State on August 1, 2022 must provide a summary of the State's progress in CY2021. The sequencing for both the baseline and annual reports stipulates that the State first produce and share an initial report with the Plaintiffs and Co-Neutrals, and the Co-Neutrals produce a subsequent report which validates the data and information within the State's reports and provides a determination of whether the Performance Standard for ITs and TOs to be accomplished in that year have been achieved.

In March 2020, when the parties reached agreement on the FSA and filed for dismissal of the *Kevin S.* lawsuit in federal court, the parties did not foresee that within weeks the state, nation, and world would be deeply and adversely affected by the Covid-19 pandemic for months to come, and into the following year. In recognition of the pandemic's significant impact on the State, the parties agreed to extend by 180 days the deadline for compliance with a significant number of commitments originally scheduled to be completed on December 1, 2020.²¹ Due to this extension (referred to herein as Parties' Extension Agreement), the State's baseline report was divided into two separate deliverables – one due on December 1, 2020 for those ITs and TOs for which the State did not request an extension of time for completion, and another on June 1, 2021²² for those ITs and TOs for which the deadline for completion was extended. The State's annual report for CY2020 progress was due on August 1, 2021.²³ The Parties' Extension Agreement is attached to this report as attachment C.

These adjusted timeframes also impacted the Co-Neutrals' reporting schedule. After consultation with the parties, in March 2021, the Co-Neutrals decided to produce one integrated and

²¹ FSA IV, B states, "The Parties have negotiated specific completion dates for each Implementation Target and Target Outcome. Defendants agree to adhere to these deadlines. The parties may not modify, amend or extend these deadlines other than by mutual consent in writing."

²² The FSA defines "day or days" as "calendar days, unless business days are expressly identified as the relevant period of time. Any deadline falling on a weekend or holiday will be extended to the next non-holiday weekday." FSA II. As May 30, 2021 was a Sunday, and the following day, May 31, 2021, was a federal holiday, the State submitted the required material on June 1, 2021.

²³ The State's annual report is due by August 1 of each year. As August 1, 2021 was a Sunday, the due date became the next business day, August 2, 2021.

comprehensive report in November 2021 to validate the State’s performance as described in both of the State’s baseline reports and their annual report.^{24,25} To the extent possible based on data provided and validated, this report includes a determination of whether the State has met the Performance Standard for commitments due on December 1, 2020, and June 1, 2021. It also reports on CY2020 performance based on data submitted by the State to the Co-Neutrals and as described in the State’s annual report on August 2, 2021.²⁶

One of the Co-Neutrals’ principal responsibilities is assessing whether the State has met the Performance Standard with respect to each IT and TO. The FSA defines the Performance Standard as,

“...making good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target or Target Outcome. A finding of good faith efforts to achieve substantial and sustained progress toward achieving the Implementation Target and Target Outcome shall be based on whether Defendants have made all reasonable efforts to achieve each Implementation Target or Target Outcome. This standard is not intended to assess Defendants’ subjective intentions, plans, or promises.”²⁷

In addition to the above definition, the FSA references what information the Co-Neutrals should use when making a determination on achievement of the Performance Standard, and factors the Co-Neutrals should apply within this assessment, including consideration of the goals of the FSA and prefatory language in each Appendix.²⁸ Ultimately, ITs and TOs are meant to collectively shift practice and processes, improve infrastructure, and in turn, outcomes, for children and families served by CYFD and HSD. As required by the FSA, the Co-Neutrals have applied the FSA definition of the Performance Standard in this report. In some instances, as discussed later in this report, evaluating the State’s efforts to achieve substantial and sustained progress necessitates a period of further observation to assess whether the State made all reasonable efforts, as the impact of the Covid-19 pandemic on the State’s resources, planning, and attention challenged the State’s implementation of certain commitments in various ways. Consequently, in some areas, the Co-Neutrals have delayed their Performance Standard determination. As progress is made in

²⁴ FSA VI, A states, in relevant part, “The Co-Neutrals shall have the authority to change the deadlines for the Co-Neutrals’ reports, but changes to any such deadlines will not have the effect of changing the deadlines for Defendants’ reports.”

²⁵ The original FSA reporting schedule required the Co-Neutrals to produce a baseline report four months after the State produced their baseline report, and for the Co-Neutrals to produce an annual report three and a half months after the State produced their annual report. In light of the bifurcated baseline reporting, the Co-Neutrals would have produced a first baseline report on April 1, 2021, a second baseline report on October 1, 2021, and an annual report on November 15, 2021, with overlapping and largely similar content present in all three reports.

²⁶ This report evaluates the State’s performance as described in both of the State’s baseline reports for ITs and TOs due December 1, 2020, and June 1, 2021. It does not validate the CY2019 baseline data as reported by the State because by the time of report production, the State had not submitted data that was corrected for evident and acknowledged data quality errors.

²⁷ FSA, pgs. 2-3.

²⁸ FSA VI, C.

combating the impacts of the pandemic, through global to local levels, the Co-Neutrals do not anticipate decisions to defer making a judgment on the Performance Standard to recur beyond this initial report.

III. Executive Summary

This is the Co-Neutrals' first *Kevin S.* report regarding the State's progress in achieving the commitments of the FSA. CYFD and HSD – like human services agencies throughout the country – experienced an unprecedented period of change brought on by the Covid-19 pandemic. The State of New Mexico officially closed all non-essential businesses on March 23, 2020,²⁹ with CYFD and HSD transitioning overnight to virtual workplans. As of the writing of this report, Governor Michelle Lujan Grisham has renewed the State of Public Health Emergency she originally declared on March 11, 2020, which will last at least through November 12, 2021.³⁰

The impacts of the pandemic on the State's commencement of *Kevin S.* implementation have been significant, as State leaders and staff have had to shift focus on developing new structures and systems to meet unforeseen challenges faced by children and families, including the basic need for food when distribution lines were disrupted, access to running water to allow for good hygiene practices to prevent virus infection and transmission, and increased demand for unemployment benefits as the economy plummeted and many jobs were lost. Due to these competing demands on government, the parties agreed to an extension of time to complete most commitments that were designed to lay a foundational structure for the *Kevin S.* reform. As detailed in full throughout this report, the State engaged with the Co-Neutrals, outside consultants, and other interested parties as the agencies worked toward meeting the commitments of the FSA and addressed the imperatives of the pandemic.

The FSA also requires both CYFD and HSD to modify and/or reinvent certain historic practices and institute numerous new policies and procedures to meet the goals of the Agreement. To move forward with the FSA's ambitious reform agenda, the State formed cross-departmental workgroups related to each of the FSA commitments to discuss and develop the required plans. Workgroups were charged with thinking through each department's administrative and procedural requirements to identify necessary changes to practices and policies, and to build integrated implementation strategies. The State has provided the Co-Neutrals with drafts, and for some commitments, multiple revisions of documents describing what they intend to do; in most instances, the State has been responsive to the Co-Neutrals inquiries and requests for clarification.

As a result, many of these documents are not yet complete or have not yet been implemented, pending Co-Neutral final review or approval of the described processes or activity. That work

²⁹ For the Public Health Order issued by the New Mexico Department of Health on March 23, 2020, see <https://cv.nmhealth.org/wp-content/uploads/2020/03/SignedPHO03-24-2019.pdf>

³⁰ For Governor Grisham's Executive Order 2021-58 extending the public health emergency to November 12, 2021, see <https://www.governor.state.nm.us/wp-content/uploads/2021/10/Executive-Order-2021-058-1.pdf>

remains iterative and ongoing. Simultaneously, work has been underway to develop and refine data collection and reporting processes to enable the State to track its progress and outcomes, as codified in the DVP, a product that requires approval by the Co-Neutrals. The work to develop the DVP has required increased coordination among the departments, their consultants, the data staff from CYFD and HSD, and experts in practice from each department to reach agreement on how new practices, and in turn outcomes, will be measured and assessed. Work to confirm the final methodologies for quantitative metrics is ongoing, and the methodologies used to produce some of the quantitative metrics reported in the State's baseline reports have already changed. Nevertheless, as of the September 1, 2021, the State did not provide the Co-Neutrals with data of sufficient quality to validate the baseline metrics reflected in the State's baseline reports.

New Mexico is still very much in the beginning stages of the significant change contemplated by the FSA. While some new policies, procedures, and practices have been developed, and in some instances disseminated to staff, the Co-Neutrals have been unable to validate the impacts of those changes at the time of this report's development, and in some cases have received information from community advocates and interested parties who are unaware of the changes, have not seen evidence of the changes, or think that *Kevin S.* reforms are being implemented without necessary transparency to the community. Importantly, the limited quantitative data the Co-Neutrals were able to validate for inclusion in this report only reflect performance through the end of CY2020, thus, do not provide a current assessment of conditions on the ground. While the State has far to go to meet the expectations and commitments of the *Kevin S.* Settlement, State leaders and external advocates have communicated their commitment to this reform agenda and their willingness to work toward achievement of the Settlement goals for New Mexico's children and families.

IV. Children in State Custody in New Mexico³¹

Demographic data provided by CYFD on children in foster care during CY2019 and CY2020 show that 3,880 children were in CYFD Protective Services Division (PSD)³² custody at any point during the CY2019 reporting period (from January 1 to December 31),³³ and 3,349 children were in PSD custody during CY2020.³⁴ There were 1,525 entries into care during CY2019 (representing 1,460 unique children), and 1,739 exits (representing 1,716 unique children).³⁵ In CY2020, there were 1,209 entries into foster care (representing 1,156 unique children), and 1,443 exits from care (representing 1,418 unique children).³⁶

**Table 1: Children Entering and Exiting State Custody
in CY2019 and CY2020³⁷**

	CY2019	CY2020
Children in state custody during reporting year	3,880	3,349
Entries	1,525	1,209
Exits	1,739	1,443
Children in state custody on Dec. 31	2,211	1,978

³¹ The Co-Neutral team analyzed data submitted by CYFD on children in state custody that was compiled from FACTS into structured reports by Falling Colors, the State's contracted data consultants. These structured reports are referred to as "Sandbox" files. As discussed later in section V of this report, the State had not submitted final data for CY2019 or CY2020 as of September 1, 2021. Throughout this section, the source file used for each analysis is specified, as are any adjustments that were made by the Co-Neutrals to address data quality issues detected prior to analysis. The State submitted revised data on October 28, 2021, addressing a number of the data issues described below, however, there was not sufficient time to review these data and update this analysis prior to completion of this report.

³² CYFD is comprised of four divisions. These include Protective Services Division (PSD), Juvenile Justice Services (JJS), Behavioral Health Services (BHS), and Tribal Affairs Division.

³³ The Co-Neutrals' analysis of 2019 cohort file (Sandbox data), submitted by CYFD on June 2, 2021. Note that this count does not include two children who appeared in the January 1, 2019, cohort file (submitted by CYFD in November and December 2020) but were missing from the full cohort file.

³⁴ The Co-Neutrals' analysis of 2020 full cohort file (Sandbox data), submitted by CYFD on August 2, 2021. Note that this count does not include one child with a six-day office stay who appeared in the cohort entry and exit files for 2020 but did not appear in the full cohort file.

³⁵ The Co-Neutrals' analysis of 2019 cohort entry and cohort exit files, submitted by CYFD on November 17, 2020 (resubmitted on December 1, 2020). Detailed 2019 cohort files were not included in the June 1, 2021, data submission.

³⁶ The Co-Neutrals' analysis of 2020 cohort entry and cohort exit files, submitted by CYFD on August 2, 2021. Both counts exclude 36 entries reflected in the file for children who were in care less than 24 hours (who are not reflected in the full cohort file), and one entry associated with an office stay that was incorrectly integrated into the cohort data. CYFD has subsequently identified additional issues in this data set; the Co-Neutral team is working with the State to diagnose and resolve these issues for future submissions and reports.

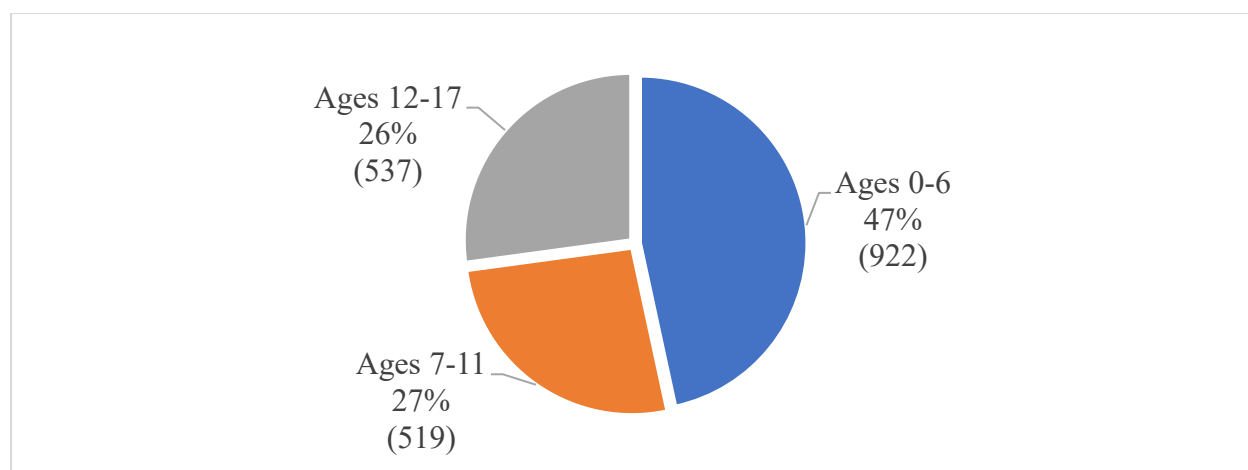
³⁷ Counts all entries and exits for children with multiple episodes of custody during the reporting year.

CYFD data show that there were 2,211 children in state custody on December 31, 2019,³⁸ and 1,978 children in state custody on December 31, 2020.³⁹ The figures below provide additional information on the characteristics of these children.

A. Age, Gender, and Race

As of December 31, 2019, young children aged birth to six years old made up the largest portion (44%) of children in state custody, followed by youth aged 12 to 17 years (28%), and children aged seven to 11 years (approximately 28%). Although the number of children in state custody decreased year over year from 2019 to 2020, the age distribution was similar; as of December 31, 2020, young children aged birth to six years old made up the largest portion (47%) of children in care, followed by children aged seven to 11 years (27%), and youth aged 12 to 17 years (26%) (see Figure 1).

Figure 1: Age of Children in State Custody on December 31, 2020
n=1,978



In 2019, there were slightly more male (52%) than female (48%) children in state custody. In 2020, the population of children in care was more evenly split – 50 percent male and 50 percent female.

The race and ethnicity of children in state custody as of December 31, 2019 is as follows: 63 percent (1,397) of children were of Hispanic ethnicity, 22 percent (496) of children were White (non-Hispanic), six percent (134) were American Indian/Alaskan Native (non-Hispanic), five

³⁸ The Co-Neutrals' analysis of the December 31, 2019, cohort file, submitted by CYFD on November 17, 2020 (resubmitted on December 1, 2020). Note that the Co-Neutral team detected some discrepancies between this file and detail in other cohort files and/or the placement files. The Co-Neutral team adjusted this file to reflect the Co-Neutrals' best understanding of the cohort of children in state custody as of December 31, 2019.

³⁹ The Co-Neutrals' analysis of the December 31, 2020, cohort file, submitted by CYFD on August 2, 2021. Note that the Co-Neutral team detected some discrepancies between this file and detail in other cohort files and/or the placement files. The Co-Neutral team adjusted this file to reflect the Co-Neutrals' best understanding of the cohort of children in state custody as of December 31, 2020.

percent (107) were Black/African American (non-Hispanic), three percent (67) were Multiracial (non-Hispanic), and less than one percent (10) were categorized as “Other.” Of the 2,211 children, 78 percent (1,731) were not documented as having a Tribal affiliation, nine percent (199) were documented as having a Tribal affiliation, and 13 percent (281) of children’s Tribal affiliation was not able to be determined, as shown in Table 2.

Table 2 below also shows the race and ethnicity of children in care as of December 31, 2020. Of the 1,978 children in care on December 31, 2020, 13 percent (251) had a documented Tribal affiliation, and 87 percent (1,727) were not documented as having a Tribal affiliation.

**Table 2: Race and Ethnicity of Children in State Custody
on December 31, 2019 and December 31, 2020**

Race and Ethnicity	Dec. 31, 2019		Dec. 31, 2020	
	Number	Percent	Number	Percent
Hispanic ethnicity (of any race)	1,397	63.2%	1,264	63.9%
White (non-Hispanic)	496	22.4%	394	19.9%
American Indian/Alaska Native (non-Hispanic)	134	6.1%	147	7.4%
Black/African American (non-Hispanic)	107	4.8%	94	4.8%
Multi-Race (non-Hispanic)	67	3.0%	64	3.2%
Native Hawaiian or Other Pacific Islander	0	0.0%	2	<1%
Other	10	<1%	0	0.0%
Unknown	0	0.0%	13	<1%
Total	2,211	100%	1,978	100%
Tribal affiliation (No)	1,731	78%	1,727	87%
Tribal affiliation (Yes)	199	9%	251	13%
Tribal affiliation (NA)	281	13%	0	0%

Note: Percentages do not add up to 100 due to rounding.

B. Living Arrangements

As of December 31, 2019, 87.8 percent (1,942) of children lived in family settings – including 64.5 percent (1,425) in non-relative resource homes, 23.2 percent (512) in relative resource homes, and less than one percent (5) in pre-adoptive homes – and 10.1 percent (224) lived in congregate care facilities.⁴⁰

As of December 31, 2020, 85.3 percent (1,688) of children in state custody lived in family settings – including 48.0 percent (969) in non-relative resource families, 32.0 percent (633) in relative resource families, and 4.3 percent (86) in pre-adoptive homes – and 6.1 percent (120) of children

⁴⁰ The December 31, 2019, cohort file submitted by the State on June 1, 2021 did not distinguish treatment foster care (TFC) homes from other resource family homes.

lived in congregate care facilities (see Table 3). On December 31, 2020, 236 children in family settings were in treatment foster care (TFC) homes.

Table 3: Placement Type for Children in State Custody on December 31, 2020

Setting	Dec. 31, 2020	
	Number	Percent
Resource Family Home (Non-relative)	739	37.3%
Foster Resource Home (Relative)	627	31.7%
Treatment Foster Care (Non-relative)	230	11.7%
Pre-Adoptive Home	86	4.3%
Institution	60	3.0%
Group Home	48	2.4%
Community Home	9	0.5%
Treatment Foster Care (Relative)	6	0.3%
Supervised Independent Living Facility	3	0.2%
Not indicated ⁴¹	170	8.6%
Total	1,978	100%

C. Length of Time in State Custody

Of the 2,211 children in state custody on December 31, 2019, 33.5 percent (740) had been in state custody less than one year, 24.8 percent (549) had been in state custody for one to two years, 17.3 percent (383) had been in state custody for two to three years, and 24.4 percent (539) had been in state custody for more than three years.

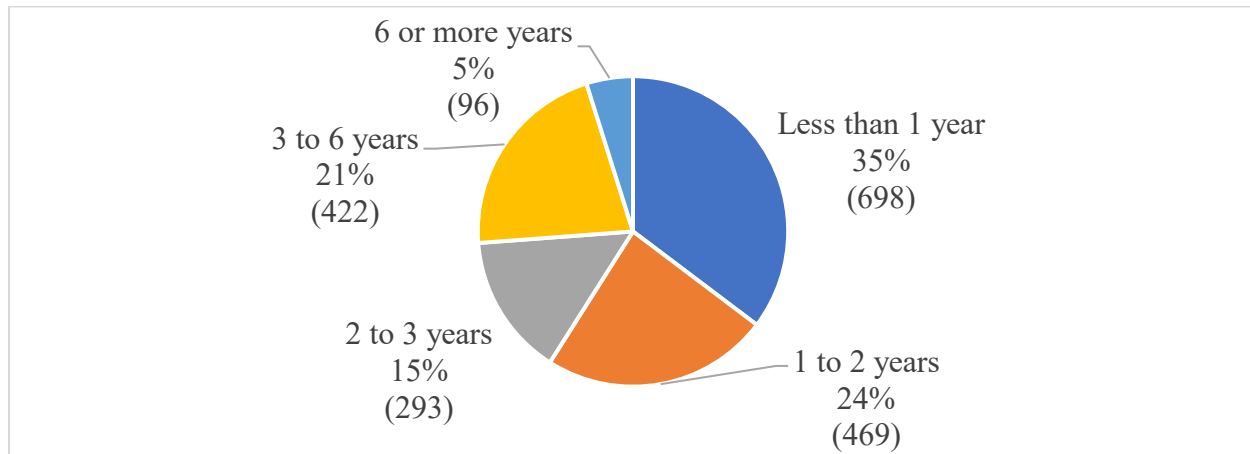
Although the number of children in custody decreased year over year from 2019 to 2020, the length of stay in care for children in state custody was similar. Of the 1,978 children in care on December 31, 2020, 35.3 percent (698) had been in state custody less than one year, 23.7 percent (469) had been in state custody for one to two years, 14.8 percent (293) had been in state custody for two to three years, and 21.3 percent (422) had been in state custody for more than three years.⁴² Of note, five percent of children had been in state custody for over six years (see Figure 2).

⁴¹ The December 31, 2020, cohort file submitted by the State on August 2, 2021, did not indicate which children were on trial home visit or runaway status as of the specified date, data reflected in routine federal reporting. The State has committed to providing this level of detail for future cohort submissions, and submitted corrections and additional detail on November 11, 2021 that indicated that on December 31, 2020: 101 children were on Trial Home Visit (5.1% of children in the cohort), 41 had runaway (2.0%), and three were on Protective Supervision (0.2%). The Co-Neutral team has not yet validated this information.

⁴² Time categories are non-overlapping; “less than one year” denotes children in state custody for fewer than 365 days, “1 to 2 years” indicates children in state custody for 365 to 729 days, and so forth.

Figure 2: Length of Stay in Care of Children in State Custody on December 31, 2020

n=1,978



D. Geography

As of December 31, 2020, nearly one-third of children in care were placed in Region 3 (Bernalillo County), as seen in Table 4.⁴³ Approximately 16 percent were placed in Region 4 (Southeast), and nearly 15 percent in Region 1 (Northwest). One-hundred and six children (5.4%) were placed out of state (at least 18 in residential settings).⁴⁴

Table 4: Regional Distribution of Placements for Children in State Custody on December 31, 2020

Region Name	Frequency	Percent
Region 1 (Northwest)	290	14.7%
Region 2 (Northeast)	213	10.8%
Region 3 (Bernalillo)	645	32.6%
Region 4 (Southeast)	311	15.7%
Region 5 (Southwest)	243	12.3%
Out of State	106	5.4%
Not available ⁴⁵	170	8.6%
Total	1,978	100.0%

⁴³ The State did not provide the child's county of removal in the 2020 cohort data, and county of placement was not provided in the 2019 cohort data. The Co-Neutrals have requested that both county of removal and county of placement be provided for all children in future cohort submissions.

⁴⁴ The data include 17 children placed with a provider who had both in- and out-of-state residential facilities on December 31, 2020, but for whom no facility-specific geographical information was provided in the data submitted. The State provided additional detail specifying facilities for these children on October 28, 2021; the Co-Neutral team was unable to review and validate that information in time for this report. For more detail, see discussion in Section V, C ii. of this report.

⁴⁵ "Not available" includes children in state custody but not placed on December 31, 2020 (e.g., children on trial home visits, protective supervision, or who had run away), and includes 17 children placed with a residential provider with both in- and out-of-state facilities for which no geographic information was provided. As noted above, the State provided additional detail specifying facilities for these children on October 28, 2021; the Co-Neutral team was unable to review and validate that information in time for this report.

E. Exits from State Custody

The vast majority of children who exited state custody in 2019 (68%) left for reunification with family. Table 5 below shows data on exits from care by exit type for 2019 and 2020. The proportion of exits to reunification was lower in 2020 (58%, 836 exits), but exits to guardianship increased (8%, 122 exits). The share of exits to adoption, emancipation, and other reasons⁴⁶ was similar for both 2019 and 2020, as shown below.

Table 5: Exits from State Custody by Exit Type during 2019 and 2020⁴⁷

Exit Type	Jan. 1 – Dec. 31, 2019		Jan. 1 – Dec. 31, 2020	
	Number	Percent	Number	Percent
Reunification with Parent(s) or Primary Caretaker(s)	1,176	68%	836	58%
Adoption	397	23%	336	23%
Emancipation	87	5%	90	6%
Guardianship	49	3%	122	8%
Living with Other Relative(s)	10	1%	13	1%
Transfer to Another Agency	11	1%	13	1%
Runaway	6	<1%	5	<1%
Death of Child	3	<1%	6	<1%
N/A	0	0%	22	2%
Total exits	1,739	100%	1,443⁴⁸	100%

⁴⁶ Including living with other relatives, transfer to another agency, runaway, or death of a child.

⁴⁷ Source - Federal_Discharge_Reason from 2019 cohort exit files, CustodyEndReason from 2020 cohort exit files. The field in the 2020 cohort exit file imputed discharge reasons from the end reason for a child's last reported placement if no federal discharge reason was recorded in the data. Where possible, the Co-Neutral team mapped these end reasons to federal discharge categories; the emancipation category above includes the following custody end reasons: "Adult-Services no longer required," "Certified as an adult," and "Reached adult age." Records for which reported custody end reason appeared to be a placement end reason (e.g., "child requested change") and did not map to a federal discharge reason are marked as "N/A." The Co-Neutrals will work with the State to determine how to best improve the quality and completeness of this data for future submissions.

⁴⁸ As noted above, this excludes 36 entries reflected in the file for children who were in care less than 24 hours (who are not reflected in the full cohort file), and one entry associated with an office stay that CYFD incorrectly integrated into the cohort data. CYFD has subsequently identified additional issues in this data file; the Co-Neutral team is working with the State to diagnose and resolve these issues for future submissions and reports.

V. Discussion of Performance

A. FSA Section VI: Process

1. Data Validation Plan

The FSA requires the State to submit a written Data Validation Plan (DVP) that sets forth the specific processes for validating progress towards achieving the commitments in the Agreement. Completion of a DVP that has the approval of the Co-Neutrals is an IT. The DVP provides key methodological definitions, detail about core data systems and processes (including planned systems changes to strengthen data collection) and presents a set of quantitative and qualitative metrics to help the Co-Neutrals assess progress. For each quantitative metric, the DVP specifies the data and methodology that will be used to calculate the metric for each reporting period. For some items, both quantitative and qualitative metrics are needed, and work is now occurring to develop the instruments needed for qualitative review. The State is working with the Co-Neutrals to identify, create, or accept the instruments necessary for any qualitative metrics for approval of the Co-Neutrals.

Collaboration between the State and the Co-Neutrals to produce the DVP was delayed by the Covid-19 pandemic, although the FSA committed the State to begin collaborating with the Co-Neutrals to produce the DVP by March 15, 2020.⁴⁹ While the DVP is not yet complete, the Co-Neutrals and State have worked together continuously over the last year and have made significant progress.⁵⁰ The work has been iterative, and the State has submitted sets of draft methodologies using the agreed upon structure. After each State submission, the Co-Neutrals have provided detailed feedback – communicating recommendations and suggestions, and highlighting potential programmatic issues.

The State revised and resubmitted an updated version of the DVP on June 1, 2021. Since that time, work has focused on finalizing the methodology for the subset of metrics for which the State has identified that CY2019 and/or CY2020 data will be available. As of September 1, 2021, the State and Co-Neutrals aligned on the methodology for most of these metrics and developed a plan to finalize the outstanding methodologies for which CY2019 and/or CY2020 data will be provided.

⁴⁹ The DVP is an IT, and was included in the set of commitments for which the State received a 180-day extension for finalization.

⁵⁰ To provide the State with a starting point for this work, the Co-Neutrals' team shared an initial metric list with the State on May 18, 2020, based on strategies used to measure performance for similar commitments in other jurisdictions. The State submitted draft metrics for the first set of commitments on November 16, 2020, revising and resubmitting the document with other deliverables on December 1, 2020. From January through March 2021, the Co-Neutrals' team met with the State's Data Steering Committee on a biweekly basis to review and discuss draft metrics for the remaining commitments to inform the draft submitted by the State on March 31, 2021, the date the Co-Neutrals requested receipt of drafts for all ITs and TOs due to be finalized and/or approved by June 1, 2021.

2. Production of Data

The FSA requires the State to submit the data required to validate the baseline with the submission of the State's baseline report, and the data required to validate the TOs for the previous reporting period on May 1st of each year. While the State did submit data on each of those dates, as of September 1, 2021, the State had not submitted to the Co-Neutrals the final data necessary to validate the baseline or CY2020 performance.

The Co-Neutrals are responsible for validating the baseline and performance measures reported by the State. This requires foundational work to both align on the methodologies used to produce those measures (as described above), and work to ensure the data underlying those calculations are of sufficient quality as to reflect actual performance. This work is ongoing. As of the date of this report, the Co-Neutral team, in collaboration with the State, has identified a number of quality issues in the data submitted, and the State has indicated they are in the process of conducting additional data quality checks. The Co-Neutral team will be able to fully validate CY2019 baseline and CY2020 performance once the outstanding data issues have been resolved and there is confidence in the quality and completeness of the data.

The State contracted with Falling Colors Corporation, a data analytics firm, to create a data platform and produce the reports necessary for validation. The contract with Falling Colors was finalized December 1, 2020.

Official data submissions are described in the table below.

Table 6: Summary of Data Submission⁵¹

Date of submission	Data reflected
December 1, 2020	Cohort data ⁵² (CY2019); baseline data (CY2019) pertaining to metrics reflected in the State's first baseline report (App. B, TO 1 and App. C, TO 4)
May 1, 2021	Preliminary performance data (CY2020) pertaining to metrics reflected in the State's first baseline report (App. B, TO 1 and App. C, TO 4)

⁵¹ On October 28, 2021, the State submitted full data sets for CY2019 and CY2020 that addressed many of the data quality issues previously identified and included some additional data consistent with metrics that have been refined since prior submissions. The Co-Neutral team is in the process of reviewing these data and will work with the State as necessary to resolve any outstanding issues.

⁵² A key part of the baseline and verification process is the use of cohort data, specifically lists and characteristics for children in state custody including children in state custody at the beginning of a period under review, at the end of a period, who entered state custody during the period, who exited state custody during the period, and who were served during the period. The cohorts are used to describe demographic changes among the out-of-home population, and to cross-reference the populations that are part of different metrics. The Co-Neutral team began work with the State to produce and verify these data in July 2020.

June 1, 2021	Selected cohort data (CY2019) ⁵³ ; baseline data (CY2019) pertaining to metrics reflected in the State’s second baseline report
August 2, 2021	Cohort data (CY2020); performance data (CY2020) pertaining to metrics reflected in the State’s first annual report (App. B, TO 1 and App. C, TO 4)

As part of the ongoing collaboration to develop the DVP – including identifying specific system changes to improve data collection – and to inform development of other deliverables required by the Agreement, the State also shared data outside of the submissions referenced above.⁵⁴

The State continues to refine and strengthen the quality of data reflected in submitted reports, and to align data fields with final metric methodologies. Falling Colors has worked with State teams to improve the quality of matches across data streams. The Co-Neutral team has also been in regular communication with Falling Colors and the State data teams flagging issues identified through data quality checks and preliminary validation work.

3. State’s Baseline Reports

Section IV, paragraph C of the FSA requires the State to produce a baseline report to the Co-Neutrals and to Plaintiffs which details the State’s achievement of ITs as well as the State’s baseline performance of TOs from January 1 to December 31, 2019. Due to the impacts of the Covid-19 pandemic and the Parties’ Extension Agreement, the State submitted its baseline report in two parts: part one details the State’s performance on ITs and TOs due December 1, 2020, as well as limited baseline performance data for CY2019. Part two details the State’s performance on ITs and TOs due June 1, 2021, as well as secondary metrics for CY2019 data where possible.

The State submitted part one of their baseline report to the Co-Neutrals and Plaintiffs’ team on December 1, 2020. The State submitted part two of their baseline report the Co-Neutrals and the Plaintiffs’ team on June 1, 2021, which described the State’s progress toward achieving ITs and TOs due June 1, 2021, as well as additional details on the State’s achievement toward select commitments due beyond June 1, 2021.

Limited baseline data are available for CY2019 because many of the commitments in the FSA have required the State to adopt new processes or collect different data than the State tracked previously. Therefore, many of the performance metrics described in the DVP – which assess the implementation of those processes – cannot be calculated for CY2019, the baseline year specified

⁵³ The June 1, 2021, submission included only the full cohort Sandbox file (Cohort.csv), but not the detailed cohort files necessary for full validation (e.g., files with all entries and all exits during the reporting period, and point-in-time files for January 1 and December 31 of the reporting year).

⁵⁴ The State also shared data on placements to inform discussions about developing a comprehensive definition of placement and to inform the development of targets for resource home recruitment and treatment foster care (TFC) placements, pursuant to the commitments in App. B, TO 6.

in the FSA. In some cases, the State has identified secondary metrics⁵⁵ to provide contextual information to allow all parties to consider relevant information over a longer horizon than would otherwise be possible.⁵⁶

Part one of the State's baseline report included limited baseline data for CY2019, reflecting only a secondary metric related to App. B, TO 1. Part two of the State's baseline report included secondary metrics for CY2019 data where possible. Work to refine metric methodologies was ongoing when the reports were produced as described above. The baseline reports reflect the State's proposed methodology at the time the report was produced, but many metrics and methodologies have since been refined.

The State submitted to the Co-Neutrals the data used to produce the measures described in the report. As described above, the Co-Neutral team identified a number of quality issues with this submission, and have therefore not yet been able to validate the baseline metrics reflected in the baseline reports. Both parts of the State's baseline reports, as well as the accompanying quantitative baseline report for part two, are available on the State's *Kevin S.* webpage.⁵⁷

4. The State's 2020 Annual Report

The FSA requires the State to annually produce a written report detailing the State's progress with respect to the ITs and TOs due in the previous calendar year.⁵⁸ The State's first annual report was due August 1, 2021, and required details of the State's performance from January 1 to December 31, 2020, on all applicable commitments due during that period. All subsequent annual reports will be due on August 1 of each year. The State's annual report is required to be available publicly on the parties' websites.

The State submitted its first⁵⁹ annual report to the Co-Neutrals and Plaintiffs on August 2, 2021.⁶⁰ The report detailed the State's progress toward meeting the ITs and TOs due between January 1,

⁵⁵ In the State's baseline reports, these were referred to as "proxy" metrics. For clarity, the State and Co-Neutrals will refer to these as "secondary" metrics in the DVP and in future reports.

⁵⁶ For example, the primary performance metric for App. B, TO 1 will assess the number and share of children in state custody who had any placements in hotels, motels, offices, or out-of-state residential facilities, identifying those for which all steps of the extraordinary circumstance determination process (including notifications) were completed as required by the FSA. Given that this is a new process, full reporting is only available for placements that occurred between December 1, 2020 (the date the process began implementation) and December 31, 2020 (the end of the reporting year). However, the secondary metric for this commitment, available from CY2019, will provide additional context by reporting each year the share of children with any placements to one of the restricted settings.

⁵⁷ To access the State's baseline reports, see <https://cyfd.org/kevin-s-settlement-documents>

⁵⁸ FSA Section IV, C.

⁵⁹ The State decided to bifurcate their annual report, with the first report focusing on those commitments due December 1, 2020, and the second focused on data for CY2020 with updated metrics as agreed upon in the DVP. The State proposed this change in reporting schedules to Plaintiffs' team, however, a finalized agreement to modify reporting timelines has not been reached.

⁶⁰ The State's annual report is due by August 1 of each year. As August 1, 2021, was a Sunday, the due date became the next business day, August 2, 2021.

2020 and December 31, 2020, and also provided quantitative performance metrics for TOs due on December 1, 2020 (reflecting data from the first month of implementation). The State submitted to the Co-Neutrals the data used to produce the measures described in the report. As described above, the State and Co-Neutral team have together identified a number of data quality issues, and therefore the Co-Neutral team has not yet been able to fully validate performance in CY2020 for the TOs reflected in the 2020 annual report. However, the Co-Neutral team has examined the data submitted by the State and report preliminary findings for App. B, TO 1⁶¹ and App. C, TO 4⁶² in relevant sections of this report. The State's 2020 annual report and quantitative performance metrics are available on the State's *Kevin S.* webpage.⁶³

5. Parties' Meetings

Section IV, paragraph C of the FSA requires the Co-Neutrals to, "preside over a meeting between the parties at least twice a year." For CY2020, these meetings are to occur in the months of July and December. For all subsequent years, the FSA stipulates the Co-Neutrals and the parties, "must make every effort to have the first Parties' Meeting no later than 30 Days after the State publishes its annual *Kevin S.* report, and the second meeting no later than 30 Days after the Co-Neutrals publish their *Kevin S.* annual report."⁶⁴ The parties have the ability to provide comments on the State's and the Co-Neutrals' annual reports prior to these meetings.

In CY2020, the first parties' meeting was held on July 22, 2020. The Co-Neutrals served as facilitators of the meeting, which was attended by leadership and staff from CYFD and HSD, including both CYFD Secretary Blalock and HSD Secretary Scrase, and the Plaintiffs' team. The second parties' meeting was held on December 16, 2020, with the Co-Neutrals presiding and attendees from both parties, again including the Secretaries of CYFD and HSD. A third meeting of the parties was held on August 26, 2021, within 30 days after the State finalized its first annual report. The next parties' meeting will take place on December 2, 2021 following finalization of this Co-Neutral report.

6. Meeting the Needs of the Named Plaintiff Children (FSA Section XII)

At the time the FSA was entered, there were 14 Named Plaintiff children for whom the State was responsible. Section XII, paragraph J of the FSA requires:

Each named Plaintiff will be offered an assessment for community-based behavioral health services within 60 Days of the signing of this Agreement to determine their current need for

⁶¹ App. B, TO 1 is the prohibition for the placement of children in any hotel, motel, out-of-state provider, office of a contractor, or state agency unless in extraordinary circumstances necessary to protect the safety and security of the child as documented in the child's record and approved by the Secretary or the Protective Services Director of CYFD.

⁶² App. C, TO 4 requires CYFD to conduct a review of Native children placed in a non-ICWA-preferred placement every 30 days.

⁶³ To access the State's 2020 annual report, see https://cyfd.org/docs/Final_Kevin_S_Aug_2021_Annual_Report.pdf

⁶⁴ FSA IV, C.

intensive home- and community-based behavioral health services. Defendants will make available any medically necessary services to each named Plaintiff immediately where possible and no later than 30 Days after the assessment otherwise. If community-based behavioral health services are not medically necessary for any named Plaintiff who is in an out-of-home placement, Defendants will meet on a monthly basis to develop a plan that will enable the named Plaintiff to be placed in a family setting as soon as medically appropriate. Defendants will routinely update the Co-Neutrals on their efforts to serve the named plaintiffs.

The Agreement was signed by the parties on March 17, 2020. As of that date, of the 14 Named Plaintiffs in the Amended Complaint, five continued to be in foster care, and one youth, who had emancipated from foster care in the spring of 2019, was active with CYFD's PSD as a respondent mother for her child who was in foster care.⁶⁵

The State has not provided sufficient information to the Co-Neutrals to conclude that each Named Plaintiff was offered an assessment for community-based behavioral health services by May 17, 2020, the date this action was due. In the summer and fall of 2020, some Named Plaintiff children received updated assessments – including psychosexual assessments, psychiatric evaluations, psychological evaluations, and neuropsychological evaluations – as were recommended or requested for specific Named Plaintiffs, and for some other Named Plaintiffs, the youth or legal guardian declined an assessment being provided. Though the State provided or offered assessments to most Named Plaintiffs in CY2020, they did not provide the assessments as required in the FSA by May 17, 2020.

As of March 17, 2020, two Named Plaintiffs were in out-of-state congregate care placements. In January 2021, one Named Plaintiff moved from an out-of-state congregate placement into a congregate placement in New Mexico; and in late-summer 2021, the child moved again into a temporary congregate placement. In December 2020, the second Named Plaintiff in out-of-state placement moved from one out-of-state congregate placement into a different out-of-state congregate placement. CYFD has not provided an estimated date by which this youth will return to New Mexico. The Department has advised the Co-Neutral team that the Department thinks there are not appropriate and necessary services within New Mexico to meet this Named Plaintiff's needs.

CYFD began meeting monthly to review the care of the 14 Named Plaintiffs in June 2020. The monthly meetings started with participation by a small number of CYFD staff, and as they progressed, began to include staff from HSD and the Named Plaintiffs' Youth Attorneys and/or

⁶⁵ The remaining Named Plaintiffs who were no longer in foster care as of the date the Agreement was signed included three sets of siblings. The first sibling group – with three siblings – had their CYFD PSD foster care case closed in May 2019; since that time, the family has had subsequent child protective services investigations, and one child has had involvement through CYFD's Juvenile Justice Services. The second sibling group – also with three siblings – had their CYFD PSD foster care case closed in January 2019. The third sibling group – with two siblings – had their foster care case closed in May 2019.

guardians ad litem, as applicable. The Co-Neutrals' staff participated in the monthly staffings, and received updates from CYFD's internal weekly staffings on these cases. Staffings with the larger group were discontinued in March 2021, while CYFD examined the format and effectiveness of the process. CYFD continues to provide monthly updates to the Co-Neutrals on the Named Plaintiffs who have open cases with CYFD⁶⁶ or with whom CYFD continues to offer support or maintain contact.

B. Creating a Trauma-Responsive System of Care (FSA Appendix A)

The commitments in Appendix A of the FSA require CYFD and HSD to, “build and support a trauma-responsive system of care for all children in state custody.” Appendix A further defines a trauma-responsive system of care as, “one that identifies, recognizes, understands the effects of, and provides sufficient services and supports to ameliorate trauma, including secondary trauma.” A trauma-responsive system of care must, “support and serve other stakeholders, including families and persons who work for or on behalf of children, youth, and families... include[s] culturally appropriate services and supports... [and] care should utilize collaborative decision-making to identify strengths and needs and to develop an individualized plan for the child.” There is an emphasis on the importance of choice for children, “in decisions about where and with whom they should live and what services they should receive, and these decisions should occur in a timely manner.” Lastly, the FSA requires, “accurate, complete, and relevant evidence-based quality management tools and measures” throughout implementation of a trauma-responsive system of care.⁶⁷

i. Implementation Targets Due December 1, 2020 and June 1, 2021

1. Establish Child and Adolescent Needs and Strengths and Functional Trauma Assessment Criteria

a. FSA Requirement

CYFD, with input and collaboration from HSD, will establish Child and Adolescent Needs and Strengths (“CANS”) and functional trauma assessment criteria for access to intensive home-based services in consultation with clinical experts agreed upon by Defendants and Plaintiffs. The criteria will aim to help CYFD, stakeholders, and providers identify children and youth for whom intensive home-based services are medically necessary and will include but not be limited to consideration of Serious Emotional Disturbance (“SED”) criteria, CANS, and functional trauma assessment screening. (App. A, IT 1.1) (Due December 1, 2020)

⁶⁶ One Named Plaintiff who is receiving CYFD services through Fostering Connections has expressed through their legal representative that they do not consent to having their case discussed and continued to be monitored through these staffings. The State no longer provides the Co-Neutrals with updates on this Named Plaintiff.

⁶⁷ FSA, pg. 1a.

The Child and Adolescent Needs and Strengths (CANS) is a comprehensive, strengths and evidence-based screening tool used to, “support decision making, including level of care and service planning, to facilitate quality improvement initiatives, and to allow for the monitoring of outcomes of services.” The tool was initially developed by the Praed Foundation, and has been adapted with the Foundation’s help and used by many public systems throughout the country to screen for a child and caregiver’s level of functioning within each of the rated items, which are grouped together within various Life Domains. One domain of the NM CANS is focused specifically on trauma and will screen for a child’s experience of trauma as well as how they are coping with its effects. The State’s development of the NM CANS screening questions includes the State’s development of a functional trauma assessment.

b. Co-Neutrals’ Finding

The Co-Neutrals’ assess the State has met the Performance Standard for this IT.

c. Discussion

Between October 2020 and January 2021, the State and the Co-Neutrals exchanged drafts and revisions of CANS materials, and on January 29, 2021, the State provided the final revised CANS (inclusive of functional trauma assessment criteria). The final CANS rating sheet and accompanying reference guide are available on the State’s *Kevin S.* webpage.^{68,69}

In establishing the CANS, the State has worked collaboratively with the Praed Foundation and with the Co-Neutrals throughout 2020 and early 2021 to develop a CANS that is tailored to New Mexico’s specific populations and their prospective needs, and also satisfies the parameters of the FSA. As a result, the final CANS differs in the Life Domains and rating items from the previous version of CANS that was used by New Mexico’s Behavioral Health Services’ Community Behavioral Health Clinicians and certain Behavior Health Therapists within CYFD’s Juvenile Justice Services division.

This IT was due to be completed by December 1, 2020, which did not occur. However, the State continued collaborating with the Co-Neutrals and the Praed Foundation to develop adequate criteria, which they achieved on January 29, 2021.⁷⁰

⁶⁸ The NM CANS reference guide and rating sheet can be found on CYFD’s *Kevin S.* webpage at <https://cyfd.org/kevin-s-settlement-documents>

⁶⁹ On November 2, 2021, the State informed the Co-Neutrals that changes were suggested by the Praed Foundation to include the addition of a “medical health module” with the CANS rating scale and reference guide. The Co-Neutrals learned of this change inadvertently upon seeing the revised version of the tool. The Co-Neutrals agree with this change, and therefore the CANS tool remains approved.

⁷⁰ The requirements for completion of both the CANS and CAT were promulgated into CYFD’s Permanency Planning policy in May 2021 (8 NM Admin Code 8.10.8.17).

2. Revised Serious Emotional Disturbance (SED) Criteria

a. FSA Requirement

CYFD and HSD will revise SED criteria to clarify that removal from home is not a requirement to access these services. (App. A, IT 1.2) (Due June 1, 2021)

b. Co-Neutrals' Finding

Following the New Mexico Behavioral Health Collaborative's (NM BHC) adaptation of the updated Serious Emotional Disturbance (SED) Criteria on January 14, 2021, the Co-Neutrals' assess the State has met the Performance Standard for this IT.

c. Discussion

The State submitted their proposal for updated SED Criteria to the NM BHC and to a representative of the Plaintiffs' team on January 7, 2021. On January 11, 2021, Disability Rights of New Mexico (DRNM) submitted a letter to the NM BHC noting additional changes the group felt were necessary and appropriate to be included in the revised SED Criteria. The State incorporated a majority of the feedback, and provided a final revised SED Criteria to the Co-Neutrals and to the NM BHC on January 13, 2021. The revised SED Criteria were presented to the NM BHC and were adopted on January 14, 2021. An alert was issued on March 16, 2021, to all CYFD and Behavioral Health Services Division (BHSD) Non-Medicaid Providers, and has been published on both the CYFD and HSD websites.⁷¹ The State's final revised SED Criteria explicitly states that a child's removal from the home is not required for an SED determination.

3. Trauma-Responsive Training and Coaching Plan

a. FSA Requirement

CYFD and HSD will create a cross-departmental Trauma-Responsive Training and Coaching Plan that describes in writing a plan and process for providing mandatory, high-quality trauma-responsive training to all CYFD employees, Designated HSD Employees and employees of child-serving agencies that contract with CYFD or HSD to provide care to Children in State Custody. Training will address the impact of trauma including its neurodevelopmental effects, implementing and accessing trauma-responsive supports and services, and secondary trauma. Training will comply with professional standards and best practices in adult education, including by being case-based and interactive, and including an assessment component to measure effectiveness. Trauma-responsive training will consist of initial or pre-service training as well as consistent, ongoing in-service training, mentoring, coaching, and support. The Trauma-Responsive Training and

⁷¹ The 2021 Serious Emotional Disturbance Definition can be found on CYFD and HSD websites at <https://cyfd.org/about-cyfd/publications-reports> and <https://cyfd.org/behavioral-health>

Coaching Plan will also provide for mandatory trauma-responsive training for Resource Families and optional trauma-responsive training for Respondents. Training for Resource Families and Respondents will be accessible both online and in person, and CYFD will provide childcare during any in-person sessions if needed. Notice of training shall be provided to Resource Families and Respondents reasonably in advance of any scheduled training, and no less than 14 Days in advance of any scheduled training. Notices will state that childcare will be provided and that requests for childcare must be received 48 hours prior to the training, or a lesser number of hours determined by CYFD and/or HSD. The written plan will include identification of the training program or materials to be used and the number of hours of training to be received by each category of trainee. The trauma-responsive training and coaching described in the plan must be sufficient to allow the Departments to meet their obligations under this Agreement. The Co-Neutrals must approve the Trauma-Responsive Training and Coaching Plan. (App. A, IT 2.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

The State provided an initial draft of its Trauma-Responsive Training and Coaching Plan to the Co-Neutrals for review on March 31, 2021. Between April and June 2021, the Co-Neutrals reviewed drafts and provided feedback on versions of the Plan provided by the State. The Co-Neutrals have not yet approved the Plan.

The State defines a trauma-responsive system as one in which all parties involved recognize and respond to the impact of traumatic stress on those who have contact with the system, including children, caregivers, and service providers. In material shared with the Co-Neutrals, the State further defines a trauma-responsive system as one that:

1. Routinely screens for trauma exposure and related symptoms;
2. Uses evidence-based, culturally responsive assessment and treatment for traumatic stress and associated mental health symptoms;
3. Establishes anti-racism and cultural humility as a core component of the building of a trauma-responsive agency;
4. Makes resources available to children, families, and providers on trauma exposure, its impact, and treatment;

5. Engages in efforts to strengthen the resilience and protective factors of children and families impacted by and vulnerable to trauma;
6. Addresses parent and caregiver trauma and its impact on the family system;
7. Emphasizes continuity of care and collaboration across child-service systems; and
8. Maintains an environment of care for staff that addresses, minimizes, and treats secondary traumatic stress, and that increases staff wellness.

The State's June 1, 2021, proposed Plan provides a phased roll-out of trauma-responsive training modules for all CYFD staff, designated HSD staff, any provider staff who contracts with the State, and resource parents. There are also training modules for respondent-parents, guardians, and caregivers, which are optional. To develop these modules, the State has contracted with trauma expert Dr. Bobbi Beale⁷² of the Begun Center for Violence Prevention Research and Education of Case Western Reserve University. The State has proposed to have the training modules fully developed by December 2021, with training of some CYFD and HSD staff already occurring.⁷³ In striving to become a trauma-responsive system, the State has also formed a cultural humility workgroup comprised of CYFD and HSD staff to review and revise internal policies.

The Co-Neutrals have requested clarity about the Plan's roll-out timeframes, as well as an updated trauma-responsive training and coaching curriculum and training materials before the State's Plan can be approved. As of September 1, 2021, the Co-Neutrals did not receive a revised draft of the Plan for consideration of Co-Neutral approval.⁷⁴

ii. Target Outcomes Due December 1, 2020 and June 1, 2021

4. CANS and CANS-CAT Screening Tools

a. FSA Requirement

By December 1, 2020, CYFD and HSD will identify, and the Co-Neutrals will approve, the form of the Child and Adolescent Needs and Strengths Crisis Assessment Tool ("CANS-CAT") and comprehensive CANS screening tools referenced in Appendix A, Implementation Target 1. (App. A, TO 1.1a)⁷⁵ (Due December 1, 2020)

⁷² For more information on Dr. Bobbi Beale, see <https://case.edu/socialwork/begun/about-us/faculty-staff/bobbi-beale>

⁷³ Page 3 of part two of the State's baseline report states the Department is currently training approximately 30 new employees per month.

⁷⁴ More recently, on September 28, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided additional written feedback to the State on November 1, 2021.

⁷⁵ App. A, TO 1.1 has multiple parts, all of which were originally due on December 1, 2021. However, the deadline to have the CANS-CAT tools approved by the Co-Neutrals was changed to December 1, 2020, per the Parties' Extension Agreement, with the implementation of the CANS-CAT screenings remaining due by December 1, 2021, per the FSA.

b. Co-Neutrals' Finding

The Co-Neutrals' assess the State has met the Performance Standard for this IT. The Co-Neutrals will monitor the progress of this TO as CYFD begins consistently using these screening tools with children in state custody.

c. Discussion

As discussed in the related IT above regarding CANS, the State has worked collaboratively with the Praed Foundation and with the Co-Neutrals throughout 2020 and early 2021 to develop the NM CANS and NM CANS-Crisis Assessment Tool (NM CAT) rating materials. These tools were finalized in early 2021 with Co-Neutral approval.⁷⁶ These tools are based on the broader CANS Comprehensive rating tools developed by the Praed Foundation but have been adapted to meet the needs of NM children and families. As a result, the NM CANS-CAT consists of a subset of specific NM CANS items across five domains⁷⁷ to screen for a child's immediate strengths and needs when entering CYFD custody. The final NM CANS and NM CANS-CAT rating sheets and accompanying reference guides are available on the State's *Kevin S.* webpage.⁷⁸

In order to administer the NM CANS and NM CANS-CAT tools, staff must undergo training and obtain certification from the Praed Foundation. The State reports this training and certification began in 2020 prior to the updated CANS rating sheets being finalized. It is the Co-Neutrals' understanding that all staff will be trained and certified on the updated NM CANS and NM CANS-CAT tools. The State has contracted with Falling Colors to create a platform to store the NM CANS and NM CANS-CAT screening tools and data, as well as the records of staff certifications. Falling Colors has also worked with the State to develop algorithms based on the NM CANS screening results to assist the State in determining the services needed to serve children in state custody, including evidence-based services as identified in the FSA.

5. *Individualized Planning Meetings*

a. FSA Requirement

Subject to the approval of the Co-Neutrals, CYFD and HSD will develop and implement a process (the Individualized Planning Meeting Plan) for convening an Individualized Planning Meeting team for making decisions and for delivering services and supports for each Child in State

⁷⁶ On November 2, 2021, the State informed the Co-Neutrals that changes were suggested by the Praed Foundation to include the addition of a "medical health module" with the CANS rating scale and reference guide. The Co-Neutrals learned of this change inadvertently upon seeing the revised version of the tool. The Co-Neutrals agree with this change, and therefore the CANS tool remains approved.

⁷⁷ The domains in the NM CANS-CAT are: Individual Strengths, Behavioral/Emotional Needs, Risk Behaviors, Cultural Needs, Early Childhood (ages 0-6), Transition Age Youth (ages 16+), Potentially Traumatic/Adverse Childhood Experiences, Traumatic Stress Symptoms, and Caregiver Responses and Needs.

⁷⁸ The NM CANS and NM CANS-CAT reference guides and rating sheets can be found on CYFD's *Kevin S.* webpage at <https://cyfd.org/kevin-s-settlement-documents>

Custody. The Individualized Planning Meeting process shall be informed by Child and Family Teaming (CFT), collaborative decision-making, and High Fidelity Wraparound models, and shall prioritize the child's voice and choice. The process shall also be strengths-based, connected to natural supports, and respectful of the child's family and unique cultural heritage. The Co-Neutrals shall not withhold approval of the Individualized Planning Meeting Plan if it is reasonably calculated to achieve the Goals of this Agreement. The Individualized Planning Meeting Plan will be completed and approved by December 1, 2020,⁷⁹ and fully implemented by December 1, 2022. (App. A, TO 4.1) (June 1, 2021)

b. Co-Neutrals' Finding

The State has begun efforts toward this TO; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this TO. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion:

On March 31, 2021, the State provided an initial draft of their Individualized Planning Meeting (IPM) Plan or process, which they renamed the Individualized Planning Process (IPP).⁸⁰ Between April and June 2021, the Co-Neutrals received and provided feedback on the draft IPP and Letter of Direction (LOD) provided by the State. The LOD serves as the instruction for MCO staff to make them aware of their responsibilities related to IPPs when serving children in state custody. The State's June 1, 2021, proposal details their intentions to create an IPP framework that all child and family team meetings will be expected to follow beginning December 2021. The State has contracted with the Child Welfare Policy and Practice Group (CWG)⁸¹ for technical assistance as they define, develop, and eventually implement their IPP process. In addition to drafts of the IPP process, the State has shared with the Co-Neutrals a draft LOD to be distributed to Managed Care Organizations (MCOs) as required attendees of IPPs, for which the Co-Neutrals have also provided written feedback.

The State's June 1, 2021, IPP draft describes specific types of IPPs at certain points in a case or decision-making processes. Each IPP type describes a prescribed set of individuals who should be

⁷⁹ As set forth in the Parties' Extension Agreement, deadlines originally defined for certain deliverables as December 1, 2020, were changed to June 1, 2021.

⁸⁰ The FSA denotes, "CYFD and HSD will develop and implement a process (the Individualized Planning Meeting Plan)" to fulfill this commitment. The State has indicated they intend to create an Individualized Planning Process (IPP) to serve as a framework to which all team meetings at CYFD will adhere in order to satisfy the commitment. As the FSA dictates this commitment to be a process, the Co-Neutrals agree with the State's decision to refer to the deliverable to meet this commitment as the Individualized Planning Process (IPP). The document describing the IPP will include a list of multiple specific meetings which will utilize the IPP for different purposes and for different situations.

⁸¹ CWG is a national policy and practice organization that provides technical assistance to systems to improve outcomes for children and families. For more information, see <https://childwelfaregroup.org/>

invited inclusive of those the child or family wish to invite, as well as a specific timeframe by when the IPP is to occur. The State has committed that all participating staff will be trained on how to facilitate and attend IPPs, and the Co-Neutrals have also asked for details on how children and families will be prepared to attend and actively participate in these meetings as well. As of September 1, 2021, the Co-Neutrals had not received a revised deliverable from the State for consideration of Co-Neutral approval.⁸²

6. *Quality Assurance, Improvement, and Evaluation Plan*

a. FSA Requirement

CYFD and HSD will create and implement a Quality Assurance, Improvement, and Evaluation Plan, including quality management tools and measures to be used for reporting on CYFD and HSD's capacity to meet the needs of Children in State Custody, including measures for reporting on providing and improving quality of care, collaborating across Departments, and for providing transparency and accountability. The Plan will include: consistent definitions and terms across CYFD and HSD, data exchange and matching across CYFD and HSD, clarification of existing measures and indicators, self-assessments, metrics as indicators of system performance (including process indicators, client outcomes, and system impact), a continuous quality improvement process that provides information in real time to decision-makers, and a process for responding to findings from the Plan. CYFD will develop a meaningful quality assurance process to ensure that training, policy, and procedure is being properly utilized and integrated into daily processes. The Co-Neutrals must approve the Quality Assurance, Improvement, and Evaluation Plan. CYFD and HSD will develop the Quality Assurance, Improvement, and Evaluation Plan by December 1, 2020⁸³ and fully implement it by December 1, 2021. (App. A, IT 5.1) (June 1, 2021)

b. Co-Neutrals' Finding

The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

The State provided an initial draft of its Quality Assurance, Improvement, and Evaluation Plan (QAIEP) to the Co-Neutrals on March 31, 2021. Between April and June 2021, the Co-Neutrals

⁸² More recently, on October 5, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on this draft on November 1, 2021.

⁸³ As set forth in the Parties' Extension Agreement, deadlines originally defined for certain deliverables as December 1, 2020, were changed to June 1, 2021.

received and provided feedback on drafts of the Plan provided by the State and met with the Plaintiffs’ team to discuss and obtain their comments.

The State’s June 1, 2021, draft organizes the QAIEP into two parts: Quality Framework and Quality Management (QM). The draft indicates describes the Quality Framework will be based on the New Mexico Practice Model,⁸⁴ which will serve as a platform for the outcomes to be measured. The outcomes will be organized within three fundamental child welfare system outcome categories – Safety, Permanency, and Well-being. The State plans to present these outcomes in a QAIEP Data Matrix. The QM component of the QAIEP draft describes the quality management activities across CYFD and HSD, with a plan for how the QAIEP will continue to be assessed and adapted over time. As of September 1, 2021, the Co-Neutrals had not received a revised QAIEP from the State for consideration of Co-Neutral approval.⁸⁵

C. Least Restrictive and Appropriate Placements (FSA Appendix B)

The commitments in Appendix B of the FSA require CYFD and HSD to, “build a system for placing children in out-of-home care in stable, safe, appropriate, community-based placements in the least-restrictive environment.”⁸⁶ The system includes:

- Caregivers who understand the strengths and needs of children, and who are able to support children to grow and heal;
- Placements that are the least restrictive, most connected, and most family-like as appropriate to meet the unique needs of children;
- Allows for children ages 14 and older to be consulted on their express placement preferences; and
- Stable placements that meet children’s needs and protect from the harm caused by multiple placement moves.

The State’s foster care system should be used, “as temporary an arrangement as possible, with the goal of being [able] to provide children in out-of-home placements a safe, nurturing, and permanent home quickly.”⁸⁷

⁸⁴ The State defines the New Mexico Practice Model as the model the State will use to guide their service delivery for all New Mexicans. An updated New Mexico Practice Model was shared with the Co-Neutrals on September 27, 2021 as part of draft documents for the QAIEP deliverable.

⁸⁵ More recently, on September 26, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. On November 1, 2021, the Co-Neutrals provided additional feedback to the State on this latest version of the QAIEP and also requested a meeting with the State to resolve outstanding issues and questions.

⁸⁶ FSA, pg. 5a.

⁸⁷ Ibid.

i. Implementation Targets Due December 1, 2020 and June 1, 2021

1. Development of Recruitment and Retention Plan

a. FSA Requirement

CYFD and HSD will develop a plan to (1) increase recruitment and retention of culturally reflective, community-based placements, with a focus on maximizing family supports and serving rural areas and difficult-to-place populations and (2) ensure that children in out-of-home care remain in stable placement and educational settings to the maximum extent feasible and that any change in placement is made in the best interests of the child and consistent with achieving the child's permanency goals. (App. B, IT 1.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The Co-Neutrals received an updated draft of the Plan on September 1, 2021, which requires more specificity and further clarification to achieve the purposes described in the IT.⁸⁸ The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

Between March and September 2021, the Co-Neutrals received and provided feedback to the State on draft Plans relative to this commitment. The State's draft Plan includes: activities to increase placements of foster children with their relatives; strategies to improve retention of resource parents based upon findings from surveys administered by CYFD and HSD to approximately 200 resource parents; and steps to increase recruitment of resource parents, such as a media and messaging strategy for different platforms, a pilot to develop and utilize data-driven tactics with the New American Foundation and the University of Chicago, and creation of an "engagement plan" for families who cannot commit to placements, but could provide respite or assistance with laundry and transportation.

In late June 2021, the Co-Neutrals provided feedback on the State's draft Plan. Areas noted as needing improvement or requiring additional detail included: information on the CYFD unit or partner providers responsible for recruiting and licensing new non-relative resource homes; a description of the methodology and process used to survey resource parents as well as more detailed findings from these surveys; a plan for evaluating the effectiveness of resource parent individualized retention plans (IRP); and clarifying questions about the State's Support and Sustain teams, and other strategies embedded in the draft.

⁸⁸ The Co-Neutrals provided feedback to the State on the revised material on October 6, 2021.

2. Publish Guidance Prohibiting Retaliation

a. FSA Requirement

CYFD will publish guidance prohibiting retaliation against any person, including foster parents, for raising concerns related to the unmet needs of Children in State Custody or their caregivers. (App. B, IT 2.1) (Due December 1, 2020)

b. Co-Neutrals' Finding:

This IT was not completed by the required due date of December 1, 2020; CYFD reports the policy was finalized and communicated to staff on March 15, 2021. The Co-Neutrals have been unable to validate the State's performance because the State has not made the guidance public as of September 1, 2021.⁸⁹ The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

Between November 2020 and February 2021, the Co-Neutrals received and provided feedback to the State on draft guidance prohibiting retaliation. On February 2, 2021, the Co-Neutrals communicated to the State that there were no further comments or suggestions on the State's guidance as drafted.

The State reports that the employees' union requested collective bargaining on the guidance prohibiting retaliation, which occurred on March 3, 2021. The State shared the final version of the guidance with the Co-Neutrals on March 5, 2021, and CYFD reports the policy went into effect and was distributed to staff by email on March 15, 2021. The State indicates the guidance has been incorporated into the CYFD employee handbook, and is included in CYFD's Human Resource Administration Procedure, Chapter 1, Part 9: Retaliation.

The procedure specifically states,

“It is unlawful for any CYFD employee, contractor, stipend student, student intern or volunteer to retaliate against anyone who has expressed a concern or made a complaint about any form of harassment, sexual harassment, or discrimination. Retaliation against an employee, client, contractor, stipend student, student intern, or volunteer alleging harassment, sexual harassment, discrimination or for participating in an investigation is prohibited. CYFD employees will not retaliate against any person, including resource

⁸⁹ The State published its Retaliation Policy on CYFD's *Kevin S.* webpage on November 9, 2021, see https://cyfd.org/docs/CYFD_Retaliation_Policy_March_15_2021_3.pdf

parents or biological parents, for raising concerns related to the unmet needs of children in CYFD custody or their caregivers.”

Retaliation against resource parents is also addressed in CYFD’s Placement Services Procedure, PR11 – Resource Family Bill of Rights and Grievance Process, and states there is, “zero tolerance for retaliation”⁹⁰, and “retaliation will not be tolerated by CYFD employees.”⁹¹ The Resource Family Bill of Rights and Grievance Process also references the prohibition against retaliation, including, “Resource Families have the right to provide input concerning the plan of services for the children in their care and to have that input given full consideration, in the same manner as information presented by any other member of the team, without fear of retaliation”⁹², and, “Resource Families have the right to be free from acts of harassment and retaliation by CYFD staff.”⁹³ Placement Services Procedure PR11 – Resource Family Bill of Rights and Grievance Process, is available on CYFD’s website.⁹⁴

3. Development and Promotion of Warm Line for Resource Parents

a. FSA Requirement

CYFD and HSD will develop and promote a warm line for Resource Families and Respondents who need assistance meeting the behavioral needs of the children in their care. (App. B, IT 3.1) (Due June 1, 2021)

b. Co-Neutrals’ Finding

The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT, specifically with respect to promotion of the warmline. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals’ report.

c. Discussion

To meet this IT, CYFD has contracted with vendor ProtoCall Service Inc. – the company that also operates New Mexico Crisis and Access Line (NMCAL) and the Peer-to-Peer Warmline – to staff and operate a resource family warm line. The scope of work for this contract provides that the primary tasks the vendor is responsible for include:

⁹⁰ PR11, paragraph 4 (December 2020).

⁹¹ PR11, paragraph 5 (December 2020).

⁹² PR11, paragraph 6.1(3) (December 2020).

⁹³ PR11, paragraph 6.1(10) (December 2020).

⁹⁴ To access PR11 – Resource Family Bill of Rights and Grievance Process, see https://cyfd.org/docs/PR_11_Resource_Family_Bill_of_Rights_and_Grievance_FINAL.pdf

- Building and maintaining procedures and call flow processes that will support staff who receive the calls in offering resources and information to callers, and to collect data on the types of callers utilizing the line and requesting support, as well as the number of referrals and information on community-based behavioral health services that were offered;
- Providing peer support services to resource parents, and family members of a foster child, who call requesting assistance;
- Employing at least two full time employees who are or have been resource parents, or who have been parents or primary caregivers of a child with a behavioral health diagnosis;
- Expanding the hours and staffing of the previously existing Peer-to-Peer Warmline call service, with operations from 7a to 11:30p MT, 365 days a year, seven days a week;
- Maintaining shift leads, a supervisor position, administrative support, and project management to support the service; and
- Developing a public awareness campaign to inform resource parents, families, youth in foster care, and other community stakeholders of the warmline.

Warmline staff who answer calls are certified, or eligible to become certified, as a Peer Support Worker (CPSW), Family Peer Support Worker (CFPSW), or are a resource parent licensed or previously licensed in New Mexico. Additional training for warmline staff is provided by New Mexico State University (NMSU) and CYFD.

CYFD outlined to the Co-Neutrals the warmline promotion plan to include the following activities:

- ProtoCall will collaborate with a CYFD PSD program manager or their designee to inform resource families, families, and youth involved with foster care of the NMCAL's hotline and warmline.
- ProtoCall has been working with Esparza Advertising Agency to create public awareness materials for television, radio, billboards, social media, and other mediums. Radio is scheduled to begin airing material in May 2021, with television, billboards, and the remaining mediums to follow.

As of June 1, 2021, CYFD reports they were in the process of reviewing the contract allocation and increasing the public awareness budget for FY2022 to allow the awareness campaign to reach a wider market in the state. The State did not include any information on this commitment in the

August 2021 annual report, including any follow up information on its efforts to implement the warmline promotion strategies it identified earlier in the year.⁹⁵

4. Promotion of Internal Grievance Procedure for Youth

a. FSA Requirement

CYFD will promote its internal Grievance Procedure for youth. (App. B, IT 3.2) (Due December 1, 2020)

b. Co-Neutrals' Finding

The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT, specifically promotion of the procedure. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

Between October and December 2020, the Co-Neutrals received and provided feedback to the State on draft grievance procedures for youth. In December 2020, the Co-Neutrals communicated to the State that there were no further comments or suggestions on the State's procedure as drafted.

On March 19, 2021, CYFD issued a Program Instruction Guideline (PIG)⁹⁶ to staff (03-2021-#5) outlining revisions to CYFD's Placement Services Procedure PR13: Application of the Reasonable and Prudent Parent Standard, and PR14: Child or Youth Grievance Process, the Foster Child and Youth Bill of Rights, and the Foster Youth Document of Responsibilities. The PIG is not publicly available,⁹⁷ and CYFD does not anticipate finalizing edits to Placement Services Procedures PR13 and PR14 until January 2022.

⁹⁵ In order for the State to have an opportunity to update its information, the Co-Neutrals asked the State in October 2021 whether the radio promotions had commenced as planned, and whether the State had expanded the public awareness budget for FY2022 to allow the warmline promotional campaign to reach a wider market. The State provided a utilization report which did not answer the questions posed. The report indicates that in May 2021, there were no calls from resource/foster parents, and in June 2021, there were two calls from resource/foster parents.

⁹⁶ Program Instruction Guidelines (PIGs) are interim directives to CYFD PSD staff which mandate changes to procedures and practice that must be implemented immediately, and will be incorporated into new or revised Procedure or Policy in the near future. PIGs are disseminated to CYFD PSD staff through email, and are posted on the CYFD Intranet which is currently unavailable to anyone other than CYFD staff. The Co-Neutrals have been unable to independently verify the date the PIG was finalized and distributed to staff, and how readily accessible it currently is to staff.

⁹⁷ In late October 2021, the State created a new CYFD webpage posting some of the *Kevin S.* documents. The State posted PR13 and PR14, although the "effective dates" do not correspond with when the procedure revisions were finalized. See https://cyfd.org/docs/PR_13_Prudent_Parenting_and_Youth_Grievance_final_english.pdf

The revised procedures provide processes by which youth can request a review of a foster care providers' decisions in applying the prudent parenting standard,⁹⁸ or to report a violation of their rights under the New Mexico Foster Child and Youth Bill of Rights.⁹⁹ Specifically, any youth ages 14 and older who disagrees with a foster care provider's decision on the youth's involvement in certain activities can contact the Director of CYFD's Office of Children's Rights (OCR)¹⁰⁰ and request a review of the foster care providers' decision within 15 days after the decision was made. Upon receipt of the request, the Director of OCR is expected to determine whether review of the decision should be conducted through a mediated discussion among the individuals involved in the decision, or if the review will be conducted by a three-person panel.¹⁰¹

If a youth wants to report a violation of their rights under the New Mexico Foster Child and Youth Bill of Rights, the process begins similar to the one outlined above for prudent parenting standard decisions. The child, youth, or person acting on their behalf contacts the OCR, and OCR staff will assist the child or youth in making the grievance, including providing the child or youth with necessary forms. The OCR is responsible for investigating the grievance, developing a file for the grievance within the OCR (which includes assigning a case number), and determining if the grievance can be addressed by informal resolution, or should be assigned to a three-person panel.

CYFD committed to post the NM Foster Child and Youth Bill of Rights at all times within eye-level range in public spaces in all CYFD PSD offices, and in all placements, including congregate care settings, resource homes, and treatment foster care homes.¹⁰² The youths' PSD worker is required to provide a copy of the Bill of Rights to all children entering foster care, and to their caregiver in the child and caregivers' native language.¹⁰³ The revised procedure also requires that the child sign an acknowledgment that they have received and understand the information

⁹⁸ The Reasonable and Prudent Parenting standard – a requirement of the federal Sex Trafficking and Strengthening Families Act of 2014, Supporting Normalcy for Children in Foster Care – is the standard caregivers should apply when determining whether to allow a child in foster care to participate in extracurricular, cultural, or social activities. Efforts should be made to normalize the lives of foster children.

⁹⁹ To access the NM Foster Child and Youth Bill of Rights, see https://cyfd.org/docs/foster_child_bill_of_rights.pdf

¹⁰⁰ The Office of Children's Rights (OCR), created in January 2021, is within CYFD, with the Director of the Office of Children's Rights reporting to the Secretary of CYFD. Following the exit of OCR's full-time director in May 2021, the role has been filled by a member of the Secretary's leadership team with additional responsibilities. OCR's goal is to ensure New Mexico's most vulnerable youth receive the services and supports to which they are entitled. In addition to a Director, OCR includes positions for a Disability Rights Attorney, Education Rights Attorney, Manager of Investigations Bureau, Youth Manager, Children Fatalities Investigator, Youth Advocate for LGBTQ Rights, Youth Advocate for Reproductive Rights, and Youth Advocate for Trafficking Survivors.

¹⁰¹ CYFD reports the three-person panel is comprised of one PSD worker who has been employed by CYFD for at minimum one year, one caregiver, and one current or former foster youth (who could be a Youth Advocate employed by CYFD). All members of the panel must be from counties outside of where the youth's case originated, and where the youth is currently placed. OCR must make efforts to convene a panel that does not have knowledge of the youth or caregiver, or supervision of the PSD workers involved in the decision process.

¹⁰² PR14, paragraph 5.

¹⁰³ Ibid.

presented in the document, and that they have been given an opportunity to ask any questions about their rights.^{104,105}

CYFD initially reported that promotion of the youth grievance procedure began in December 2020, and the State anticipated completing all activities outlined in the promotion plan by March 15, 2021. However, by that point, the State advised that it was delayed in placing posters and flyers in CYFD PSD offices and children's placements as there was a delay in translation services. As of September 1, 2021, the State did not provide evidence that it had undertaken key promotional steps, and the Co-Neutrals independently confirmed that some had not occurred, such as posting the Grievance Procedure on the PullTogether website.¹⁰⁶ As of October 1, 2021, the only reference to the youth grievance procedure on the CYFD website is a link posted on June 11, 2021 which features the Youth Bill of Rights and contact information for youth who believe their rights may have been violated, but no details about the process.¹⁰⁷ Furthermore, the State's 2020 annual report described many of its promotional activities as still pending and prospective. The Co-Neutrals expect the State to make all reasonable efforts to implement the promotional strategies to which the State committed this year in the grievance procedures and associated documents.

5. Development of Grievance Procedure for Resource Families

a. FSA Requirement

CYFD will also develop a Grievance Procedure for Resource Families. (App. B, IT 3.3) (Due December 1, 2020)

b. Co-Neutrals' Finding

This IT was not completed by the required due date of December 1, 2020; CYFD reports the policy was published on May 25, 2021. The Co-Neutrals assess that the State's efforts to develop a Grievance Procedure for Resource Families, which is the required action for this commitment, meets the Performance Standard for this IT.

¹⁰⁴ CYFD is expected to ask the caregiver to sign an acknowledgment verifying receipt and understanding. For children under the age of five, the procedure requires the child's caregiver to sign the acknowledgment on the child's behalf. Copies of signed acknowledgements are provided to the caregiver, and all youth ages 14 or older, with copies maintained in the youth's PSD case file, the resource parents' provider file, and are documented in the narrative of the case management system (FACTS or CCWIS) to include the date of review and acknowledgement, and the names of the caregivers notified.

¹⁰⁵ In October 2021, Co-Neutral staff reviewed FACTS records for two 17-year-old foster youth, and was unable to find a signed acknowledgement or reference to a date of review in either file.

¹⁰⁶ Immediately prior to publication of this report, the Co-Neutrals verified that a link to the Youth Bill of Rights had been posted to the PullTogether website, available at <https://pulltogether.org/>

¹⁰⁷ As referenced earlier, in late October 2021, the State created a new CYFD webpage posting some of the *Kevin S.* documents. The State posted PR13 and PR14, although the "effective dates" do not correspond with when the procedure revisions were finalized. CYFD reported the agency made PR 13 and PR 14 available to staff via PIG 03-2021-#5. See https://cyfd.org/docs/PR_13_Prudent_Parenting_and_Youth_Grievance_final_english.pdf

c. Discussion

Between October 2020 and January 2021, the Co-Neutrals received and provided feedback to the State on draft grievance procedures for resource families. In February 2021, the Co-Neutrals communicated to the State that there were no further comments or suggestions on the State's procedure as drafted.

Finalization of this policy required an amendment to the New Mexico Administrative Code. On April 5, 2021, the proposed changes were published in the *Albuquerque Journal*, and a public hearing was held on April 9, 2021. The final policy (8 NM Admin Code 8.26.2) was adopted and submitted to the State Register on May 6, 2021, and published on May 25, 2021.¹⁰⁸ The State has also revised and made publicly available CYFD's Placement Services Procedure, PR11 – Resource Family Bill of Rights and Grievance Process.^{109,110}

The process provides that any resource parent who feels they have had their rights violated (as outlined in the Resource Parents Bill of Rights¹¹¹), who feels they have been retaliated against, or who has witnessed a policy or procedure violation by PSD staff on their case can follow a two-step grievance process. The first step is to file a formal grievance with the CYFD Office of Constituent Affairs, which reviews the complaint and issues a finding within 15 days to the resource family, designated Regional Manager, and county office. The Regional Manager is responsible for ensuring the resolution, as applicable, is implemented within the county office. If the resource family does not feel their grievance has been resolved after the first step, they may file a request for review by the Office of the Inspector General (OIG) under the Office of the Secretary. OIG conducts a review of the grievance, which may include interviews with relevant staff and contractors, a review of CYFD records, and issues a finding to the resource family and CYFD Constituent Affairs within 30 business days. If OIG recommends specific actions, the Regional Manager is responsible for ensuring these are completed, and must provide a written response to the parties involved.

¹⁰⁸ To access 8 NM Admin Code 8-26-2, see <https://www.srca.nm.gov/parts/title08/08.026.0002.html>

¹⁰⁹ To access PR11 – Resource Family Bill of Rights and Grievance Process, see https://cyfd.org/docs/PR_11_Resource_Family_Bill_of_Rights_and_Grievance_FINAL.pdf

¹¹⁰ On March 19, 2021, prior to finalizing the updated PR11, CYFD re-issued a PIG (03-2021-#6) to staff providing notice and details of revisions to PR11: Resource Family Bill of Rights and Grievance Process.

¹¹¹ See paragraph 6.1 of PR11 for a full list of the Resource Parents Bill of Rights.

ii. **Target Outcomes Due December 1, 2020 and June 1, 2021**

6. Prohibition of Placements in Hotels, Motels, Out-of-State, and in Offices Except in Extraordinary Circumstances

a. FSA Requirement

By December 1, 2020, no child under 18 will be placed in any hotel, motel, out-of-state provider, office of a contractor, or state agency office unless in extraordinary circumstances necessary to protect the safety and security of the child as documented in the child's record and approved by the Secretary or the Protective Services Director of CYFD. In any such extraordinary circumstance, CYFD shall provide notice to the child's Guardian ad Litem and Youth Attorney immediately where possible, and not more than 24 hours after the placement of the child. Notification to the dependency court to which the child's case is assigned must occur within 3 business days. When a child is placed with an out-of-state provider, notice to the child's Guardian ad Litem, Youth Attorney, and the dependency court to which the child's case is assigned will be given prior to the move, pursuant to statute. (App. B, TO 1.1) (Due December 1, 2020)

b. Co-Neutrals' Finding

December 2020 Data

The State's 2020 annual report identified three children who were newly placed in out-of-state facilities in December 2020. One child was an infant who was born in an out-of-state hospital but is not subject to this requirement because the child's first placement after leaving the hospital was in New Mexico. Of the remaining two children, after reviewing both children's records, the Co-Neutrals have assessed that one child's placement does not meet the definition of an out-of-state placement for purposes of this commitment. The child was in an acute hospitalization for 10 days in a neighboring State and was returned to their kinship placement immediately after being released from the hospital. Consistent with federal reporting standards¹¹² and the agreed upon definition of placement, the stay in the out-of-state facility is considered a temporary absence, not a placement, and is therefore not included within this requirement. The report did not identify any placements to offices, hotels, or motels during the month of December 2020, which is when this commitment took effect and the only month of implementation reflected in the CY2020 report.

In validating the State's data for this measure, the Co-Neutrals identified two additional placements in December 2020 to a provider in with both in- and out-of-state facilities for whom geographic information was incorrectly recorded in the data submitted by CYFD to the Co-Neutrals; specifically, the county and out-of-state indicator flag were both listed as "unknown."

¹¹² Administration for Children and Families' "Child Welfare Policy Manual: Questions & Answers." See question 21 in section 1.2B.7 AFCARS, Data Elements and Definitions, Foster Care Specific Elements, Placements, available at https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp?citID=150

Upon review of the child-specific records, the Co-Neutrals determined that while CYFD's FACTS database indicated both placements were out-of-state, one of these placements was actually an in-state placement that was incorrectly recorded in FACTS since CYFD had not yet created a provider code within FACTS to reflect this facility. CYFD reports that a code for the provider's in-state facility was added in late December 2020, but the incorrect provider ID could not be back-dated to correct the mistake within the child's record.¹¹³

Following the Co-Neutral team's preliminary data validation work described above, the Co-Neutrals determined two children had been newly placed in December 2020 in out-of-state facilities subject to this TO's extraordinary circumstances test barring such placements, "unless in extraordinary circumstances necessary to protect the safety and security of the child as documented in the child's record and approved by the Secretary or the Protective Services Director of CYFD"; the Co-Neutral team did not identify any placements to offices, hotels, or motels during the month of December 2020 in the data provided by the State. The Co-Neutrals requested information regarding each of the children with out-of-state placements in December 2020, including background information on their placement history and reason for placement moves, diagnoses and list of medications, psychological evaluations or clinical assessments, court reports, child and/or family case plans, child and family team or treatment team notes, documentation submitted and received from the child's MCO or HSD related to authorization for out-of-state placement, documentation demonstrating specific threats to the child's safety and security, details on why no placement services in the state of New Mexico were able to keep the child safe prior to placement out-of-state, explanation why the specific out-of-state facility in which the child was placed was selected and description of the placement, information reviewed about the safety record of the out-of-state placement in advance of the decision to place the child in that facility to protect the child's safety and security, among other items. The State provided some, but not all of the requested information.¹¹⁴

¹¹³ On October 28, 2021, the State submitted a table to the Co-Neutrals with corrected detail for each child placed to this provider in CY2019 and CY2020. However, there was not sufficient time to review these data and update this analysis prior to completion of this report.

¹¹⁴ The State contends that reviewing the safety of out-of-state placements is not required by the language of this commitment in the FSA. The Co-Neutrals strongly disagree. The preamble to Appendix B of the FSA begins by stating, "When assessing CYFD's and HSD's efforts to implement the commitments in this Appendix, the Co-Neutrals will consider, in addition to other data and information, the extent to which CYFD and HSD build a system for placing children in out-of-home care in stable, safe, appropriate, community-based placements in the least-restrictive environment." The FSA disallows the placement of children with out-of-state providers unless, "in extraordinary circumstances necessary to protect the safety and security of the child." It is not possible for the State to demonstrate that extraordinary circumstances made it necessary to place a child with an out-of-state provider to protect the child's safety and security without ever independently evaluating the safety and security of the placement. The State's current position is that CYFD is not obligated to assess the safety and security of out-of-state providers because CYFD is not responsible for licensing and auditing of out-of-state facilities. The State notes, "that function resides with each State's Licensing and Certification Authority." However, there are numerous instances across the country where a residential care provider maintains a facility license but the local child welfare agency, having evaluated the safety record of the facility, has stopped placing children in the facility. New Mexico has no less of an obligation to assess safety, and has,

CYFD indicated that one of the two placements applicable to this TO met the standard set forth in the TO. In that case, documentation reflects a request for approval of an out-of-state placement made to the CYFD interim Protective Services Division (PSD) Director in December 2020. The stated justification for the placement was that the child had been denied admission to in-state facilities; the child has a non-specific neurological disorder and severe processing deficits in reading, writing, and math; and the child reportedly requires a facility that specializes in these deficits. There was no reference to threats to the child's safety and security as extraordinary circumstances. Meeting notes for the month prior to the out-of-state placement reflect that CYFD Behavioral Health Services Division staff expressed a preference for a more family-like placement setting for this young child, with community support services – such as wraparound services – provided to support the child's needs. Notes from the meeting held immediately prior to the child's placement out of state indicate that the team reportedly received denials from several TFC providers, but there is no documentation reflecting that a child-specific contract for services tailored to meet the child's needs was pursued. While the documentation includes the CYFD interim PSD Director's electronic signature on a form titled, "Memorandum for Decision: Request for Out-of-State RTC Placement Approval," neither the box for "approved" or "not approved" on the form was checked by the interim Director.

The Co-Neutrals reviewed the documentation associated with the second out-of-state placement that was not identified in the State's annual report, and it did not contain a completed request for approval.

Additionally, although specifically requested by the Co-Neutrals, the State provided no documentation to reflect CYFD or HSD reviewed either out-of-state provider's safety record prior to placing a child within the facility. Although New Mexico agreed not to place children in out-of-state facilities unless necessary to protect their safety and security, there is no evidence the State reviewed the out-of-state provider's history of licensing violations, restraints, allegations of child abuse and neglect, and substantiated instances of child maltreatment before placing either child in the out-of-state facilities.

After review of the information provided, the Co-Neutrals assessed that neither (0%) of the two applicable December 2020 out-of-state placements of children met the extraordinary circumstances standard of being necessary to protect the safety and security of the child. As referenced above, the State's 2020 annual report identified that one of the children's placements did meet the extraordinary circumstances standard, and all required processes were followed. Based on the Co-Neutrals' review of the information provided by the State, the Co-Neutrals do not concur and assess the State has not met the Performance Standard for this TO.

in fact, accepted responsibility for ensuring safety in out-of-state facilities by agreeing to the extraordinary circumstances standard in the FSA.

The Co-Neutrals emphasize that the data included in this report only reflect performance through December 31, 2020, thus, do not provide a current assessment of conditions on the ground. The parties agreed, “By December 1, 2021, every child in out-of-home care will be in a licensed foster home placement unless a current finding of medical necessity requires otherwise or an Individualized Planning Meeting team determines that *a non-clinical setting is in the child’s best interest.*” (emphasis added)¹¹⁵ The State has agreed to eliminate utilization of inappropriate placements by December 1, 2021, and the Co-Neutrals understand and expect this to include placements in the Receiving Center. Based on the Co-Neutrals understanding of the operations of the Receiving Center, the Co-Neutrals view this as an inappropriate placement for children.

c. Discussion

In December 2020, CYFD drafted revisions to its Permanency Planning Procedure PR10 – Out of Home Placements to specifically require that, “(n)o child under 18 will be placed in any hotel, motel, office of a contractor, or state agency office unless in extraordinary circumstances necessary to protect the safety and security of the child.” The procedure outlines that placement of a child in a congregate care setting can ***only*** occur after CYFD has validated that the child would not be safe and secure in any other placement in New Mexico. Placing children in an out-of-state residential treatment facility for the purposes of addressing their behavioral and mental health needs due the unavailability of services in New Mexico ***is no longer allowed*** as of December 1, 2020 unless CYFD has validated the child ***would not be safe or secure in any other placement in New Mexico.***

As of the writing of this report, CYFD has not undertaken the necessary procedural steps to revise its Placement Procedure PR10. CYFD reports a PIG (12-2020-#8) was issued internally to CYFD staff on January 14, 2021,¹¹⁶ notifying staff of the changes cited above, and CYFD does not anticipate finalizing the process to revise the Placement Procedure PR10 until the end of January 2022.¹¹⁷

The State reported two metrics for this commitment in their 2020 annual report. In addition to the metric described above, the State also submitted a secondary metric with baseline data from CY2019; specifically, the share of children who had any placement in a hotel, motel, office, or out-of-state residential facility. The Co-Neutrals did not receive data of sufficient quality to fully validate this metric.

¹¹⁵ FSA, pg 6a.

¹¹⁶ PIG 12-20-#8.

¹¹⁷ After additional feedback from the Co-Neutrals in April 2021, in June 2021, CYFD included additional clarification within its draft Placement Procedure PR10, paragraph 10 to specify that extraordinary circumstances are defined as placement or services necessary to protect the safety and security of the child. As of October 1, 2021, the Co-Neutrals do not have information supporting that these changes were communicated to staff via an updated PIG or otherwise.

CY2020 Data

Although the Co-Neutrals did not receive data of sufficient quality to fully validate these metrics, the Co-Neutrals' analysis of the data submitted by the State¹¹⁸ indicates that during CY2020, at least 117 children had at least one placement to a hotel, motel, office, or out-of-state facility. Specifically, the State data indicates two children had hotel placements,¹¹⁹ 27 children had at least one placement in an office, and 92 children had at least one placement in an out-of-state residential facility.¹²⁰

These data do not include multiple placements identified by the Co-Neutrals to a residential provider for whom geographic information was missing in the data submitted by the State to the Co-Neutrals (the county and out-of-state indicator flag were both listed as "unknown"). The State has reported that this provider had both in- and out-of-state facilities during the reporting period, but the Co-Neutrals are unable to determine which placements were in- and out-of-state from the data provided. Specifically, the data cited above include 17 children who were placed with this provider in CY2020 who may have had out-of-state placements but were not reflected in the State's count of children with any placements in a hotel, motel, office, or out-of-state residential facility (three children placed with the identified provider in CY2020 were already reflected in the secondary metric as they had other hotel, motel, office, and/or out-of-state placements during the year).¹²¹

The second metric was a primary performance metric, available for December 2020; specifically, the share of children with any new placements in a hotel, motel, office, or out-of-state residential facility for whom the required extraordinary circumstance determination and notification protocols were followed. Performance toward this metric was discussed earlier under Co-Neutrals' Finding.

7. Joint Clinical Reviews of Out-of-State Placements

a. FSA Requirement

By December 1, 2020, HSD and CYFD will conduct a joint clinical review of any out-of-state placement, where the child's out-of-state placement is not the child's permanency plan, at least on a monthly basis. (App. B, TO 2.1) (Due June 1, 2021)

¹¹⁸ Specifically, "Placement.csv", the Sandbox data file submitted to the Co-Neutrals on August 2, 2021.

¹¹⁹ The State's 2020 annual report notes that the youth placed in hotels were, "days shy of their 18th birthdays." The Co-Neutrals have assessed that one youth was placed 16 days prior to turning 18 (total stay in the hotel was 18 days), and the other youth was placed three days prior to turning 18 (total stay in the hotel was 64 days).

¹²⁰ Four children had both office and out-of-state stays; one of the children placed in a hotel also had an office stay.

¹²¹ The State reported that 117 (3.49%) of the 3,349 children with any placements in CY2020 had at least one placement in a hotel, motel, office, or out-of-state residential facility. As noted, these calculations were assessed with data that have not been finalized so the Co-Neutrals have not fully validated this metric.

b. Co-Neutrals' Finding

The guidance and processes for this TO were not completed by the required due date of June 1, 2021. The Co-Neutrals have not evaluated implementation, and make no Performance Standard determination on the State's performance. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.

c. Discussion

Between March and September 2021, the Co-Neutrals received and provided feedback to the State on draft material related to this commitment, including a proposed process for conducting the joint clinical reviews, a Letter of Direction (LOD) to provide direction to MCOs for implementing this commitment, and an audit tool that outlines required joint clinical review (JCR) components, which is also used to track compliance with this commitment.¹²²

The JCR is a process that utilizes the IPP framework,¹²³ and is required for children who are placed out of state to provide a forum to review their treatment plan and updates, discharge plan, any gaps in the medical and behavioral health care being provided, and strategies to address any identified gaps. JCR meetings occur every 30 days, are coordinated by the CYFD permanency planning worker, and include participation by the PSD worker, PSD supervisor, the Community Behavioral Health Clinician (CBHC),¹²⁴ the MCO care coordinator or other care coordinator representative, the youth, family members, the case manager from the residential treatment facility, the GAL or Youth Attorney, Tribal representative (as applicable), and current and other service providers.

The JCR process is outlined in CYFD's anticipated revisions to Procedure PR10 – Out of Home Placements,¹²⁵ and the requirement for participation by the MCO care coordinator in the JCR meeting, as well as other IPP meetings, is included in the LOD.¹²⁶ The Joint Clinical Review Audit Tool (JCRAT) was developed by the State to ensure thorough and detailed examination of a child's clinical course occurs during the JCR, and provides a summary of the treatment, course of action, and necessary follow up.

¹²² On September 24, 2021, the Co-Neutrals communicated to the State that there were no further comments or suggestions on the State's joint clinical review documents as submitted.

¹²³ The State continues to develop their IPP framework, as discussed in this report under App. A, TO 4.1. The State's October 5, 2021, IPP proposal details their intentions to create an IPP framework that all child and family team meetings will be expected to follow beginning December 2022. Per the FSA, JCRs are to be implemented with the final IPP framework after it has been approved; in the meantime, an inter-agency, multi-disciplinary process will be utilized.

¹²⁴ The Community Behavioral Health Clinician (CBHC) is a behavioral health clinician who works with CYFD to provide clinical mental health consultation, referral, and review for children in state custody.

¹²⁵ The State has indicated to the Co-Neutrals that the revised Procedure will be finalized in January 2022.

¹²⁶ HSD has indicated that the LOD will be issued up to 60 days after the Co-Neutrals' approval.

The State indicates efforts are underway to implement joint clinical reviews, with 30-day staffings for every child placed out of state beginning in December 2020,¹²⁷ discharge planning and participation by MCOs in the process beginning in June 2021, training on the JCRAT tool for staff in September 2021, and use of the JCRAT form in October 2021 for all children. In future reports, the Co-Neutrals will assess the State's implementation of the JCR process for all children in out-of-state placements that are not the child's permanency plan.

8. Caseworker Visits to Children Placed Out-of-State

a. FSA Requirement

A CYFD caseworker known to the child will conduct in-person visits every month. (App. B, TO 2.2) (App. B, Due June 1, 2021)

b. Co-Neutrals' Finding

The guidance and DVP metric for this TO were not completed by the required due date of June 1, 2021. The Co-Neutrals have not evaluated implementation, and make no Performance Standard determination on the State's performance. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.

c. Discussion

Between March and September 2021, the Co-Neutrals received and provided feedback to the State on draft material related to this commitment within CYFD's Procedures¹²⁸ and instructions to staff, and in how it is defined within the DVP to collect and assess performance data.¹²⁹

For purposes of this commitment, "known to child" is defined as the child's primary PSD worker or their supervisor. Anticipated revisions to CYFD's Procedure PR10 – Out of Home Placement, within Monthly Visits¹³⁰, states:

"If the decision is to place a child or youth in an out of state congregate placement, the PSD Worker or Supervisor must visit the child monthly to assess the child/youth's safety and wellbeing and ensure the child/youth's needs are being met. When that is impossible, the PSD Worker's Supervisor may approve the monthly worker-child visit be conducted by a worker who has a relationship to the child/youth to assess the child/youth's safety and

¹²⁷ These actions and dates have not been independently validated by the Co-Neutrals.

¹²⁸ Revisions are required for two CYFD Procedures: PR10 – Out of Home Placement, and PR19 – Visitation. The State has indicated to the Co-Neutrals that the revised Procedures will be finalized in January 2022.

¹²⁹ On September 24, 2021, the Co-Neutrals communicated to the State that there were no further comments or suggestions on the State's materials shared on September 16, 2021 related to this commitment.

¹³⁰ CYFD issued a PIG (10-2021-#19) to staff on October 19, 2021, advising of changes within CYFD's Procedures PR10 – Out of Home Placement, and PR19 – Visitation. The revised PIG can be found at the found at the CYFD Kevin S. webpage at https://cyfd.org/docs/10-2021-no19_PIG_RE-ISSUE_of_Worker_Child_Visitation.pdf

wellbeing and ensure the child/youth's needs are being met. PSD Worker and Supervisor will ensure contact is maintained between the child and their family.”

9. *Out-of-State Individualized Planning Process (IPP) Meeting and Development of Discharge Plans*

a. FSA Requirement

Within the first 30 Days of the placement, the out-of-state Individualized Planning Meeting team will develop a discharge plan which includes identification of in-state resources that need to be developed for the child to return to New Mexico. The CYFD caseworker will do so by working with HSD or its designee to secure services that could be funded by Medicaid. Individualized Planning Meetings, which may take place during scheduled treatment team meetings for children in residential care, will be held every 30 Days to support the child and identify steps necessary to promote discharge. (App. B, TO 2.3) (Due June 1, 2021)

b. Co-Neutrals' Finding

The guidance and processes for this TO were not completed by the required due date of June 1, 2021. The Co-Neutrals have not evaluated implementation, and make no Performance Standard determination on the State's performance. The Co-Neutrals will assess the State's efforts toward this TO in a future Co-Neutrals' report.

c. Discussion

This TO is interrelated to App A, TO 4.1 which requires CYFD and HSD to develop and implement an Individualized Planning Process (IPP)¹³¹ for convening team meetings to make decisions for delivering supports and services to children in foster care. As discussed earlier in this report, CYFD and HSD have contracted with the Child Welfare Policy and Practice Group to develop, train, and provide technical assistance to the State on its IPP which is scheduled to be fully implemented in December 2022. For further discussion on the IPP process, which has not yet been finalized by the State, see discussion of the Individualized Planning Meeting Plan commitment in the Trauma-Responsive System of Care section of this report.

The discharge planning component of this commitment is discussed above in App. B, TO 2.1, Joint Clinical Review. A topic of the JCR discussion must include discharge planning, and identification of necessary supports and services to promote the plan.¹³²

¹³¹ Originally called the Individualized Planning Meeting (IPM) Plan as described above in App. A, TO 4.1.

¹³² On September 24, 2021, the Co-Neutrals communicated to the State that there were no further comments or suggestions on the State's materials provided on September 16, 2021, related to this commitment.

10. Approval of Annual Target for New Culturally Reflective Foster Homes

a. FSA Requirement

Beginning on December 1, 2020, and on an annual basis by December 31 each year thereafter, the Co-Neutrals will approve a Target Outcome for CYFD to approve a specified number of new culturally reflective foster homes during the following year. (App. B, TO 6.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

After considerable back-and-forth between the State and Co-Neutrals, and in consultation with Plaintiffs, an agreement was reached on the target for the number of new culturally reflective foster homes CYFD will license between July 1, 2021, and December 31, 2021. The Co-Neutrals will assess the State's efforts toward this TO in a future Co-Neutrals' report.

c. Discussion

In developing the six-month target, the State and the Co-Neutrals examined historical recruitment trends, using provider licensing data from the State's FACTS database to calculate the number of non-relative resource homes developed during each six-month period, from January 2019 to December 2020.¹³³ The final target for the last six months of 2021 was approved by the Co-Neutrals at 89 newly¹³⁴ licensed non-relative resource homes statewide, which is 112.5 percent of the average number of homes recruited during the four six-month periods evaluated.

The State is required to set, and the Co-Neutrals are required to approve, a new annual target by December 31 each year. Information of the State's performance in 2021, and on the CY2022 target, will be included in a future Co-Neutrals' report.

11. Approval of Annual Target for New Treatment Foster Care Placements

a. FSA Requirement

Beginning on December 1, 2020, and on an annual basis by December 31 each year thereafter, the Co-Neutrals will approve a Target Outcome for ... HSD to approve a specified number of new treatment foster care placements during the following year. (App. B, TO 6.3) (Due 5/30/2021)

b. Co-Neutrals' Finding

After considerable back-and-forth between the State and Co-Neutrals, and in consultation with Plaintiffs, in July 2021, an agreement was reached for a six-month target (July 1, 2021, through

¹³³ The State and Co-Neutral team analyzed provider licensing data collected in FACTS; homes "on hold" (i.e., not available for placement) at the end of each period were excluded.

¹³⁴ "Newly" licensed is defined as homes that have not had an approved license within the prior 365 calendar days. Homes on "hold" will not be considered newly licensed when they return to active status.

December 31, 2021) for new placements in treatment foster care (TFC) homes. The Co-Neutrals will assess the State's efforts toward this TO in a future Co-Neutrals' report.

c. Discussion

To develop this target, the State and Co-Neutrals examined historical placement trends, and calculated the number of children placed in TFC-licensed homes each quarter in 2020.¹³⁵

The analysis revealed that although the majority of children placed in TFC homes had been foster children approved to receive TFC services, there were also many other children placed within these homes – specifically siblings of the children approved for TFC services,¹³⁶ and non-sibling children who were not receiving TFC services¹³⁷ (providers are reimbursed at a modestly lower rate to care for children in both of these latter categories). To prevent the unintended consequence of separating sibling groups within family-based settings, the Co-Neutrals agreed to include within the target for the second half of 2021 children in state custody who are receiving TFC services as well as their siblings.

After review of data on the average number of TFC approved children and their siblings in TFC placements within three-month periods in CY2020, agreement was reached on setting the July through December 2021 target at 132 new placements,¹³⁸ representing 112.5 percent of the number of qualifying TFC placements that occurred in the average six-month period in 2020.¹³⁹

The State is required to set, and the Co-Neutrals are required to approve, a new annual target by December 31st each year. In August 2021, the parties and Co-Neutrals agreed to develop a workgroup to discuss the barriers to recruitment and availability of TFC placements to help inform target setting for 2022. The workgroup is scheduled to have its first meeting in October 2021.¹⁴⁰

12. Creation of CYFD Workforce Development Plan

a. FSA Requirement

CYFD will create a CYFD Workforce Development Plan that will ensure CYFD's workforce has adequate qualifications, expertise, skills, and numbers of personnel. The CYFD Workforce Development Plan will describe in writing the expected nature, scope, capacity, and structure of the workforce necessary to meet the obligations described in this Agreement. The plan will include

¹³⁵ The State and Co-Neutral team analyzed TFC provider data collected in FACTS.

¹³⁶ Siblings were identified as children with the same case identification number as a child receiving TFC services.

¹³⁷ Eleven percent of the foster children placed in TFC placements in 2020 were not siblings of other children within the home, and were not approved for TFC services.

¹³⁸ Placements are considered "new" if the child has not been placed with the same resource provider within the previous 365 calendar days.

¹³⁹ Specifically, the methodology is based on the average number of TFC placements per quarter in 2020, doubled (since the target was for a six-month period), with a growth factor.

¹⁴⁰ The TFC workgroup meeting occurred on October 19, 2021.

a specific hiring plan that identifies, by county, the number of staff, credentials, and training required to meet the objectives identified in the CYFD Workforce Development Plan and outlines strategies to recruit and retain staff. The Plan will require that all caseworkers and supervisors have sufficient educational credentials and/or directly relevant experience. It will require that CYFD have a sufficient number of caseworkers to ensure that no caseworker will carry a case load of greater than the current professional standard identified by the Child Welfare League of America (CWLA). It will also include sufficient numbers of staff trained and able to implement ICWA guidelines using culturally responsive practices. The Plan will describe specific strategies to attract and retain diverse, high-quality staff with appropriate qualifications and skills. Co-Neutrals must approve the CYFD Workforce Development Plan. CYFD will develop the Workforce Development Plan by December 1, 2020 and fully implement it by December 1, 2021. (App. B, TO 10.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

This Plan was due for the Co-Neutrals' approval on June 1, 2021. CYFD submitted a revised version of the Plan to the Co-Neutrals on September 1, 2021.¹⁴¹ That version is in part unclear and remains unresponsive to requests for certain information from the Co-Neutrals. The draft includes guidance on graduated caseloads "not yet approved" by the agency's leadership. The Co-Neutrals assess the State has not met the Performance Standard for this TO.

c. Discussion

Between March and September 2021, the Co-Neutrals received and provided feedback to the State on draft versions of the Plan relative to this commitment. The State's June 1, 2021, draft Plan included objectives under the following goals:

- Implement a recruitment and retention plan to decrease the turnover rate of employees;
- Implement a centralized training plan to increase the effectiveness of training employees;
and
- Implement an organizational development plan to increase the workforce supports for caseworkers for a suitable workload of all caseworkers.

In late June 2021, the Co-Neutrals provided extensive feedback and questions to the State related to: the need for an empirical caseload standard, graduated caseloads for new staff, pre-service training for new staff, certificate-based training, and a self-paced training manual and evaluations.

In the Co-Neutrals' assessment, one of the primary challenges to developing the CYFD Workforce Development Plan, and a barrier to the Co-Neutrals' approval, has been the State's refusal

¹⁴¹ The Co-Neutrals provided feedback to the State on the revised material on October 6, 2021.

throughout most of 2021 to set an empirical caseload standard. The FSA language for this TO requires, “CYFD have a sufficient number of caseworkers to ensure that no caseworker will carry a caseload greater than the current professional standard identified by the Child Welfare League of America (CWLA).”¹⁴² The Co-Neutrals began discussions with both the State and Plaintiffs team in February 2021 on the importance of setting an empirical caseload standard to allow the State to identify, “a specific hiring plan that identifies, by county, the number of staff, credentials, and training required to meet the objectives identified in the CYFD Workforce Development Plan.”¹⁴³ The State’s June 1, 2021 submission on material related to this commitment did not include a reasonable or internally consistent¹⁴⁴ proposal. By September 1, 2021, the State’s submission was far from a finished product. It includes guidance on a graduated caseload standard not approved by CYFD’s own leadership; language indicating it will not revise its training manual for new staff until its hiring process has been approved, despite again not providing the Co-Neutrals with requested data on the number of staff needed to meet caseload standards; and a roll-out schedule for proposed certificate-based training through December 2022, despite language in the FSA that CYFD must fully implement its Workforce Development Plan by December 1, 2021.

The Co-Neutrals repeatedly informed CYFD that an approvable Plan will need to include a clear, empirical caseload standard; the number of casework staff CYFD needs, detailed by county, to implement the standard; and the detailed methodology used to determine the number of needed positions, by county. That information will guide CYFD as it strives to put into practice the caseload standard, and other important features, of the Workforce Development Plan that New Mexico agreed to build and implement. To date, the State has not provided that information, most recently responding that, “county-by-county position availability has been determined over the years and has considered caseload/workload requirements, as well as the availability of qualified staff in the area. County position allotment has been reached over many years of understanding needs in county in relation to positions available and the ability to hire in that county.”

D. Indian Child Welfare Act (FSA Appendix C)

The commitments in Appendix C of the FSA require CYFD and HSD to, “serve Native American families, build a relationship with each of the New Mexico Tribes and Pueblos, and comply with the Indian Child Welfare Act (ICWA) in its letter and intent.” The State must, “comply with ICWA and shall make every effort to ensure that all Native Children and families receive appropriate support and services.”^{145, 146}

¹⁴² FSA, pg. 7a.

¹⁴³ Ibid.

¹⁴⁴ For example, the State’s June 2021 draft Workforce Development Plan did not articulate an empirical caseload standard for staff, but in another section of the Plan, set a standard for new employees to maintain a 50 percent reduced caseload for the first six months of service, without ever establishing the actual caseload standard.

¹⁴⁵ FSA, pg. 8a.

¹⁴⁶ Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63.

i. Implementation Targets Due December 1, 2020 and June 1, 2021

1. Draft and Promote Passage of State ICWA Law

a. FSA Requirement

CYFD and HSD will work with the Administrative Office of the Courts (AOC) and with New Mexico Tribes and Pueblos to draft a State ICWA law that mirrors and expands upon the federal version. The drafting committee will include representatives of New Mexico Tribes and Pueblos, representatives of Native Children, Native parents, and other caregivers involved in the child welfare system, experts on the federal ICWA, and providers of culturally relevant services and supports. The drafting committee will have discretion to determine the content of the law and will consider definitions of “active efforts,” “qualified expert witness,” including qualifications of for determining a “qualified expert witness,” and development of a pool of potential expert witnesses. HSD and CYFD will identify and arrange for an appropriate facilitator such as the New Mexico Department of Indian Affairs to convene the drafting committee to assist in drafting the law. CYFD and HSD will actively promote passage of the law, including by making a positive recommendation of the bill to the Governor’s Office with appropriate justification. (App. C, IT 1.1) (Due June 1, 2021)

b. Co-Neutrals’ Finding

While the State made efforts toward this IT, it did not follow the specific process requirements, which in the Co-Neutrals’ assessment, may have contributed to the inability to move forward with a vote on a New Mexico Indian Child Welfare Act (ICWA) law in the last legislative session. The Co-Neutrals have determined a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT, by working with the Tribes, Pueblos, and other designated parties, in a manner consistent with the FSA for the upcoming legislative session in January 2022.

c. Discussion

In part two of the State’s baseline report, CYFD outlined numerous activities between July 2020 and March 2021 to create and pass a New Mexico ICWA law pursuant to this FSA. These include: formation of a workgroup, with participants from CYFD, New Mexico Tribal Indian Child Welfare Consortium (NMTIC),¹⁴⁷ the Coalition to Stop Violence Against Native Women (CSVANW), and Bold Futures NM. CYFD presented to a range of groups and interested parties, such as the Eight Northern Indian Pueblos Council (October 2020), NM Tribal-State Judicial Consortium (TSJC) (October 2020), the Indian Affairs Department (IAD) Annual State and Tribal Leaders Summit,

¹⁴⁷ NMTIC was established in 2015 as a consortium of Tribal ICWA social workers from 23 NM Tribes who work collaboratively to improve and strengthen child welfare practices as they relate to Native children in New Mexico.

and the All Pueblo Council of Governors (November 2020). CYFD also hosted a statewide ICWA Summit (October 2020).

The State made efforts toward creation and passage of state ICWA legislation, however, these efforts began late in the legislative calendar and failed to satisfy the specific process requirements of the FSA. The specific language and process requirements of this IT were negotiated by the parties to include a requirement that CYFD and HSD, “work with the Administrative Office of the Courts,” and the NM Tribes and Pueblos¹⁴⁸ to draft the bill, and for the drafting committee to include, “representatives from the NM Tribes and Pueblos, representatives of Native children, Native parents, and other caregivers involved in the child welfare system, experts on the federal ICWA, and providers of culturally relevant services and supports.” Also, the State committed that, “HSD and CYFD will identify and arrange for an appropriate facilitator such as the New Mexico Department of Indian Affairs to convene the drafting committee to assist in drafting the law.”

To assess whether the requirements of this IT were fulfilled, the Co-Neutrals have reviewed numerous documents and information provided by the State, and engaged in conversations with many community advocates and interested parties. The Co-Neutrals have heard concerns from interested parties involved in the process that the engagement of NM Tribes and Pueblos began late with respect to the last legislative session, and some report that there was inadequate consultation with Tribes as Sovereign Nations. Additionally, the specific representatives identified in the FSA as required participants of the drafting committee were not assembled to work together. Likewise, while NMTIC is a good group with which to engage about the State ICWA law drafting, working with that group did not fulfill the obligation of the State to convene a drafting committee with specific representation to determine the content of the law. Nor does NMTIC fulfill the State’s responsibility to consult specifically with Tribes as Sovereign Nations. The Co-Neutrals have concluded that the process requirements within this IT were therefore not fulfilled.

Since the end of the last legislative session, work has continued to craft a state ICWA law that can be successful. There is broad consensus among CYFD, NM Tribes and Pueblos, and interested parties on the need for a state ICWA law, and there is optimism that CYFD working with leaders of Tribes and Pueblos, as well as legislators, creates the opportunity to implement the language of this commitment rigorously and convene an effective collaboration. The Co-Neutrals will assess whether CYFD and HSDs’ current efforts align with the FSA requirements for this IT in a future Co-Neutrals’ report.

¹⁴⁸ The FSA defines NM Tribes and Pueblos to be inclusive of all Tribes, Pueblos, and Nations in New Mexico. The Co-Neutrals’ use of this term within this report is consistent with the FSA definition.

2. *Development of Assessment Tool, Processes, and Procedures*

a. FSA Requirement

With the input of New Mexico’s Tribes and Pueblos, CYFD and HSD will develop processes and procedures to promote traditional interventions as first-line interventions and services, using an assessment tool for Native Children in State Custody, modifications of existing assessment tools, or other means recommended by Native experts. The form of the assessment tool or other means shall be approved by the Co-Neutrals, but the Co-Neutrals shall not withhold approval of the assessment tool if it is reasonably calculated to achieve the Goals of this Agreement. (App. C, IT 2.1) (Due June 1, 2021)

b. Co-Neutrals’ Finding

This deliverable was due on June 1, 2021, and based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT. The Co-Neutrals have been unable to fully assess completion of this IT, nor to provide approval of the required assessment tool in isolation of the accompanying processes and procedures, which as of September 1, 2021, had not been provided by the State.¹⁴⁹

c. Discussion

The State has developed a Cultural Assessment Questionnaire (CAQ), inclusive of a series of questions designed to determine if a Native child in CYFD custody has a need for cultural or traditional services, interventions, supports, or ceremonies.¹⁵⁰ CYFD reports that the CAQ questions were developed in collaboration with ICWA workers from NM Tribes and Pueblos who attend NMTIC meetings, and during CYFD ICWA case consultations.^{151,152}

The State’s June 1, 2021, submission of materials for this commitment did not include the processes and procedures for administering the CAQ, or how it will be utilized to promote traditional interventions as first-line interventions and services. The State’s materials stated that

¹⁴⁹ More recently, on September 30, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on the revised material on November 1, 2021.

¹⁵⁰ The questions include, for example, “What are you and your child’s clanship?; What cultural/traditional activities are important for you and your family to participate in, and how can CYFD support you and your family to get this set up?; and What traditional healing (physical and/or emotional) ceremonies do you and your family participate in (i.e., medicine men/women, herbal remedies, etc...)?”

¹⁵¹ Specifically, the State has identified that the CAQ was developed with input and feedback from: Pueblo de Cochiti, Pueblo of Isleta, Pueblo of Laguna, Mescalero Apache, Nambe Pueblo, Pueblo of Pojoaque, San Felipe, San Ildefonso, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zuni, Ysleta del Sur, and the Navajo Nation ICWA.

¹⁵² In response to suggested edits proposed by the Co-Neutrals, CYFD indicated that the questions in the CAQ were developed based on Tribal input, and will not be altered unless a change is recommended by the Tribes and Pueblos.

the process for administering the CAQ would be developed within a PIG that would be completed by December 1, 2021, beyond the June 1, 2021 deadline.

In June 2021, the Co-Neutrals provided feedback and questions to the State related to CAQ processes and procedures, including the timeframe and meeting type that will be used to administer the CAQ, who will be required participants and who should be invited to such a meeting, at what frequency the CAQ will be administered (e.g., once shortly after the Native child enters care, or at periodic intervals), and the timeline for staff and participant training on use of the CAQ.

3. *Pursue Federal Funding through Medicaid and IV-E*

a. FSA Requirement

HSD and CYFD will pursue federal funding to the maximum extent allowable through Medicaid and IV-E funding for traditional and culturally responsive treatments, interventions, and supports, including non-medicalized interventions, for Native Children in State Custody. (App. C, IT 3.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The State provided material relevant to this IT on June 1, 2021; the Co-Neutrals provided specific feedback and posed questions to the State on June 28, 2021, and did not receive a response or an updated draft of this commitment as of September 1, 2021.¹⁵³ Based on the information that has been provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT.

c. Discussion

In the State's materials related to this commitment and provided to the Co-Neutrals on June 1, 2021, separate updates were provided for HSD's work to pursue federal Medicaid funding, and CYFD's work to create more opportunities for New Mexico Tribes and Pueblos to leverage Title IV-E federal funding¹⁵⁴ for children in foster care, or at risk of entering foster care.

The majority of HSD's update on maximizing federal Medicaid funding describes current conditions, specifically that services provided to all Medicaid-eligible Native children through an Indian Health Services (IHS) and Tribal 638 facility¹⁵⁵ are matched at 100 percent of the federal

¹⁵³ More recently, on September 30, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on the revised material on November 1, 2021.

¹⁵⁴ Title IV-E of the Social Security Act is the largest federal funding stream for child welfare activities. These funds are available to Title IV-E agencies (states and Tribes) to assist with the costs of foster care maintenance for eligible children, administrative expenses to manage the program, and training for staff and resource parents.

¹⁵⁵ Tribal Contract or Compact Health Centers (also called 638 contract or compact) are operated by Tribes or Tribal organizations and Urban Indian Health Centers to offer outpatient health care programs and facilities. For more information, see <https://www.ihs.gov/odsct/title1/>

medical assistance percentage (FMAP).¹⁵⁶ HSD identified more than 75 NM Medicaid-enrolled providers for the IHS, Tribal 638, or Urban Health Clinics that offer services ranging from dental, optometry, behavioral health, pediatric care, and physical health in an inpatient and outpatient setting. HSD draws a federal match to fund services for Native children who receive Medicaid coverage through a managed care organization (MCO), including Blue Cross Blue Shield of NM, Presbyterian Health Plan, and Western Sky Community Care. The MCOs are responsible for care coordination and delivery of behavioral and physical health covered services for children enrolled in their networks. The MCOs offer Native American traditional and spiritual medicine as a value-added service – up to \$250 to 300 per year; however, this is not reimbursable by Medicaid in New Mexico at this time.

In an effort to pursue additional federal Medicaid funding for traditional and culturally responsive treatments, interventions, and supports for Native children in custody, HSD had considered submitting an 1115 Waiver¹⁵⁷ amendment to the U.S. Centers for Medicare and Medicaid Services (CMS) to request reimbursement for traditional healing services when provided in, at, or as part of services offered by the IHS, a tribe or tribal organization, or an Urban Indian health program facility, at the 100 percent FMAP rate. However, given at least one other state's experience with such an approach, the State has determined CMS is unlikely to approve such a request. The State is now considering whether a State Plan Amendment request or another approach with the MCOs might be more likely to be successful. The Co-Neutrals will continue to engage with the State as this process goes forward to determine whether additional federal Medicaid funding for such services is possible.

The information provided by CYFD for this IT focuses on their work with NM Tribes and Pueblos to provide technical assistance to improve access to federal Title IV-E funding (which pertains to App C., IT 6.1 discussed later in this report section). CYFD provided very limited information on how the State is leveraging Title IV-E for traditional and culturally responsive treatment, interventions, and supports. The State's response references that CYFD is engaged in conversations with several other states with larger populations of Native children to discuss possible solutions on a federal level for accessing Title IV-E reimbursement for prevention activities under the Family First Prevention Services Act (FFPSA),¹⁵⁸ but does not detail specific strategies nor a timeline for completion.

¹⁵⁶ The Federal Medical Assistance Percentages (FMAP) are the percentage rates used to determine the matching funds rate allocated annually under Medicaid to certain medical and social service programs.

¹⁵⁷ Section 1115 of the Social Security Act provides the Centers for Medicare and Medicaid Services (CMS) with the authority to approve experimental, pilot, or demonstration projects that are likely to assist in promoting the objectives of the Medicaid program. If approved, they allow states flexibility to design and improve programs by demonstrating and evaluating state-specific strategies and policy approaches for specific populations.

¹⁵⁸ The Family First Prevention Services Act (FFPSA) was passed in February 2018 as part of the Bipartisan Budget Act. Under FFPSA, states will be able to claim Title IV-E reimbursement for mental health treatment, substance use recovery, and in-home parent skill-based programs that are identified as well-supported, supported, or promising practices.

4. *Full Time Employee to Develop Culturally Responsive Services*

a. FSA Requirement

CYFD will maintain a full-time employee responsible for developing and maximizing culturally responsive services for Native Children in State Custody, and for coordinating and overseeing provision of culturally responsive services to Native Children in State Custody by local staff throughout the state. (App. C, IT 4.1) (Due December 1, 2020)

b. Co-Neutrals' Finding

The Co-Neutrals assess that the job description provided, and appointment of a Director of Tribal Affairs, meets the Performance Standard for this IT.

c. Discussion

CYFD is comprised of four divisions, all of which are housed within the Office of the Secretary. These include Protective Services Division (PSD), Juvenile Justice Services (JJS), Behavioral Health Services (BHS), and Tribal Affairs Division. The Tribal Affairs Division was developed in 2020, and the former CYFD Native American liaison position expanded into this new Division. The person holding that position has been in the role of Native American liaison, and now Director of Tribal Affairs, since October 2019. CYFD also hired a CYFD PSD tribal coordinator in April 2021, and is recruiting for tribal coordinators within CYFD's BHS and JJS Services.

The State reports the Director of Tribal Affairs has the following duties and responsibilities:

- Work collaboratively with the NM Tribes, Pueblos, and Nations to identify barriers to service delivery, develop and maximize services responsive to the needs of tribal members, and act as a conduit for the major issues and concerns expressed by the Tribes, Pueblos, and Nations.
- Represent the Office of the Secretary at state, regional, and national meetings on issues that impact state-tribal relations.
- Serve as the CYFD contact for policy issues concerning ICWA.
- Assist CYFD and the Tribes, Pueblos, and Nations with ICWA and Juvenile Justice Services intergovernmental agreements and other CYFD-tribal Title XX and Title IV-E intergovernmental agreements.
- Develop partnerships between the State of New Mexico, Tribes, Pueblos, Nations, off-reservation entities, and federal agencies that mutually affect positive policy and practice outcomes for all Indian children and families.

- Work to ensure CYFD compliance with the State Tribal Collaboration Act.¹⁵⁹
- Work to ensure CYFD compliance with Native American provisions in the NM Children's Code.
- Work to ensure CYFD compliance with ICWA and with CYFD's policy and intergovernmental agreement changes because of the December 16, 2016, U.S. Bureau of Indian Affairs (BIA) Indian Child Welfare Act Regulations.
- Advise CYFD on pending legislation affecting Native American children and families and provide guidance on program implementation of any enacted legislation.

5. *Native Resource Family Recruitment and Retention Plan*

a. FSA Requirement

CYFD will develop a plan to increase recruitment and retention of Native Resource Families. The plan will include identifying relatives of Native Children, as required by ICWA or the New Mexico Tribe or Pueblo's preferred placement priorities, as well as identifying other potential Native Resource Families. The plan will include identification of additional supports needed for Native Resource Families, including supports and services that are culturally responsive and are not the same as those provided to non-Native parents, as well as providing assistance for families to navigate Resource Family licensing requirements. One methodology for identifying additional needed supports will be surveying former Native Resource Families to determine why they have stopped serving as a Resource Family and surveying potential Native Resource Families that did not complete the process to determine why they chose not to become a Resource Family. (App. C, IT 5.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The State submitted a draft Plan on June 1, 2021, and the Co-Neutrals provided feedback on June 28, 2021. As of September 1, 2021, the Co-Neutrals had not received a response to their feedback, nor updated material for this commitment. Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT.

c. Discussion

Information provided by the State on June 1, 2021, related to this IT emphasizes the first priority for CYFD and the Tribes and Pueblos is that Native children in care are placed with their family members or relatives, as defined by the Tribes and Pueblos. If a relative placement is not possible,

¹⁵⁹ To access the State Tribal Collaboration Act, see <https://www.rld.nm.gov/wp-content/uploads/2021/06/State-Tribal-Collaboration-Act-SB196.pdf>

CYFD has proposed steps to recruit non-relative resource homes through targeted recruitment of Native resource families who live both on and off Tribal reservations. To inform these efforts, CYFD has proposed the following activities:

- Surveying formerly licensed families and families who did not complete the licensing process to solicit feedback on their experience.
- Surveying tribal ICWA caseworkers and Tribal leadership to determine the types of resource families that are needed, and recommendations on retaining these resource families.
- Working with Tribes to provide financial and technical assistance through CYFD's PSD Federal Reporting Bureau, IV-E Unit, and Office of Tribal Affairs for licensure of individually identified families, and to develop foster care licensing programs.
- Conducting focus groups with Tribes in July and August 2021, as well as regularly scheduled focus groups, surveys, and recruitment that will be conducted by a third-party contractor.
- Ensuring Tribal participation on the Relative Connections workgroup monthly meetings to help identify strategies, opportunities, and challenges to recruiting Native resource homes.
- Training for staff, to include how to build rapport with children and elicit information about potential relative and kin placements.
- Implementing kinship navigator programs at the regional and central office level.
- Offering additional kinship supports through contracted providers – specifically, Southwest Family and Child Guidance Center in the Central region, and DNA Legal Services in the Northwest region.
- Developing individualized retention plans for each resource home, including support plans developed with the Tribal caseworker.

CYFD anticipates developing, implementing, and rolling out all recruitment and retention efforts by December 30, 2021, and provided benchmark dates by which specific activities would be completed.

In late June 2021, the Co-Neutrals provided feedback on the State's draft Plan. Areas noted as needing improvement included further description about how the State will gain input and advice from Native resource families; additional detail regarding development of creative individualized recruitment strategies that are designed and carried out by Tribes and Pueblos; revisions to the format and questions included in a draft resource family survey; and consideration of including a

grant program that would provide resources directly to the Tribes and Pueblos to design and carry out their own recruitment activities. As of September 1, 2021, the Co-Neutrals did not receive a response to their feedback, nor updated material for this commitment.¹⁶⁰

6. NM Tribes and Pueblos Access to IV-E Funding

a. FSA Requirement

CYFD will work with New Mexico Tribes and Pueblos to engage in dialogue, develop agreements, and take any other steps necessary to help New Mexico Tribes and Pueblos better access IV-E funding to improve services for Native Children, including additional funding for legal representation for New Mexico Tribes and Pueblos and Respondents. (App. C, IT 6.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

CYFD has expressed a commitment to creating more opportunities for New Mexico Tribes and Pueblos to leverage Title IV-E federal funding for children in foster care, or who are at risk of entering foster care.¹⁶¹ The primary strategy for this has been through development of Joint Power Agreements (JPAs)¹⁶² between the State and NM Tribes and Pueblos, which would allow the State to pass through Title IV-E federal funds to tribal nations for reimbursable costs. The Navajo Nation is the only New Mexico tribe with a Title IV-E direct plan, which allows them to draw down funds directly from the federal government for approved activities and costs.¹⁶³

¹⁶⁰ On November 1, 2021, in response to review of a draft of this report, the State notified the Co-Neutrals that they are finalizing a contract with the Coalition to Stop Violence Against Native Women to conduct a range of outreach activities, including, but not limited to, focus groups, one-on-one interviews, and surveys with formerly licensed resource families and families who did not complete the licensing process to solicit feedback on their experience. The State reported to the Co-Neutrals that it anticipated fully executing the contract by the end of October 2021. However, as of the finalization of this report, the Co-Neutrals had not received final confirmation whether this contract is in place.

¹⁶¹ CYFD is the designated Title IV-E agency for New Mexico, and can pass through Title IV-E funds to Tribes or Pueblos for the care of Native children who meet the eligibility criteria, and who are in the custody of the Tribe or Pueblo as a result of parental or other caregiver abuse or neglect.

¹⁶² CYFD updated the JPA template in 2020, which is titled, "Pass Through of Title IV-E Foster Care Maintenance, Adoption Assistance and Guardianship Assistance Payments with New Mexico Tribes, Nations and Pueblos."

¹⁶³ Although the Navajo Nation is its own Title IV-E agency, the Ramah Navajo (Pine Hill) is not.

A JPA allows for the following Tribal activities and costs to be reimbursed:

- Foster care, guardianship, and adoption (including tribal customary adoption) payments for children in Tribal custody. Reimbursement can include care and support expenses to licensed foster care providers for costs related to housing, food, toiletries, clothing, mileage, and other incidentals.
- Pass-through administrative costs for staff on expenses identified in CYFD's cost allocation plan, including partial reimbursement for salaries and benefits for Tribal social workers, and funding for legal representation for children involved in the child welfare system in Tribal courts.
- Staff and resource parent training costs.
- Access to university stipend program for students graduating from one of the four universities¹⁶⁴ with social worker programs who currently have Title IV-E program agreements with CYFD.

Currently, there are 10 Tribes with JPAs with the State, but CYFD reports the Tribes are not actively requesting reimbursement for any Title IV-E eligible activities or programs.¹⁶⁵ CYFD notes that some reasons Tribes and Pueblos have provided for not requesting reimbursement include that they do not take many children into custody as they pursue other options to keep children safe, they do not have the infrastructure or funding for formal foster care programs, and frequent changes in leadership can disrupt Title IV-E collaboration with the State.

CYFD reports utilizing the following activities to assist NM Tribes and Pueblos in their consideration of entering into JPAs for those who currently do not have them, and for those who have prior JPAs, to update them to leverage Title IV-E funds:

- Offering technical assistance to any interested Tribe or Pueblo to set up reimbursement infrastructure for administration of Title IV-E.
- Hosting mini-Title IV-E summits twice a year – beginning in the fall of 2021 – to help address concerns, answer questions, and facilitate Tribe-to-Tribe learning.

¹⁶⁴ The four universities include: New Mexico Highlands University (NMHU), New Mexico State University (NMSU), Eastern New Mexico University (ENMU), and Western New Mexico University (WNMU).

¹⁶⁵ CYFD reports that some Tribes and Pueblos use Title IV-B funds (if available), Tribal general funds (if available), or funds through Temporary Assistance for Needy Families (if available) to cover the cost of foster placements or diversion programs.

- Providing technical assistance for administering Title IV-E programs, including assistance with determining eligibility requirements, processing payments, and running child abuse and neglect and criminal records checks.
- Offering free access to CYFD’s new Medicaid comprehensive child welfare information system (CCWIS), which includes Title IV-E eligibility and payment modules to assist Tribes and Pueblos in submitting reimbursement claims.¹⁶⁶

As of June 1, 2021, CYFD reports meeting with more than 12 Tribes and Pueblos to review and discuss the JPA. The State’s June 1, 2021, submission to the Co-Neutrals described the information and efforts outlined above, and the Co-Neutrals sent follow up questions to the State requesting additional information to allow the Co-Neutrals to assess whether the State has met this Performance Standard. As of September 1, 2021, the Co-Neutrals had not received a response.^{167,168}

7. *Collection and Analysis of Data to Understand Needs of Native Children, and State’s Capabilities to Meet those Needs*

a. FSA Requirement

CYFD and HSD will collect and analyze data sufficient to understand the characteristics and needs of Native Children in State Custody and the capabilities of the State to meet those needs. The data to be collected will include (1) data about Native Children in State Custody, including tribal membership status, confirmation and correction of birth certificates, removal rates, and placements (including whether children are placed with relative, non-relative Native, or non-relative non-Native Resource Families, Treatment Foster Care, congregate care, residential placement, or other out of home placement); (2) data on the demographics and characteristics of placements available to Native children (including Resource Families); and (3) data on the demographics, characteristics and services provided by treatment providers available to Native Children in State Custody. (App. C, IT 7.1) (Due June 1, 2021)

¹⁶⁶ CYFD reports that as of May 2021, Taos Pueblo had launched the first two modules of the information system, and Isleta Pueblo was scheduled to begin next. Full implementation of the information system is expected for October 2022.

¹⁶⁷ More recently, on September 30, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on the revised material on November 1, 2021.

¹⁶⁸ In response to review to the draft of this report, the State notified the Co-Neutrals that CYFD had entered into an updated JPA with one Pueblo, and was working to finalize new JPAs with two other Pueblos.

b. Co-Neutrals' Finding

The State submitted draft material relevant to this IT on June 1, 2021, and the Co-Neutrals provided feedback on June 28, 2021. As of September 1, 2021, the Co-Neutrals had not received a response to their feedback, nor updated material for this commitment.¹⁶⁹ Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT.

c. Discussion

The State has not submitted a specific and comprehensive plan to the Co-Neutrals relative to this IT. Information provided by the State on June 1, 2021, described the mechanisms that will be utilized to improve identification of Native children, and lists the ITs and TOs in FSA Appendix C for which information on Native children will be reported, but does not outline how data will be collected and analyzed to demonstrate an understanding of the needs of Native Children in state custody, and the capabilities of the State to meet those needs.

8. ***Creation of ICWA Unit***

a. FSA Requirement

CYFD and HSD will create and maintain a dedicated ICWA unit in the 2nd Judicial District that includes dedicated and specially trained caseworkers, supervisors, and children's court attorneys who will specialize in ICWA and act as consultants and trainers on ICWA cases. CYFD will work with AOC to implement lessons learned from the ICWA unit and court in the 2nd Judicial District throughout the state. (App. C, IT 8.1) (Due December 1, 2020)

b. Co-Neutrals' Finding

The Co-Neutrals assess that the State's efforts toward this IT meets the Performance Standard.

c. Discussion

In January 2020, New Mexico's first ICWA Court opened in the Second Judicial District, Bernalillo County, as the sixth such court in the country.¹⁷⁰ CYFD reports this Court was years in the making, and is the result of collaboration between CYFD, the Administrative Office of the Courts, the 2nd Judicial District Court, NMTIC, the Navajo Nation, and Casey Family Program's Indian Child Welfare Program. Bernalillo County was selected as it handles the highest volume of

¹⁶⁹ More recently, on September 30, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on the revised material on November 1, 2021.

¹⁷⁰ Other ICWA court sites at that time included Billings, Montana; Denver, Colorado; Adams County, Colorado; Los Angeles, California; Yellowstone, Wyoming; and Duluth, Minnesota. For a current map of ICWA Courts in the United States, see <https://www.ncjfcj.org/child-welfare-and-juvenile-law/icwa-courts/#section-map>

abuse and neglect cases statewide, as well as the highest number of ICWA cases due to the large population of urban Native American children and families in Albuquerque.

The ICWA Court is overseen by Chief Children's Court Judge Marie Ward, and hearings are presided over by Judge Catherine Begaye. The ICWA Court contracts with identified respondent attorneys and guardians ad litem (GALs) to provide legal services for families involved with the Court. CYFD developed an ICWA unit comprised of a children's court attorney, supervisor, and four ICWA specialist case managers to serve all ICWA cases in Bernalillo County. CYFD reports the goal of this unit is to ensure CYFD PSD cases include Tribal involvement, that Native children are in preferred placements, and receive culturally appropriate services.

In late 2020, Judge Begaye and Chief Judge Ward provided CYFD with feedback on court structure and services. CYFD reports themes from this feedback include:

- Forms being utilized for case updates should be updated and a more consistent process for distribution to the parties should be put in place;
- Facilitation of staffings should switch from the Special Master to the ICWA unit supervisor;
- The process for feedback from all parties to the case should be clarified;
- ICWA specialists would benefit from further trainings on specific topics, including creation of case plans, and nuanced points of ICWA;
- Convene an ICWA Court Advisory and Leadership Committee, to advise on ongoing activities of the Court; and
- Technological improvements were recommended, as the Covid-19 pandemic required all court interactions to be conducted virtually.

CYFD reports agreeing to recommendations for improvement, with changes to the format of staffings being implemented in November 2020, and planning to create an Advisory Committee by the end of 2020. CYFD agreed with court leadership to collect further lessons learned through the Advisory Committee. Effective May 18, 2021, CYFD reports New Mexico Partners (NM Partners) had agreed to be the ICWA Court Advisory Board, and the next meeting will be scheduled in November or December 2021.

A goal of the ICWA Court is to replicate its success in other regions of the state, transferring lessons learned during development and implementation in the first Court. CYFD reports collaborating with the Administrative Office of the Courts to develop trainings and learning opportunities for judges and contract attorneys throughout the state.

ii. Target Outcomes Due December 1, 2020 and June 1, 2021

9. Identification, Access, and Expansion of Culturally Responsive Services

a. FSA Requirement

CYFD will work with New Mexico Tribes and Pueblos, families, and Native Children to identify culturally responsive services. HSD will develop and expand access to traditional and culturally responsive treatments, interventions, and supports. CYFD will develop and arrange for traditional and culturally competent interventions, which may include interventions that are not medicalized and/or have not been evaluated as evidence-based, well-supported, or promising. CYFD and HSD will expand culturally relevant services that can be used as an active effort to keep families intact and to avoid taking children into custody. (App. C, TO 2.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

As discussed below, the material provided by the State to assess progress on this TO was insufficient. The Co-Neutrals provided specific feedback and questions to the State on this TO in late June 2021, and as of September 1, 2021, the State had not yet responded nor provided an updated draft of this commitment.¹⁷¹ Despite the State's commitment to expand culturally responsive services, based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this TO.

c. Discussion

The material provided by CYFD on June 1, 2021, relative to this TO was primarily related to the CAQ referenced in App. C, IT 2.1 discussed earlier in this section, and did not include the information required by the Co-Neutrals to assess whether the State had met the Performance Standard for this commitment.

Information provided by HSD for this commitment incorporates much of the information provided for App. C, IT 3.1 (pursue federal funding through Medicaid for traditional and culturally responsive treatments) discussed earlier in this section, and also identifies stakeholder groups that HSD has engaged to increase awareness and provide technical assistance on accessing Medicaid and grant funding opportunities. HSD reports these stakeholder groups include the Native American Behavioral Health Providers Association, with its first meeting held in March 2021; Local Behavioral Health Collaborative meetings, that include representation from Tribal programs and behavioral health consumers; Native American Technical Advisory Committee (NATAC), which meets quarterly and includes tribal providers and tribal leaders or their appointees; and the

¹⁷¹ More recently, on September 30, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on the revised material on November 1, 2021.

Medicaid Advisory Committee (MAC) and the Native American Sub-Committee (NASC), which also meets quarterly.

This TO also requires the State to engage with and obtain feedback from Native families and children, in addition to NM Tribes and Pueblos. The Work Plan included in the State's June 1, 2021, material references activities to meet with Tribes and Pueblos, but does not identify specific activities to reach out to and hear directly from Native children and families to identify culturally relevant services.

After several discussions between the Co-Neutrals and *Kevin S.* parties, in August 2021, there was agreement to develop a workgroup to reach a common understanding and definition of culturally relevant services for purposes of the FSA.¹⁷² The State, Plaintiffs, and Co-Neutrals agree with the goals of expanding and improving access to traditional and culturally relevant services, but have not yet developed consensus around an operational definition of culturally relevant services or how to assess whether the State is improving access to such services, which will be required to guide the future work.

10. Policies to Ensure Native Children receive Traditional or Culturally Responsive Services

a. FSA Requirement

CYFD will make every effort to ensure that services are provided as quickly as possible with consideration of the traditions and culture of the Native child's Tribe or Pueblo, as well as child and family preferences. CYFD will develop policies to ensure that native Children in State Custody receive traditional or culturally responsive services, supports, or interventions, including interventions which are non-medicalized and/or have not been evaluated as evidence-based, well-supported, or promising, including collecting data on implementation of the protocols. The Co-Neutrals will approve the policies and evaluate the Department's compliance with the policy. The Co-Neutrals shall not withhold approval of the policy if it is reasonably calculated to achieve the goals of this Agreement. (App. C, TO 2.3) (Due June 1, 2021)

b. Co-Neutrals' Finding

The FSA language for this TO requires development of policies, and that such policies are approved by the Co-Neutrals. As of September 1, 2021, the Co-Neutrals had not received a draft policy from the State to assess or consider for approval.¹⁷³ Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this TO.

¹⁷² The workgroup had its first meeting on October 13, 2021.

¹⁷³ More recently, on September 30, 2021, the State submitted a revised draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on the revised material on November 1, 2021.

Furthermore, the TO requires that once the policy is developed and approved, the Co-Neutrals will evaluate compliance with the policy as outlined in the final DVP.

c. Discussion

The information provided by CYFD on June 1, 2021, relative to this TO was primarily related to the CAQ referenced in App. C, IT 2.1 discussed earlier in this section, and the State's intent to develop and implement a PIG by December 1, 2021 on use of the CAQ.

11. *Policy to Provide/Ensure Direct Assistance for Traditional Ceremonies*

a. FSA Requirement

CYFD will develop a policy to provide or ensure provision of direct assistance for traditional ceremonies, including arranging for all preparation and providing payment if needed, if Native Children want to participate. The policy will 1) provide for Native Children in State Custody to be presented with information about traditional ceremonies with sufficient time to decide whether they want to participate, 2) affirmatively encourage participation, and 3) facilitate all necessary preparation activities. The Co-Neutrals will approve the policy and evaluate the Department's compliance with the policy. The Co-Neutrals shall not withhold approval of the policy if it is reasonably calculated to achieve the Goals of this Agreement. (App. C, TO 3.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The information provided by CYFD for this TO was the same response as provided for App. C, TO 2.3 above. CYFD has not provided the Co-Neutrals with a draft policy to assess for compliance with this Performance Standard, or for consideration of approval.¹⁷⁴ Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this TO.

12. *30-Day Review of Native Children in Non-ICWA-Preferred Placements*

a. FSA Requirement

By December 1, 2020, when a Native Child is in a non-ICWA-preferred placement, the placement will be reviewed every 30 Days. (App. C, TO 4.1) (Due December 1, 2020)

¹⁷⁴ Ibid.

b. Co-Neutrals' Finding

The Co-Neutrals cannot validate the reported performance until the State provides final data. The Co-Neutrals make no Performance Standard determination on the State's performance. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.

c. Discussion

The State reported two metrics for this commitment in its 2020 annual report, both focused on 29 children placed during the month of December 2020 who were identified as potentially ICWA-eligible at the time of placement (i.e., a court had determined that they were ICWA eligible or there was no court determination, but their ICWA-status was "reason-to-know" based on their reported race and/or tribal affiliation). The 29 children do not reflect the full universe of Native children in foster care placements in December 2020, but is limited to those who were newly placed or changed placements during the month.

The State did not begin systematically tracking whether placements were aligned with ICWA placement preferences ("ICWA-preferred") until 2020. For the 29 children who experienced a new placement in December 2020, the State reported the average length of time each child had been in non-ICWA preferred placements, and data on the number of children for whom the required out-of-preferred-placement (OOPP) meetings occurred during December 2020.¹⁷⁵ The Co-Neutral team will be able to fully validate reported performance once the outstanding data issues have been resolved and there is confidence in the quality of the data.

Since the State's 2020 annual report was released on August 2, 2021, the State and Co-Neutrals have finalized the methodology that will be used to assess progress towards this commitment.¹⁷⁶ Future reports will include data on the length of time Native children spent in all non-ICWA preferred placements (not just those placements that began on or after December 1, 2020). Similarly, data will be available for validation on the timeliness of OOPP meetings for all ICWA-eligible children in non-ICWA preferred placements.

13. *Development of Protocols for 30-Day Review Process*

a. FSA Requirement

CYFD will establish protocols governing the 30-Day review process to include families, tribal representatives, legal representatives, and Resource Families. The protocols will require that the aim of the placement review will be to determine what actions, services and supports will enable the child to be moved to an ICWA-approved placement. If State ICWA legislation is passed and is

¹⁷⁵ See discussion in App. C, TO 4.2 below – Development of Protocols for 30-Day Review Process – for further explanation of OOPP meetings.

¹⁷⁶ Final methodologies will be included in the DVP once approved by the Co-Neutrals.

more protective than the federal ICWA, a placement may meet this standard by being preferred by or consistent with the State ICWA legislation. The Co-Neutrals shall approve the protocols, but the Co-Neutrals shall not withhold approval of the protocols if they are reasonably calculated to achieve the Goals of this Agreement. The Co-Neutrals will evaluate compliance with the protocols. (App. C, TO 4.2) (Due December 1, 2020)

b. Co-Neutrals' Finding

The State has developed protocols for the required 30-day review process of Native children placed in out-of-preference placements. The Co-Neutrals approved the protocols in January 2021 but have not yet evaluated implementation, and make no Performance Standard determination on the State's compliance with the protocols. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.

c. Discussion

Between October 2020 and January 2021, the Co-Neutrals received and provided feedback on draft material developed by the State relative to this commitment. A Guidance Memorandum - titled, *ICWA – Foster and Adoptive Placement of American Indian/Alaskan Native Children* – describes legal requirements pursuant to the federal ICWA on the placement of Native children in foster care, and establishes a process by which CYFD will conduct regular reviews of Native children who are not placed according to ICWA placement preferences in order to identify preferred placements for the Native child. On January 16, 2021, CYFD provided a revised deliverable addressing the Co-Neutrals' feedback, and the Co-Neutrals approved the final protocol on January 19, 2021.¹⁷⁷ The Guidance Memorandum is attached as Attachment D.

The Co-Neutrals are unable to determine who CYFD distributed the Guidance Memorandum to, and when it was distributed.¹⁷⁸ CYFD issued a PIG (03-2021-#7), dated March 24, 2021, outlining the process included in the Guidance Memorandum. The State has indicated to the Co-Neutrals that the revised Procedure will be finalized in January 2022.

Pursuant to federal law, Native children in foster care should be provided placements that allow them to remain connected to their families, culture, and communities. Preferred placements for Native children are listed below, in descending order of preference:

- 1) A member of the Indian child's extended family;
- 2) A foster home that is licensed, approved, or specified by the Indian child's tribe;

¹⁷⁷ In September 2021, the State provided an updated version of the Guidance Memorandum which corrected a typographical error related to dates.

¹⁷⁸ The Guidance Memorandum is dated December 1, 2021, but the Co-Neutrals did not approve the protocols until January 19, 2021.

- 3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- 4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.¹⁷⁹

CYFD's process requires that when a Native child enters custody, efforts are first made to identify and secure a relative placement for the child. If these efforts are unsuccessful, and the child is placed in an OOPP, the caseworker must notify the Tribal Affairs Division within 48 hours. The Director of Tribal Affairs is responsible for documenting these notifications, and scheduling and conducting an OOPP meeting for each Native child in OOPP placements at least every 30 days until the child is placed in a preferred placement.

The OOPP meeting must include a representative from the Office of Tribal Affairs, the permanency planning worker, and the permanency planning supervisor. Other meeting attendees should include the resource family, the GAL or youth attorney, the Native child's parents, the parents' attorneys, grandparents and other extended family members, and the youth, as appropriate. The children's court attorney is encouraged to attend, and a representative from the child's Tribe, Pueblo, or Nation must be made aware of the meeting and be invited to participate in a meaningful manner. The topics and issues for discussion within the meeting are outlined within the *Process* section of the Memorandum.

A phased implementation plan was developed by CYFD to provide a sequencing schedule and timeline by which all Native children in an out-of-preference placement would be reviewed. In January 2021, CYFD reports the Office of Tribal Affairs began identifying and tracking cases of Native children currently in foster care in an OOPP. Beginning that same month, the Director of Tribal Affairs was required to develop a staffing plan, including how many cases will be reviewed each month, with a goal of having all Native children in OOPP who entered foster care prior to February 2021 reviewed by July 1, 2021.

On February 1, 2021, the Office of Tribal Affairs was scheduled to begin receiving notice of any occurrence of a Native child being placed in CYFD custody as a result of a PSD investigation. The Director of Tribal Affairs or their delegate is responsible for tracking these cases, and scheduling OOPP meetings for Native children not in preferred placements.

14. Procedures to Enhance Accountability for ICWA Placement Preferences

a. FSA Requirement

CYFD will work with New Mexico Tribes and Pueblos to identify any tribal placement preferences that deviate from ICWA. CYFD will create procedures that enhance accountability for ICWA

¹⁷⁹ 25 U.S.C. § 1915 (b)

placement preferences, including allowing the child's tribe or pueblo and extended family members to participate in ICWA-preferred placement reviews, Individualized Planning Meetings and case decision making meetings. (App. C, TO 4.3) (Due December 1, 2020)

b. Co-Neutrals' Finding

The State has developed protocols for the required 30-day Review process of Native children placed in OOPP to enhance accountability for ICWA placement preferences. The protocols allow for participation by a Native child's Tribe, Pueblo, or Nation and extended family in OOPP meetings. The Co-Neutrals approved the protocols in January 2021, but have not yet evaluated implementation, and make no Performance Standard determination on the State's implementation of the procedures, as the procedures have not yet been finalized beyond issuance of a Guidance Memorandum and PIG, dated March 24, 2021. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.

c. Discussion

The Co-Neutrals assessed the State's efforts toward this TO in conjunction with App. C, TO 4.2 discussed above. CYFD is planning on incorporating the requirements for preferred placements for Native children, and OOPP meetings into its Procedure PR10 – Out of Home Placements, by January 2022.

15. *Development and Implementation of ICWA Training Plan*

a. FSA Requirement

CYFD will develop an ICWA training plan by December 1, 2020, and implement it by December 1, 2021. ICWA trainings will be developed collaboratively with the CYFD's Academy for Training and Professional Development Team, Protective Services Tribal Liaison, CYFD Tribal Liaison, Tribal Advisors, and culturally responsive experts. The ICWA training will include specific information on the history of ICWA, historic relations between Native American people and state and national government, and the history of culturally insensitive social work practices. It will also include skills development in working with Native families and communities, historical trauma, engagement, cultural humility and culturally responsive intervention techniques for Native American parents and youth and community engagement with New Mexico Tribes and Pueblos, as well as best practices for ICWA. The training will include information on New Mexico Tribes and Pueblos, sovereignty, and jurisdictional issues. The Co-Neutrals shall approve the ICWA training plan, but the Co-Neutrals shall not withhold approval of the training plan if it is reasonably calculated to achieve the Goals of this Agreement. The Co-Neutrals will evaluate implementation of the training plan. (App. C, TO 5.1) (Due December 1, 2020)

b. Co-Neutrals' Finding

This TO was not completed by the required due date of December 1, 2020. The State has made consistent efforts to improve the development of the Plan, and to address remaining questions that need to be answered before the Plan can receive the Co-Neutrals' approval. Given that the Plan is not finalized or approved, additional time is needed for the Co-Neutrals to assess whether the State has met the Performance Standard for development of the Plan. The Co-Neutrals will assess implementation of the Plan in future reports.

c. Discussion

Between October 2020 and September 1, 2021, the Co-Neutrals received and provided feedback on draft plans provided by the State related to this TO. The most recent draft plan, titled *CYFD Training and Coaching Plan for Increase in Knowledge, Skills and Abilities on Indian Child Welfare Act*, describes the Advisory Group that has been involved in developing the Plan;¹⁸⁰ the four levels of certification (Novice, Proficient, Advanced, and Distinguished) for different types of staff; the course titles and information included within each type of certification level; trainings for children's court attorneys; training for resource parents; training for external partners; plans for curriculum development and coaching of staff; plans for evaluating completion of trainings; and an implementation plan with timelines, activities, and measurable targets.

The Co-Neutrals' most recent feedback to the State sought clarification on CYFD's plan to train the existing workforce. CYFD is planning on contracting with the National Indian Child Welfare Association (NICWA) to develop a condensed training curriculum to provide current CYFD staff necessary training. Although this training was originally thought to be scheduled for December 2021, in comments on the draft of this report in early November 2021, the State notified the Co-Neutrals that the plan for training current staff was on hold until the contract with NICWA was executed, and to allow time to work collaboratively with NICWA and Tribals partners. The State has not yet provided details of this Plan and, therefore, the Co-Neutrals have been unable to provide approval of the plan.

E. Behavioral Health Services (FSA Appendix D)

The Final Settlement Agreement sets ambitious goals for the rebuilding of the behavioral health system for children and families in New Mexico. Appendix D of the FSA requires the State to, "structure and build a statewide, community-based mental health system that all children and families will be able to access." CYFD and HSD must structure the system to ensure, "prompt access to necessary services for all children in state custody and their families" regardless of where

¹⁸⁰ CYFD reports the ICWA Training Advisory Group members include the following representatives: ICWA manager for the Pueblo of Nambe; ICWA worker for the Pueblo of Taos; the Director for the Pueblo of Isleta Social Services; ICWA worker for the Jicarilla Apache Tribe; case worker for the Pueblo of Pojoaque Social Services; the Director of Navajo Nation Department of Social Services; and the Director for the Isleta Pueblo Social Services.

they live. Access to these services will ensure children in state custody are able to remain in the most family-like settings possible, and will reduce reliance on in- state and out-of-state residential and congregate care placements. The system must include, “diverse and full-spectrum of community-based services,” including medically necessary mental health services, which will be provided in the following descending order of preference based on the child’s level of need – “at home, in a family setting, or in the most home-like setting appropriate to a child’s needs and consistent with the Children’s Code.”¹⁸¹

i. Implementation Targets Due December 1, 2020 and June 1, 2021

1. Behavioral Health Care Workforce Development Review

a. FSA Requirement

HSD and CYFD will create a Behavioral Health Care Workforce Development Review with the objective of supporting and expanding provider capacity to provide community-based mental and behavioral health services with reasonable promptness that are accessible throughout the State, and particularly in rural areas. The Behavioral Health Care Workforce Development Review will describe in writing the expected nature, scope, capacity, and structure of the workforce necessary to meet the obligations described in this Agreement, including how HSD works with MCOs on increasing capacity to make available screening/assessment, High Fidelity Wraparound services, evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, intensive case management, mobile crisis response services and intensive home-based services to every Child in State Custody for whom they are medically necessary. HSD will either create or require MCOs to create a specific hiring/contracting plan that identifies, by county, the number of staff and credentials required to meet the objectives identified in the Behavioral Health Care Workforce Development Review. The Co-Neutrals must approve the Behavioral Health Care Workforce Development Review. (App. D, IT 1.1) (Due June 1, 2021)

b. Co-Neutrals’ Finding

As discussed below, the State continues to make progress toward this IT. However, the Co-Neutrals have not been able to approve the State’s proposed Review and Plan. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals’ report.

c. Discussion

The State provided an initial draft of its Behavioral Health Care Workforce Development Review on March 31, 2021, for the Co-Neutrals’ review. Since that time, the Co-Neutrals have met with

¹⁸¹ FSA, pg. 12a.

State staff, solicited and provided input from a national expert, and continue to review and provide feedback on additional drafts provided by the State.

The State's June 1, 2021, draft proposes two phases by which the State plans to meet the commitment. Phase 1 involves gathering data through December 2021 relevant to current service availability, current workforce capacity, provider expansion capacity, and current and expected service utilization. Phase 2 is proposed to be completed by the end of March 2022, and involves utilizing the information gathered in Phase 1 to develop a specific hiring and contracting plan, by county, to build a sustainable behavioral health workforce with the capacity to meet the needs of children in state custody.

2. *Initial Expected Service Utilization*

a. FSA Requirement

To assess need, HSD and CYFD will define initial expected service utilization for screening/assessment, High Fidelity Wraparound services, evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, intensive case management, mobile crisis response services and intensive home-based services. The Co-Neutrals must approve the methodology for predicting expected utilization of these services. (App. D, IT 2.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The State continues to make progress toward this IT. However, the Co-Neutrals have not yet been able to approve the State's proposed methodology. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

The State provided an initial draft of its methodology to the Co-Neutrals on March 31, 2021. The State continues to revise their methodology based on on-going feedback from the Co-Neutrals and their national experts, including the State's recognition of the impact of this IT on the Review discussed above, as the Expected Service Utilization will directly impact the size of the workforce the State will need to meet the provisions of the FSA.

This commitment requires the Co-Neutrals to approve the State's methodology for assessing initial expected utilization for services in New Mexico. The State's proposed methodology continues to evolve, and currently includes collecting and analyzing available data to discern the types of services already being used by New Mexicans, and specifically children in state custody, as well as the services that are not currently being offered but would be used by children in state custody

if they were accessible.¹⁸² The State is also looking at other jurisdictions' efforts in trying to determine an effective way to estimate future utilization as current services expand and additional new services become available. The Co-Neutrals and the State will continue to collaborate until an approvable methodology is developed.

3. *Detailed Progress Report on Reimbursement Methodology, Billing Rate Information, and Guidance for Providers*

a. FSA Requirement

HSD will produce to the Co-Neutrals and Plaintiffs' counsel a detailed interim progress report on the State's efforts to develop and publish reimbursement methodology, billing rate information, and guidance for providers. (App. D, IT 3.1a)¹⁸³ (Due December 1, 2020)

b. Co-Neutrals' Finding

The Co-Neutrals assess that the State has met the Performance Standard for this IT.

c. Discussion

The State submitted a draft of their Progress Report to the Co-Neutrals on November 22, 2020. Between November and December 2020, the Co-Neutrals provided feedback to the State, and updated drafts were provided by the State. The State submitted a final Progress Report relative to this commitment to the Co-Neutrals on December 1, 2020.¹⁸⁴

The State's December 1, 2020, report detailed the State's process to develop and publish a reimbursement methodology, billing rate information, and guidance for providers; proposed a timeline by which those processes and changes will be complete; and described various evidence-based practices, the current and proposed reimbursement rates, and the process by which those rates may need to be studied if changed. The State also submitted supplemental materials including the New Mexico Behavioral Health Provider Toolkit as well as a draft of the Behavioral Health Policy Manual.

¹⁸² Prior to finalization of this report, the State indicated they have decided to hire a contractor with expertise in Medicaid service utilization to assist in meeting this commitment. The Co-Neutrals have requested a meeting with the State to learn more and to discuss moving forward to create an approvable methodology.

¹⁸³ App. D, IT 3.1a was created and agreed upon by the parties in their August 8, 2020, Extension Agreement.

¹⁸⁴ To read the State's progress report for this IT, see https://cyfd.org/docs/D_3_1_1_Provider_Guidance_Report_12_1_20_formatted.pdf

4. Develop and Publish Reimbursement Methodology, Billing Rates, and Provider Guidance

a. FSA Requirement

HSD will develop and publish reimbursement methodology, billing rates (taking into account validated information regarding adequate rates), and guidance for providers for screening/assessment, High Fidelity Wraparound services, evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, intensive case management, mobile crisis response services and intensive home-based services, leveraging Medicaid whenever possible. The methodology and guidance will include provider eligibility criteria as well as billing and coding procedures. (App. D, IT 3.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

The State provided a draft of material relevant to this IT, but did not complete this IT by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to review the documents once finalized and promulgated by the Behavioral Health Services Division (BHSD) and assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

On March 31, 2021, the State provided its initial draft of this IT to the Co-Neutrals for review. Between March and August 2021, the Co-Neutrals reviewed drafts and provided feedback to the State. On August 24, 2021, the Co-Neutrals provided a memo to the State with remaining questions, but without further comments for revision. The Co-Neutrals have not yet received answers to these questions or a final document.

The State has proposed a set of published documents that will be issued by the BHSD to meet the provisions of this commitment. These documents include:

- A Provider Alert with the updated definition of Serious Emotional Disturbance (SED) (originally issued to providers on March 11, 2021);
- Updates to the Behavioral Health Policy and Billing Manual¹⁸⁵;

¹⁸⁵ The Behavioral Health Policy and Billing Manual provides guidance on service provision and reimbursement for behavioral health services to Medicaid and non-Medicaid providers, MCOs, and other interested parties. When making a change to the Manual, there is a 30-day period for public comment prior to any change taking effect. A period of public comment for the proposed changes relevant to this deliverable ended on August 30, 2021. The State expects the review and revision process to take two weeks, with a potential date for the updated manual to be finalized and published by October 15, 2021. The current manual can be found at www.hsd.state.nm.us/providers/behavioral-health-policy-and-billing-manual/

- Updates to the Medicaid Behavioral Health Fee Schedule¹⁸⁶; and
- Updates to the non-Medicaid fee schedule¹⁸⁷.

The State has indicated a timeline of October 15, 2021, for public comment periods for the Behavioral Health Policy and Billing Manual and the Medicaid Behavioral Health Fee Schedule to be completed and updates finalized. However, the Co-Neutrals have not yet been provided with any information about the status of these processes nor the finalized documents. Similarly, the Co-Neutrals have not been provided with information about the status of the publication of the non-Medicaid fee schedule which is currently available only to providers with access to Falling Colors (BHSD's administrative services organization) billing data system.

The State also provided a comprehensive report on the reimbursement methodology, billing rates, and provider guidance for each of the following services:

- Screening and Assessment Services, specifically:
 - NM CANS and NM CANS-CAT;
 - Early and Periodic Screening, Diagnosis and Treatment (EPSDT);
 - Comprehensive multidisciplinary team evaluations for people with Serious Mental Illness (SMI) or Serious Emotional Disturbance (SED); and
 - Comprehensive mental health assessments for individuals who do not have SMI or SED.
- High-Fidelity Wraparound services.
- Evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, such as:
 - Trauma Focused Cognitive Behavioral Therapy (TF-CBT);
 - Multi-systemic Therapy (MST);
 - Functional Family Therapy (FFT);

¹⁸⁶ The Medicaid Behavioral Health Fee Schedule provides detailed information about codes, rates, and eligible Medicaid providers. Changes to the fee schedule involves a 30-day public comment period. The current fee schedule can be found at www.hsd.state.nm.us/providers/fee-schedules/

¹⁸⁷ Maintained by BHSD, the non-Medicaid fee schedule largely mirrors Medicaid rates and will also be updated. This fee schedule is available on the website of BHSD's administrative services organization, Falling Colors, at www.bhsdstar.org. At this time, only providers who are registered with Falling Colors can view the fee schedule, however BHSD is in the process of publicizing the fee schedule.

- Eye Movement Desensitization and Reprocessing (EMDR); and
- Dialectical Behavior Therapy (DBT).
- Mobile crisis response services;
- Intensive case management; and
- Intensive home-based services.

5. *Publish in the Public Record for Comment Proposed Medication Protocols Regulations*

a. FSA Requirement

CYFD, with input from HSD and Dr. George Davis, will publish in the public record for comment proposed regulations governing medication protocols to ensure that Children in State Custody are not overmedicated, while ensuring timely access to medically necessary medication and treatment. (App. D, IT 4.1a) ¹⁸⁸ (December 1, 2020)

b. Co-Neutrals' Finding

The Co-Neutrals assess that the State has met the Performance Standard for this IT.

c. Discussion

The State submitted an initial draft of the revised medication protocols to the Co-Neutrals on October 1, 2020. From October through December 2020, the Co-Neutrals provided feedback to the State and reviewed additional drafts of the proposed regulations, with input from the Plaintiffs' team representative. The State presented the updated regulations at the New Mexico Behavioral Health Collaborative (NM BHC) meeting on January 14, 2021. The NM BHC voted and approved the draft regulation, and it was then submitted for publication in the New Mexico Register and in the *Albuquerque Journal* on February 25, 2021. The Notice of Public Hearing was published on March 9, 2021, and the hearing occurred on April 9, 2021. The Co-Neutrals observed the public hearing, which was held via Zoom, and included the reading of various written comments submitted by the public for consideration.

6. *Adopt Regulations Governing Medication Protocols*

a. FSA Requirement

CYFD, with input from HSD, will adopt regulations governing medication protocols to ensure that Children in State Custody are not overmedicated, while ensuring timely access to medically

¹⁸⁸ App. D, IT 4.1a was created and agreed upon by the parties in the August 8, 2020 Extension Agreement.

necessary medication and treatment. The regulations will include a mandatory clinical review process provided by an independent mental health professional with a license to prescribe psychotropic medication for all children prescribed psychotropic medication while in state custody and will include guidance aimed to ensure that medication is not misused as a primary response to trauma-related behaviors. In addition, the regulations will require specific review of: 1) any use of polypharmacology; 2) dosage for all prescribed medication; and 3) use of atypical anti-psychotics. Co-Neutrals must approve the final form of these regulations. (App. D, IT 4.1) (June 1, 2021)

b. Co-Neutrals' Finding

The Co-Neutrals assess that the State has met the Performance Standard for this IT.

c. Discussion

The State submitted an initial draft of the revised medication regulations to the Co-Neutrals on October 1, 2020. From October through December 2020, the Co-Neutrals provided feedback to the State and reviewed additional drafts of the proposed regulations. As stated in the above related IT, the proposed regulations underwent the process for public comment. Following completion of the public comment process on April 9, 2021, the State submitted its final medication regulations to the Co-Neutrals on April 19, 2021. The updated regulations were published in the New Mexico Administrative Code (NMAC) and in the New Mexico Register on May 24, 2021.¹⁸⁹

The final regulation references the medication protocol, and the State confirmed the protocol reviewed and approved by the Co-Neutrals is the protocol referenced that will be utilized. In the Co-Neutrals' review of a PIG developed by CYFD and dated October 23, 2020 (10-2020-#5, Permanency Planning Procedure 17 – Medical and Behavioral Health & Psychotropic Medication), the Co-Neutrals identified several differences between the protocol the Co-Neutrals approved in December 2020 and what was communicated to staff in October 2020. In November 2021, the State updated and corrected the material.¹⁹⁰

7. Monitor Implementation of Care Coordination in Contracts

a. FSA Requirement

HSD will monitor implementation of a term in all contracts with its designees to require that care coordination include identification of physical, behavioral health, and long-term care needs, and

¹⁸⁹ For the updated 8 NM Admin. Code 8.10.8.17, see <https://www.srca.nm.gov/nmac/nmregister/xxxii/8.10.8amend.html>

¹⁹⁰ In response to this observation, the State re-issued Permanency Planning Procedure 17 – Medical and Behavioral Health & Psychotropic Medication (PIG 11-2021-#20) on November 4, 2021, available at https://cyfd.org/docs/11-2021-no20_PIG-RE-ISSUE_Psychotropic_Medication.pdf

providing services to address said needs, in compliance with Section 4.4 of Centennial Care 2.0 Managed Care Organization contracts with HSD. (App. D, IT 5.1) (June 1, 2021)

b. Co-Neutrals' Finding

As discussed below, this IT was not completed by the required due date of June 1, 2021, but the State is close to finalizing the documents necessary to achieve this IT. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard of this IT until a future Co-Neutrals' report.

c. Discussion

On March 31, 2021, the State submitted an initial draft of its memo and Letter of Direction (LOD) to MCOs related to this commitment. Since that time, the Co-Neutrals have reviewed and provided feedback on additional drafts. On August 24 2021, the Co-Neutrals submitted additional questions to the State and indicated there were no further comments for revision. The Co-Neutrals have not yet received answers to these questions or a final document.

The State's material related to this commitment describes contractual obligations made between the MCOs, who are required to perform a number of assessments to determine a member's level of need. One of the assessments, the comprehensive needs assessment (CNA), helps determine whether a member is in need of care coordination services.¹⁹¹ HSD has agreed to require MCOs to provide all children in state custody with care coordination services initially, with the ability to be stepped down at any time based on identified need.¹⁹² To monitor care coordination for children in state custody, HSD integrated care coordination for children in state custody into their current compliance review process beginning in May 2021. The process includes CYFD providing a quarterly list of children in state custody to HSD, which HSD will then use to identify children's affiliated MCOs. HSD will then request reports on care coordination activities for those children. The State reports this process began on July 15, 2021; the Co-Neutrals have not yet seen results from this process. HSD will also monitor the MCO assessments (health risk assessment [HRA], and CNA), Care Coordination level 2 or 3 determination¹⁹³, instances where it is reported that care

¹⁹¹ Care coordination activities are designed by the outcome of the CNA and include the development of a comprehensive care plan (CCP), monthly or quarterly engagement for disease management interventions, coordination with providers, the identification of service gaps, and the facilitation of access to care.

¹⁹² While the State has agreed to this requirement of MCOs, the Co-Neutrals have not yet seen the final LOD to be issued to MCOs regarding this requirement.

¹⁹³ MCOs utilize assessments to determine the level of care of its' members. For those members deemed a level 2 or 3, the member is assigned a care coordinator to assist in meeting their needs. In discussions involving this IT, it was decided that all children in state custody should be assessed at a level 2 or 3 so that they have immediate access to a care coordinator if needed. If the MCO assessment determines a child in state custody does not meet that requirement, they may be reduced to a level 1, where a care coordinator is not provided.

coordination services were refused or the member is difficult to engage or unreachable for all children in state custody with an identified MCO.

The State also shared with the Co-Neutrals drafts of the LOD that will be sent to MCOs, which will act as a contractual amendment outlining MCO responsibilities for care coordination for members who are also children in state custody. At the time of this report, the Co-Neutrals have not yet seen the final LOD¹⁹⁴, and have not been told whether it has been sent to the MCOs.

8. Reinstate “No Reject, No Eject” Language in Medicaid Contracts

a. FSA Requirement

HSD will reinstate language in its Medicaid contracts to prevent children from being rejected or removed from behavioral health services providers. HSD will work with providers to identify and remove other administrative barriers to providing services. (App. D, IT 6.1) (Due June 1, 2021)

b. Co-Neutrals’ Finding

This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding this IT until a future Co-Neutrals’ report.

c. Discussion

On March 31, 2021, the State submitted an initial draft of items to meet this commitment to the Co-Neutrals for review. Between March and August 2021, the Co-Neutrals reviewed and provided feedback on additional draft documents related to this commitment. On August 24, 2021, the Co-Neutrals submitted additional questions to the State and indicated there were no further comments for revision. The Co-Neutrals have not yet received answers to these questions or a final document.

The State has proposed adding the following language to the Centennial Care 2.0 MCO contracts relative to this commitment¹⁹⁵:

¹⁹⁴ Prior to finalization of this report, the State indicated they have decided to combine the LODs for App. D, ITs 5.1, 6.1, 7.1, and 9.1. The Co-Neutrals have not yet received the final LOD for review.

¹⁹⁵ This commitment was specifically to “reinstate” language regarding the no reject, no eject concept to Medicaid contracts. This language was not originally in the State’s contractual language with MCOs, but was originally in the State’s previously carved out behavioral health MCO contract language with only a subset of its providers which were authorized to provide a full range of behavioral health services. While the State has not applied this renewed requirement of MCOs for all providers or all services, it has expanded the number of providers to which the MCOs will have to apply this concept by applying this to all CCSS and HFW providers for children in state custody.

“4.9.2: Minimum requirements for contract provider agreements shall contain at least the following provisions, as applicable to the provider types and services:

New Subsection 4.9.2.48: Include provision, as applicable to the Comprehensive Community Support Services (CCSS) and High-Fidelity Wraparound (HFW) provider types and services, for no reject and no eject in identified behavioral health provider agreements for members who are Children in state custody.

- a. No reject means that the provider must accept the referral for eligibility and medical necessity determination. If the member is Medicaid eligible, meets the Serious emotional Disturbance (SED) criteria, and meets medical necessity, the provider must provide or coordinate and assure provision of all needed services through CCSS and HFW service providers for Children in State Custody. A Provider will not discriminate against or use any policy or practice that has the effect of discriminating against an individual on the basis of health status or need for services.*
- b. No eject means the provider must continue to coordinate services and assist members in accessing appropriate services and supports unless the Member or their legal representative requests a change of provider.*

MCOs must provide care coordination activities unless there is a delegated care coordination agreement with the provider. MCO care coordinators will assist in the identification of providers, services and supports, or other resources as needed. Per contract, MCOs are not able to disenroll any member from its health plan.

For non-Medicaid children in state custody there is a general fund pool managed by CYFD who will send a provider alert/blast to the CCSS and High-Fidelity Wraparound providers to inform them of the no reject/no eject requirement.”

In addition to the contractual language, the State has further committed to the following action steps:

1. Add “no reject/no eject” requirements and trainings to the NM Wraparound CARES provider manual/implementation plan. The MCOs will use updated NM Wraparound CARES provider manual/implementation plan as the basis for developing provider trainings;
2. Include “no reject/no eject” requirements in the HFW training;
3. Add “no reject/no eject” requirements to CCSS audit tool;
4. Add “no reject/no eject” to quality compliance tool;

5. Develop shared standards to track denial of services to children in state custody in congregate care settings; and
6. Develop a process for conducting random sampling of instances of “reject” or “eject.”

This IT also commits the State to work with providers to identify and remove other administrative barriers to providing services. The State has described in the draft document pertaining to this commitment its previous and on-going activities working with the New Mexico Behavioral Health Provider Association, the MCOs, and other stakeholders on administrative barriers and activities being undertaken to address identified barriers, particularly, those associated with the following:

- Lack of sufficiently trained staff to work with SED youth;
- Lack of specialty services to meet the needs of a child with high acuity or complexity of symptoms; and
- Lack of sufficient reimbursement.

The Co-Neutrals have also asked the State to work with providers to address credentialing complexities and service authorization difficulties experienced by some providers for some services.

9. Notice of Action and Grievance Protocols

a. FSA Requirement

HSD will revise its Notice of Action and grievance protocols to require a Notice of Action be provided to the child’s caregiver, legal representative, and legal custodian whenever a service recommended by an Individualized Planning Meeting Team is reduced, modified, delayed, or denied, or if the service or is not approved within 10 Days. (App. D, IT 7.1) (June 1, 2021)

b. Co-Neutrals’ Finding

This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals’ report.

c. Discussion

The State provided an initial draft of the proposed protocols and draft LOD to the Co-Neutrals on March 31, 2021. Between March and August 2021, the Co-Neutrals reviewed and provided feedback on additional draft documents related to this commitment. On August 24, 2021, the Co-

Neutrals submitted additional questions to the State and indicated there were no further comments for revision. The Co-Neutrals have not yet received answers to these questions or a final document.

The State's draft MCO protocols¹⁹⁶ establish when an MCO member or their authorized representative¹⁹⁷ must be notified of a decision made about their services. With respect to services recommended through an IPP for children in state custody, when those services are reduced, modified, delayed, denied, or not approved within 10 Days, the MCO must notify the child in state custody, their caregiver,¹⁹⁸ their legal representative, and their legal custodian. The member and/or their authorized representative then have the option to file a formal grievance through the grievance protocols,¹⁹⁹ which are required to be provided at the time the member is enrolled with an MCO.²⁰⁰

10. Joint Process for Offering Services and Supports

a. FSA Requirement

HSD and CYFD will review and identify the responsibilities shared by both Departments and create a joint process for offering services and supports include screening, assessing, referring, treating and providing transition services to Children in State Custody of the department, including Children in State Custody who were never removed from Respondents' homes or children who have returned to Respondents' homes but who remain Children in State Custody. The goal of this joint process shall be to maximize each child's access to services and to create unified process for offering services and supports. (App. D, IT 8.1) (June 1, 2021)

b. Co-Neutrals' Finding

This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the

¹⁹⁶ Current MCO protocols can be found in the MCO Contracts, available at <https://www.hsd.state.nm.us/lookingforinformation/medical-assistance-division/>; within the MCO Policy Manual, available at <https://www.hsd.state.nm.us/wp-content/uploads/2020/12/Centennial-Care-Managed-Care-Policy-M.pdf>; and in the NMAC 8.308.15 Grievances and Appeals code at https://www.nmonesource.com/nmos/nmac/en/item/18065/index.do#!b/s8_308_15_7

¹⁹⁷ For children in state custody, the authorized representative is identified as CYFD.

¹⁹⁸ Defined as the parent or resource parent of children in state custody.

¹⁹⁹ Grievance protocols are also available on each MCO's member website – BCBS, https://www.bcbsnm.com/pdf/provider_member_appeal_grievance.pdf; PHP, <https://www.phs.org/health-plans/understanding-health-insurance/Pages/appeals.aspx#:~:text=How%20to%20file%20a%20Grievance,6%20p.m.%20with%20any%20questions.&text=We%20call%20this%20our%20formal%20grievance%20process>; WSCC, <https://www.westernskycommunitycare.com/members/medicaid/resources/complaints-appeals.html>; and Fee-for-Service (non-Medicaid), https://www.hsd.state.nm.us/wp-content/uploads/2020/12/MAD-100-Revised-2_24_201.pdf

²⁰⁰ For Medicaid eligible children who are fee-for-service funded rather than a member of a MCO, HSD is contracting with an organization to provide some of the information and assistance provided by MCOs for their members.

Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

The State provided an initial draft of its joint process to the Co-Neutrals on March 31, 2021. Since that time, the Co-Neutrals reviewed and provided feedback to the State on additional draft documents related to this commitment. As of September 1, 2021, the Co-Neutrals have not received a revised draft for review.²⁰¹

The draft documents provide significant information about changes to practices in both CYFD and HSD being undertaken and/or proposed to assure appropriate sharing of information about children in state custody, such as who the assigned MCO and care coordinator are, who the responsible PSD staff are, where and how to find other relevant information such as NM CANS/CANS-CAT screenings, what services are being provided, and who to contact if needed services are difficult to access, among other things.

11. Contractually Require Training for Care Coordination Providers

a. FSA Requirement

HSD or its designees will require training through its contracts for those providing care coordination for Children in State Custody who receive Medicaid, consistent with the requirements in place under Section 3.3.5 and 4.4 of the Centennial Care 2.0 MCO contracts with HSD. HSD will require this training in any and all future contracts with its designees. (App. D, IT 9.1) (Due June 1, 2021)

b. Co-Neutrals' Finding

This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

c. Discussion

Initial drafts of the LOD and material to meet this commitment were provided to the Co-Neutrals on March 31, 2021. The Co-Neutrals reviewed and provided feedback on additional drafts between March through August 2021. On August 24, 2021, the Co-Neutrals submitted additional questions

²⁰¹ More recently, on September 16, 2021, the State submitted an additional draft to the Co-Neutrals for consideration. The Co-Neutrals provided feedback to the State on October 1, 2021.

to the State and indicated there were no further comments for revision. The Co-Neutrals have not yet received answers to these questions or a final document.²⁰²

The State's current contracts with MCOs require regular and ongoing training for MCO staff, including training for care coordination, and care coordination requirements for specific high-needs populations. The State has proposed revising all current MCO trainings to include specific training for providing care coordination in a trauma-responsive manner for children in state custody.

ii. Target Outcomes Due December 1, 2020 and June 1, 2021

12. Detailed Progress Report on Efforts to Build High-Fidelity Wraparound Capacity

a. FSA Requirement

HSD will produce to the Co-Neutrals and Plaintiffs' counsel a detailed progress report on the State's efforts to build High-Fidelity Wraparound capacity. (App. D, TO 3.1a) (December 1, 2020)

b. Co-Neutrals' Finding

The Co-Neutrals assess that the State has met the Performance Standard for this TO.

c. Discussion

The State submitted a draft of this report to the Co-Neutrals on October 1, 2020. Between October and December 2020, the Co-Neutrals provided feedback to the State. The State submitted a final progress report to the Co-Neutrals on December 1, 2020.²⁰³

High-Fidelity Wraparound (HFW) is an approach to service delivery rather than an intervention, and it, "provides a comprehensive, holistic, youth and family-driven way of responding when children or youth experience serious mental health or behavioral challenges."²⁰⁴ It consists of a youth and their family working with a team to define and achieve their vision and goals, which may include connection to services or devising creative solutions to achieve the desired end result. The youth and their family are at the center of the team, which may consist of their identified supports (including additional family and friends), as well as identified service providers. The FSA requires the State to expand its capacity to provide HFW to children and families in New Mexico.

²⁰² Prior to finalization of this report, the State indicated they have decided to combine the LODs for App. D, ITs 5.1, 6.1, 7.1, and 9.1. The Co-Neutrals have not yet received the final LOD for review.

²⁰³ For the State's final High-Fidelity Wraparound progress report, see https://cyfd.org/docs/D_3_1_HiFi_Wrap_Progress_Report_12_1_20_formatted.pdf

²⁰⁴ For more detailed information on High-Fidelity Wraparound, see <https://nwi.pdx.edu/wraparound-basics/#whatIsWraparound>

The Parties' Extension Agreement required the State to provide this detailed progress report by December 1, 2020. On that day, the State provided material that included a detailed description of HFW as a service, the cost and return on investment to implement the service in New Mexico, the proposed billing methodology, and current updates on the State's efforts to implement the proposed process for expansion, including requesting CMS' approval of an 1115 waiver request to fund HFW through Medicaid in New Mexico. CMS and the State are currently in discussions about the waiver request, which includes other changes to New Mexico's Medicaid system that would benefit children in state custody.

VI. Attachments

A. Glossary of Acronyms

- AOC – Administrative Office of the Courts
- BHSD – Behavioral Health Services Division
- CANS – Child and Adolescent Needs and Strengths screening
- CAQ – Cultural Assessment Questionnaire
- CAT – Crisis Assessment Tool
- CBHC – Community Behavioral Health Clinician
- CCSS – Comprehensive Community Support Services
- CFPSW – Family Peer Support Worker
- CFT– Child and Family Team
- CMS – Centers for Medicare and Medicaid Services
- CNA – Comprehensive Needs Assessment
- CPSW – Peer Support Worker
- CSVANW – Coalition to Stop Violence Against Native Women
- CWG – Child Welfare Policy and Practice Group
- CWLA – Child Welfare League of America
- CY – Calendar Year
- CYFD – Children Youth and Families Department
- DBT – Dialectical Behavior Therapy
- DRNM – Disability Rights New Mexico
- DVP – Data Validation Plan
- EMDR – Eye Movement Desensitization and Reprocessing
- ENMU – Eastern New Mexico University
- EPSDT – Early and Periodic Screening, Diagnosis and Treatment
- FFSPA – Family First Prevention Services Act
- FFT – Functional Family Therapy
- FMAP – Federal Medical Assistance Percentage
- FSA or Agreement – Final Settlement Agreement
- GAL – Guardian ad litem
- HFW – High-Fidelity Wraparound
- HRA – Health Risk Assessment
- HSD – Human Service Department
- IAD – Indian Affairs Department
- ICWA – Indian Child Welfare Act
- IHS – Indian Health Services
- IPP – Individualized Planning Process (previously IPM – Individualized Meeting Plan)
- IRP – Individualized Retention Plan
- IT – Implementation Target

- JCR – Joint Clinical Review
- JCRAT – Joint Clinical Review Audit Tool
- JJS – Juvenile Justice Services
- JPA – Joint Power Agreement
- LOD – Letter of Direction
- MAC – Medicaid Advisory Committee
- MCO – Managed Care Organization
- MST – Multi-systemic Therapy
- NADLC – Native American Disability Law Center
- NASC – Native American Sub-Committee
- NATAC – Native American Technical Advisory Committee
- NICWA – National Indian Child Welfare Association
- NM – New Mexico
- NM BHC – New Mexico Behavioral Health Collaborative
- NMAC – New Mexico Administrative Code
- NMCAL – New Mexico Crisis and Access Line
- NMHU – New Mexico Highlands University
- NMSU – New Mexico State University
- NMTIC – New Mexico Tribal Indian Child Welfare Consortium
- OCR – Office Children’s Rights
- OIG – Office of the Inspector General
- OOPP – out-of-preference placements
- PHP – Presbyterian Health Plan
- PIG – Program Instruction Guideline
- PSD – Protective Services Division
- QAIEP – Quality Assurance, Improvement, and Evaluation Plan
- QM – Quality Management
- RTC – Residential Treatment Center
- SAMHSA – Substance Abuse and Mental Health Services Administration
- SED– Serious Emotional Disturbance
- SMI – Serious Mental Illness
- TANF – Temporary Assistance for Needy Families
- TFC – Treatment Foster Care
- TF-CBT – Trauma Focused Cognitive Behavioral Therapy
- TO – Target Outcome
- TSJC – NM Tribal-State Judicial Consortium
- WNMU – Western New Mexico University
- WSCC – Western Sky Community Care

**B. Status of FSA Commitments due December 1, 2020, and June 1, 2021
as of September 1, 2021**

General FSA Commitments	
Commitment	Status as of September 1, 2021
<p>VI: C 1 Data Validation Plan By December 1, 2020, Defendants will submit to Plaintiffs and the Co-Neutrals a written Data Validation Plan that has been approved by the Co-Neutrals. Defendants and the Co-Neutrals shall begin to collaborate on the Data Validation Plan by March 15, 2020. The Data Validation Plan will set forth a process, including methodology and data sources, for validating Defendants’ progress toward achieving the Implementation Targets and Target Outcomes. The Data Validation Plan will set clear timelines for taking any intermediary steps necessary to validate progress toward the Implementation Targets and Target Outcomes and assign responsibility for supplying information necessary to fulfill the Data Validation Plan. The Co-Neutrals will evaluate the Data Validation Plan in consultation with each Party. Completion of a Data Validation Plan that has the approval of the Co-Neutrals is an Implementation Target. The Parties will attempt to resolve any disagreements about the Data Validation Plan in good faith. If they cannot do so, any disputes about the Data Validation Plan shall proceed through the dispute resolution process in Section IX on an expedited basis, with deadlines set by the Co-Neutrals and the arbitrator, as appropriate. (Due 6/1/2021) ²⁰⁵</p>	<p>Collaboration between the State and the Co-Neutrals to produce the DVP was delayed by the Covid-19 pandemic, although the FSA committed the State to begin collaborating with the Co-Neutrals to produce the DVP by March 15, 2020. While the DVP is not yet complete, the Co-Neutrals and State have worked together continuously over the last year and have made significant progress. The work has been iterative, and the State has submitted sets of draft methodologies using the agreed upon structure. After each State submission, the Co-Neutrals have provided detailed feedback – communicating recommendations and suggestions and highlighting potential programmatic issues.</p> <p>The State revised and resubmitted an updated version of the DVP on June 1, 2021. Since that time, work has focused on finalizing the methodology for the subset of metrics for which the State has identified that CY2019 and/or CY2020 data will be available. As of September 1, 2021, the State and Co-Neutrals aligned on the methodology for most of these metrics and developed a plan to finalize the outstanding methodologies for which CY2019 and/or CY2020 data will be available.</p>

²⁰⁵ The DVP is an IT, and was included in the set of commitments for which the State received a 180-day extension for finalization.

<p>VI: C 2 Baseline Reports²⁰⁶ By December 1, 2020, Defendants will provide to Plaintiffs and the Co-Neutrals a baseline report and all data underlying the report. The baseline report shall assess Defendants' achievement of the Implementation Targets. It shall also describe Defendants' baseline performance with respect to the Target Outcomes during the period from January 1, 2019 to December 31, 2019... The baseline reports shall be made public on the Parties' websites. These assessments are intended to be informational, and disagreements related to the content of these reports shall not proceed through the dispute resolution process in Section IX. (Part 1 Due 12/1/2020, Part 2 Due 6/1/2021)</p>	<p>The State submitted part one of their baseline report to the Co-Neutrals and Plaintiffs' team on December 1, 2020. The State submitted part two of their baseline report to the Co-Neutrals and the Plaintiffs' team on June 1, 2021, which described the State's progress toward achieving ITs and TOs due June 1, 2021, as well as additional details on the State's achievement toward select commitments due beyond June 1, 2021.</p> <p>Part one of the State's baseline report included limited baseline performance data for CY2019, reflecting only a secondary metric related to App. B, TO 1. Part two of the State's baseline report included secondary metrics for CY2019 data where possible.</p> <p>The State submitted to the Co-Neutrals the data used to produce the measures described in the report. The Co-Neutral team identified a number of quality issues with this submission, and have therefore not yet been able to validate the baseline metrics reflected in the baseline reports.</p>
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²⁰⁶ Due to the impacts of the Covid-19 pandemic and the resulting Parties' Extension Agreement, the State submitted its baseline report in two parts: Part 1 details the State's achievement on ITs and TOs due December 1, 2020, and Part 2 details the State's achievement on ITs and TOs due June 1, 2021.

<p>VI: C 3 Annual Report By August 1, 2021, and every twelve months thereafter, Defendants shall provide to Plaintiffs and the Co-Neutrals a written report of their progress with respect to the Target Outcomes and Implementation Targets. The period of assessment for each annual report shall be the previous calendar year—for example, the report due by May 1, 2021 shall describe Defendants’ performance from January 1, 2020 to December 31, 2020. Defendants’ annual reports and any plans, reviews, or policies referenced therein shall be made public on the Parties’ websites. (Due 8/2/2021)</p>	<p>The State submitted its first²⁰⁷ annual report to the Co-Neutrals on August 2, 2021.²⁰⁸ The report detailed the State’s progress toward meeting the ITs and TOs due between January 1 and December 31, 2020, and also provided quantitative performance metrics for TOs due on December 1, 2020. The Co-Neutral team identified a number of quality issues with this submission, and have therefore not yet been able to fully validate the performance metrics reflected in the 2020 annual report. However, the Co-Neutral team has examined the data submitted by the State and report findings for App. B, TO 1²⁰⁹ and App. C, TO 4²¹⁰ in relevant sections of this report.</p>
<p>Section XII Meeting the Needs of Named Plaintiffs Each named Plaintiff will be offered an assessment for community-based behavioral health services within 60 Days of the signing of this Agreement to determine their current need for intensive home- and community-based behavioral health services. Defendants will make available any medically necessary services to each named Plaintiff immediately where possible and no later than 30 Days after the assessment otherwise. If community-based behavioral health services are not medically necessary for any named Plaintiff who is in an out-of-home placement, Defendants will meet on a monthly basis to develop a plan that will enable the named Plaintiff to be placed in a family setting as soon as medically appropriate.</p>	<p>The State has not provided sufficient information to the Co-Neutrals to conclude that each Named Plaintiff was offered an assessment for community-based behavioral health services by May 17, 2020, the date this action was due. In the summer and fall of 2020, some Named Plaintiff children received updated assessments – including psychosexual assessments, psychiatric evaluations, psychological evaluations, and neuropsychological evaluations – as were recommended or requested for specific Named Plaintiffs, and for some other Named Plaintiffs, the youth or legal guardian declined an assessment being provided. Though the State provided or offered assessments to most Named Plaintiffs</p>

²⁰⁷ The State decided to bifurcate their annual report, with the first report focusing on those commitments due December 1, 2020, and the second focused on data for CY2020 with updated metrics as agreed upon in the DVP. The State proposed this change in reporting schedules to Plaintiffs’ team, however, a finalized agreement on reporting timelines has not been reached.

²⁰⁸ The State’s annual report is due by August 1 of each year. As August 1, 2021, was a Sunday, the due date became the next business day, August 2, 2021.

²⁰⁹ App. B, TO 1 is the prohibition for the placement of children in any hotel, motel, out-of-state provider, office of a contractor, or state agency unless in extraordinary circumstances necessary to protect the safety and security of the child as documented in the child’s record and approved by the Secretary or the Protective Services Director of CYFD.

²¹⁰ App. C, TO 4 requires CYFD to conduct a review of Native children placed in a non-ICWA-preferred placement every 30 days.

Defendants will routinely update the Co-Neutrals on their efforts to serve the named plaintiffs.	in CY2020, they did not provide the assessments as required in the FSA by May 17, 2020. As of the writing of this report, one Named Plaintiff remains in out-of-state congregate placement.
Appendix A: Trauma Responsive System of Care	
Implementation Targets Due December 1, 2020 and June 1, 2021	
Commitment	Status of September 1, 2021
1. App. A, IT 1.1 CYFD, with input and collaboration from HSD, will establish Child and Adolescent Needs and Strengths (“CANS”) and functional trauma assessment criteria for access to intensive home-based services in consultation with clinical experts agreed upon by Defendants and Plaintiffs. The criteria will aim to help CYFD, stakeholders, and providers identify children and youth for whom intensive home-based services are medically necessary and will include but not be limited to consideration of Serious Emotional Disturbance (“SED”) criteria, CANS, and functional trauma assessment screening. (Due 12/1/2020)	The Co-Neutrals’ assess the State has met the Performance Standard for this IT.
2. App. A, IT 1.2 CYFD and HSD will revise SED criteria to clarify that removal from home is not a requirement to access these services. (Due 6/1/2021)	Following the New Mexico Behavioral Health Coalition’s (NM BHC) adaptation of the updated Serious Emotional Disturbance (SED) Criteria on January 14, 2021, the Co-Neutrals assess the State has met the Performance Standard for this IT.

<p>3. App. A, IT 2.1 CYFD and HSD will create a cross-departmental Trauma-Responsive Training and Coaching Plan that describes in writing a plan and process for providing mandatory, high-quality trauma-responsive training to all CYFD employees, Designated HSD Employees²¹¹ and employees of child-serving agencies that contract with CYFD or HSD to provide care to Children in State Custody...The trauma-responsive training and coaching described in the plan must be sufficient to allow the Departments to meet their obligations under this Agreement. The Co-Neutrals must approve the Trauma Responsive Training and Coaching Plan.²¹² (Due 6/1/2021)</p>	<p>The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p align="center">Target Outcomes Due December 1, 2020 and June 1, 2021</p>	
<p align="center">Commitment</p>	<p align="center">Status of September 1, 2021</p>
<p>4. App. A, TO 1.1a By December 1, 2020, CYFD and HSD will identify, and the Co-Neutrals will approve, the form of the Child and Adolescent Needs and Strengths Crisis Assessment Tool ("CANS-CAT") and</p>	<p>The Co-Neutrals' assess the State has met the Performance Standard for this IT. The Co-Neutrals will monitor the progress of this TO as CYFD begins consistently using these screening tools with children in state custody.</p>

²¹¹ "Designated HSD Employees" refers to (1) Social and Community Services Coordinators, their supervisors and managers, including the Behavioral Health Services Division Director; and (2) any HSD employee or their designee involved in care coordination activities, EPSDT services, or determinations about service utilization for children in state custody, including supervisory and management level employees.

²¹² Training will address the impact of trauma including its neurodevelopmental effects, implementing and accessing trauma-responsive supports and services, and secondary trauma. Training will comply with professional standards and best practices in adult education, including by being case-based and interactive, and including an assessment component to measure effectiveness. Trauma-responsive training will consist of initial or pre-service training as well as consistent, ongoing in-service training, mentoring, coaching, and support. The Trauma-Responsive Training and Coaching Plan will also provide for mandatory trauma-responsive training for Resource Families and optional trauma-responsive training for Respondents. Training for Resource Families and Respondents will be accessible both online and in person, and CYFD will provide childcare during any in-person sessions if needed. Notice of training shall be provided to Resource Families and Respondents reasonably in advance of any scheduled training, and no less than 14 Days in advance of any scheduled training. Notices will state that childcare will be provided and that requests for childcare must be received 48 hours prior to the training, or a lesser number of hours determined by CYFD and/or HSD. The written plan will include identification of the training program or materials to be used and the number of hours of training to be received by each category of trainee.

comprehensive CANS screening tools referenced in Appendix A, Implementation Target 1. (Due 12/1/2020) ²¹³	
<p>5. App. A, TO 4.1 Subject to the approval of the Co-Neutrals, CYFD and HSD will develop and implement a process (the Individualized Planning Meeting Plan) for convening an Individualized Planning Meeting team for making decisions and for delivering services and supports for each Child in State Custody. The Individualized Planning Meeting process shall be informed by Child and Family Teaming (CFT), collaborative decision-making, and High Fidelity Wraparound models, and shall prioritize the child’s voice and choice. The process shall also be strengths-based, connected to natural supports, and respectful of the child’s family and unique cultural heritage. The Co-Neutrals shall not withhold approval of the Individualized Planning Meeting Plan if it is reasonably calculated to achieve the Goals of this Agreement. The Individualized Planning Meeting Plan will be completed and approved by December 1, 2020, and fully implemented by December 1, 2022. (Due 6/1/2021)</p>	<p>The State has begun efforts toward this TO; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this TO. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals’ report.</p>

²¹³ App. A, TO 1.1 has multiple parts, all of which were originally due on December 1, 2021. However, the deadline to have the CANS-CAT tools approved by the Co-Neutrals was changed to December 1, 2020 per the Parties’ Extension Agreement, with the implementation of the CANS-CAT screenings remaining due by December 1, 2021 per the FSA.

<p>6. App. A, TO 5.1 CYFD and HSD will create and implement a Quality Assurance, Improvement, and Evaluation Plan, including quality management tools and measures to be used for reporting on CYFD and HSD’s capacity to meet the needs of Children in State Custody, including measures for reporting on providing and improving quality of care, collaborating across Departments, and for providing transparency and accountability. The Plan will include: consistent definitions and terms across CYFD and HSD, data exchange and matching across CYFD and HSD, clarification of existing measures and indicators, self-assessments, metrics as indicators of system performance (including process indicators, client outcomes, and system impact), a continuous quality improvement process that provides information in real time to decision-makers, and a process for responding to findings from the Plan. CYFD will develop a meaningful quality assurance process to ensure that training, policy, and procedure is being properly utilized and integrated into daily processes. The Co-Neutrals must approve the Quality Assurance, Improvement, and Evaluation Plan. CYFD and HSD will develop the Quality Assurance, Improvement, and Evaluation Plan by December 1, 2020 and fully implement it by December 1, 2021. (Due 6/1/2021)</p>	<p>The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals’ report.</p>
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Appendix B: Least Restrictive and Appropriate Placements

Implementation Targets Due December 1, 2020 and June 1, 2021

Commitment	Status of September 1, 2021
<p>1. App. B, IT 1.1 CYFD and HSD will develop a plan to (1) increase recruitment and retention of culturally reflective, community-based placements, with a focus on maximizing family supports and serving rural areas and difficult-to-place populations and (2) ensure that children in out-of-home care remain in stable placement and educational settings to the maximum extent feasible and that any change in placement is made in the best interests of the child and consistent with achieving the child's permanency goals. (Due 6/1/2021)</p>	<p>The State has begun efforts toward this IT, however, a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p>2. App. B, IT 2.1 CYFD will publish guidance prohibiting retaliation against any person, including foster parents, for raising concerns related to the unmet needs of Children in State Custody or their caregivers. (Due 12/1/2020)</p>	<p>This IT was not completed by the required due date of December 1, 2020; CYFD reports the policy was finalized and communicated to staff on March 15, 2021. The Co-Neutrals have been unable to validate the State's performance because the State has not made the guidance public as of September 1, 2021. The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>

<p>3. App. B, IT 3.1 CYFD and HSD will develop and promote a warm line for Resource Families and Respondents who need assistance meeting the behavioral needs of the children in their care. (Due 6/1/2021)</p>	<p>The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT, specifically with respect to promotion of the warmline. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p>4. App. B, IT 3.2 CYFD will promote its internal Grievance Procedure for youth. (Due 12/1/2020)</p>	<p>The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT, specifically promotion of the procedure. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p>5. App. B, IT 3.3 CYFD will also develop a Grievance Procedure for Resource Families. (Due 12/1/2020)</p>	<p>This IT was not completed by the required due date of December 1, 2020; CYFD reports the policy was published on May 25, 2021. The Co-Neutrals assess that the State's efforts to develop a Grievance Procedure for Resource Families, which is the required action for this commitment, meets the Performance Standard for this IT.</p>

Target Outcomes Due December 1, 2020 and June 1, 2021	
Commitment	Status of September 1, 2021
<p>6. App. B, TO 1.1 By December 1, 2020, no child under 18 will be placed in any hotel, motel, out-of-state provider, office of a contractor, or state agency office unless in extraordinary circumstances necessary to protect the safety and security of the child as documented in the child's record and approved by the Secretary or the Protective Services Director of CYFD. In any such extraordinary circumstance, CYFD shall provide notice to the child's Guardian ad Litem and Youth Attorney immediately where possible, and not more than 24 hours after the placement of the child. Notification to the dependency court to which the child's case is assigned must occur within 3 business days. When a child is placed with an out-of-state provider, notice to the child's Guardian ad Litem, Youth Attorney, and the dependency court to which the child's case is assigned will be given prior to the move, pursuant to statute. (Due 12/1/2020)</p>	<p>After review of the information provided, the Co-Neutrals assessed that neither (0%) of the two applicable December 2020 out-of-state placements of children met the extraordinary circumstances standard of being necessary to protect the safety and security of the child. The State's 2020 Annual Report identified that one of the children's placements did meet the extraordinary circumstances standard, and all required processes were followed. Based on the Co-Neutrals' review of the information provided by the State, the Co-Neutrals do not concur and assess the State has not met the Performance Standard for this TO.</p>
<p>7. App. B, TO 2.1 HSD and CYFD will conduct a joint clinical review of any out-of-state placement, where the child's out-of-state placement is not the child's permanency plan, at least on a monthly basis. (Due 6/1/2021)</p>	<p>The guidance and processes for this TO were not completed by the required due date of June 1, 2021. The Co-Neutrals have not evaluated implementation, and make no Performance Standard determination on the State's performance. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.</p>
<p>8. App. B, TO 2.2 A CYFD caseworker known to the child will conduct in-person visits every month. (Due 6/1/2021)</p>	<p>The guidance and DVP metric for this TO were not completed by the required due date of June 1, 2021. The Co-Neutrals have not evaluated implementation, and make no Performance Standard determination on the State's performance. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.</p>

<p>9. App. B, TO 2.3 Within the first 30 Days of the placement, the out-of-state Individualized Planning Meeting team will develop a discharge plan which includes identification of in-state resources that need to be developed for the child to return to New Mexico. The CYFD caseworker will do so by working with HSD or its designee to secure services that could be funded by Medicaid. Individualized Planning Meetings, which may take place during scheduled treatment team meetings for children in residential care, will be held every 30 Days to support the child and identify steps necessary to promote discharge. (Due 6/1/2021)</p>	<p>The guidance and processes for this TO were not completed by the required due date of June 1, 2021. The Co-Neutrals have not evaluated implementation, and make no Performance Standard determination on the State's performance. The Co-Neutrals will assess the State's efforts toward this TO in a future Co-Neutrals' report.</p>
<p>10 App. B, TO 6.1 Beginning on December 1, 2020, and on an annual basis by December 31 each year thereafter, the Co-Neutrals will approve a Target Outcome for CYFD to approve a specified number of new culturally reflective foster homes during the following year. (Due 6/1/2021)</p>	<p>After considerable back-and-forth between the State and Co-Neutrals, and in consultation with Plaintiffs, an agreement was reached on the target for the number of new culturally reflective foster homes CYFD will license between July 1, 2021 and December 31, 2021. The Co-Neutrals will assess the State's efforts toward this TO in a future Co-Neutrals' report.</p>
<p>11. App. B, TO 6.3 Beginning on December 1, 2020, and on an annual basis by December 31 each year thereafter, the Co-Neutrals will approve a Target Outcome for ... HSD to approve a specified number of new treatment foster care placements during the following year. (Due 6/1/2021)</p>	<p>After considerable back-and-forth between the State and Co-Neutrals, and in consultation with Plaintiffs, in July 2021, an agreement was reached for a six-month target (July 1, 2021 through December 31, 2021) for new placements in treatment foster care (TFC) homes. The Co-Neutrals will assess the State's efforts toward this TO in a future Co-Neutrals' report.</p>
<p>12. App. B, TO 10.1 CYFD will create a CYFD Workforce Development Plan that will ensure CYFD's workforce has adequate qualifications, expertise, skills, and numbers of personnel. The CYFD Workforce Development Plan will describe in writing the expected nature, scope, capacity, and structure of the workforce necessary to meet the obligations described in this Agreement. The plan will include a specific hiring plan that identifies, by county, the number of staff, credentials, and training</p>	<p>This Plan was due for the Co-Neutrals' approval on June 1, 2021. CYFD submitted a revised version of the Plan to the Co-Neutrals on September 1, 2021. That version is in part unclear and remains unresponsive to requests for certain information from the Co-Neutrals. The draft includes guidance on graduated caseloads "not yet approved" by the agency's leadership. The Co-Neutrals</p>

<p>required to meet the objectives identified in the CYFD Workforce Development Plan and outlines strategies to recruit and retain staff. The Plan will require that all caseworkers and supervisors have sufficient educational credentials and/or directly relevant experience. It will require that CYFD have a sufficient number of caseworkers to ensure that no caseworker will carry a case load of greater than the current professional standard identified by the Child Welfare League of America (CWLA). It will also include sufficient numbers of staff trained and able to implement ICWA guidelines using culturally responsive practices. The Plan will describe specific strategies to attract and retain diverse, high-quality staff with appropriate qualifications and skills. Co-Neutrals must approve the CYFD Workforce Development Plan. CYFD will develop the Workforce Development Plan by December 1, 2020 and fully implement it by December 1, 2021. (Due 6/1/2021)</p>	<p>assess the State has not met the Performance Standard for this TO.</p>
<p align="center">Appendix C: Indian Child Welfare Act (ICWA)</p>	
<p align="center">Implementation Targets Due December 1, 2020 and June 1, 2021</p>	
<p align="center">Commitment</p>	<p align="center">Status of September 1, 2021</p>
<p>1. App. C, IT 1.1 CYFD and HSD will work with the Administrative Office of the Courts (AOC) and with New Mexico Tribes and Pueblos to draft a State ICWA law that mirrors and expands upon the federal version. The drafting committee will include representatives of New Mexico Tribes and Pueblos, representatives of Native Children, Native parents, and other caregivers involved in the child welfare system, experts on the federal ICWA, and providers of culturally relevant services and supports. The drafting committee will have discretion to determine the content of the law and will consider definitions of “active efforts,” “qualified expert witness,” including qualifications of for determining a “qualified expert witness,” and development of a pool of potential expert witnesses. HSD and CYFD will identify and arrange for an appropriate facilitator such as the New Mexico Department of Indian Affairs to convene the drafting</p>	<p>While the State made efforts toward this IT, it did not follow the specific process requirements, which in the Co-Neutrals’ assessment, may have contributed to the inability to move forward with a vote on a State ICWA law in the last legislative session. The Co-Neutrals have determined a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT, by working with the Tribes, Pueblos, and other designated parties, in a manner consistent with the FSA in the current legislative session.</p>

committee to assist in drafting the law. CYFD and HSD will actively promote passage of the law, including by making a positive recommendation of the bill to the Governor's Office with appropriate justification. (Due 6/1/2021)	
2. App. C, IT 2.1 With the input of New Mexico's Tribes and Pueblos, CYFD and HSD will develop processes and procedures to promote traditional interventions as first-line interventions and services, using an assessment tool for Native Children in State Custody, modifications of existing assessment tools, or other means recommended by Native experts. The form of the assessment tool or other means shall be approved by the Co-Neutrals, but the Co-Neutrals shall not withhold approval of the assessment tool if it is reasonably calculated to achieve the Goals of this Agreement. (Due 6/1/2021)	This deliverable was due on June 1, 2021, and based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT. The Co-Neutrals have been unable to fully assess completion of this IT, nor to provide approval of the required assessment tool in isolation of the accompanying processes and procedures, which as of September 1, 2021, had not been provided by the State.
3. App. C, IT 3.1 HSD and CYFD will pursue federal funding to the maximum extent allowable through Medicaid and IV-E funding for traditional and culturally responsive treatments, interventions, and supports, including non-medicalized interventions, for Native Children in State Custody. (Due 6/1/2021)	The Co-Neutrals provided specific feedback and posed questions to the State on this IT on June 28, 2021, and did not receive a response or an updated draft of this commitment as of September 1, 2021. Based on the information that has been provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT.
4. App. C, IT 4.1 CYFD will maintain a full-time employee responsible for developing and maximizing culturally responsive services for Native Children in State Custody, and for coordinating and overseeing provision of culturally responsive services to Native Children in State Custody by local staff throughout the state. (Due 12/1/2020)	The Co-Neutrals assess that the job description provided, and appointment of a Director of Tribal Affairs, meets the Performance Standard for this IT.
5. App. C, IT 5.1 CYFD will develop a plan to increase recruitment and retention of Native Resource Families. The plan will include identifying relatives of Native Children, as required by ICWA or the New Mexico Tribe or Pueblo's preferred placement priorities, as well as identifying other potential Native Resource Families. The plan will include	The State submitted a draft Plan on June 1, 2021, and the Co-Neutrals provided feedback on June 28, 2021. As of September 1, 2021, the Co-Neutrals had not received a response to their feedback, nor updated material for this commitment. Based on the information provided by the

<p>identification of additional supports needed for Native Resource Families, including supports and services that are culturally responsive and are not the same as those provided to non-Native parents, as well as providing assistance for families to navigate Resource Family licensing requirements. One methodology for identifying additional needed supports will be surveying former Native Resource Families to determine why they have stopped serving as a Resource Family and surveying potential Native Resource Families that did not complete the process to determine why they chose not to become a Resource Family. (Due 6/1/2021)</p>	<p>State, the Co-Neutrals assess the State has not met the Performance Standard for this IT.</p>
<p>6. App. C, IT 6.1 CYFD will work with New Mexico Tribes and Pueblos to engage in dialogue, develop agreements, and take any other steps necessary to help New Mexico Tribes and Pueblos better access IV-E funding to improve services for Native Children, including additional funding for legal representation for New Mexico Tribes and Pueblos and Respondents. (Due 6/1/2021)</p>	<p>The State has begun efforts toward this IT; a period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p>7. App. C, IT 7.1 CYFD and HSD will collect and analyze data sufficient to understand the characteristics and needs of Native Children in State Custody and the capabilities of the State to meet those needs. The data to be collected will include (1) data about Native Children in State Custody, including tribal membership status, confirmation and correction of birth certificates, removal rates, and placements (including whether children are placed with relative, non-relative Native, or non-relative non-Native Resource Families, Treatment Foster Care, congregate care, residential placement, or other out of home placement); (2) data on the demographics and characteristics of placements available to Native children (including Resource Families); and (3) data on the demographics, characteristics and services provided by treatment providers available to Native Children in State Custody. (Due 6/1/2021)</p>	<p>The State submitted draft material relevant to this IT on June 1, 2021, and the Co-Neutrals provided feedback on June 28, 2021. As of September 1, 2021, the Co-Neutrals had not received a response to their feedback, nor updated material for this commitment. Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this IT.</p>

<p>8. App. C, IT 8.1 CYFD and HSD will create and maintain a dedicated ICWA unit in the 2nd Judicial District that includes dedicated and specially trained caseworkers, supervisors, and children’s court attorneys who will specialize in ICWA and act as consultants and trainers on ICWA cases. CYFD will work with AOC to implement lessons learned from the ICWA unit and court in the 2nd Judicial District throughout the state. (Due 12/1/2020)</p>	<p>The Co-Neutrals assess that the State’s efforts toward this IT meets the Performance Standard.</p>
<p align="center">Target Outcomes Due December 1, 2020 and June 1, 2021</p>	
<p align="center">Commitment</p>	<p align="center">Status of September 1, 2021</p>
<p>9. App. C, TO 2.1 CYFD will work with New Mexico Tribes and Pueblos, families, and Native Children to identify culturally responsive services. HSD will develop and expand access to traditional and culturally responsive treatments, interventions, and supports. CYFD will develop and arrange for traditional and culturally competent interventions, which may include interventions that are not medicalized and/or have not been evaluated as evidence-based, well-supported, or promising. CYFD and HSD will expand culturally relevant services that can be used as an active effort to keep families intact and to avoid taking children into custody. (Due 6/1/2021)</p>	<p>The material provided by the State to assess progress on this TO was insufficient. The Co-Neutrals provided specific feedback and questions to the State on this TO in late June 2021, and as of September 1, 2021, the State had not yet responded nor provided an updated draft of this commitment. Despite the State’s commitment to expand culturally responsive services, based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this TO.</p>
<p>10. App. C, TO 2.3 CYFD will make every effort to ensure that services are provided as quickly as possible with consideration of the traditions and culture of the Native child’s Tribe or Pueblo, as well as child and family preferences. CYFD will develop policies to ensure that native children in state custody receive traditional or culturally responsive services, supports, or interventions, including interventions which are non-medicalized and/or have not been evaluated as evidence-based, well-supported, or promising, including collecting data on implementation of the protocols. The Co-Neutrals will approve the policies and evaluate the Department’s compliance with the policy. The Co-Neutrals shall not</p>	<p>The FSA language for this TO requires development of policies, and that such policies are approved by the Co-Neutrals. As of September 1, 2021, the Co-Neutrals had not received a draft policy from the State to assess or consider for approval. Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this TO. Furthermore, the TO requires that once the policy is developed and approved, the Co-Neutrals will evaluate compliance with the policy as outlined in the final DVP.</p>

withhold approval of the policy if it is reasonably calculated to achieve the goals of this Agreement. (Due 6/1/2021)	
11. App. C, TO 3.1 CYFD will develop a policy to provide or ensure provision of direct assistance for traditional ceremonies, including arranging for all preparation and providing payment if needed, if Native Children want to participate. The policy will 1) provide for Native Children in State Custody to be presented with information about traditional ceremonies with sufficient time to decide whether they want to participate, 2) affirmatively encourage participation, and 3) facilitate all necessary preparation activities. The Co-Neutrals will approve the policy and evaluate the Department's compliance with the policy. The Co-Neutrals shall not withhold approval of the policy if it is reasonably calculated to achieve the Goals of this Agreement. (Due 6/1/2021)	The information provided by CYFD for this TO was the same response as provided for App. C, TO 2.3 above. CYFD has not provided the Co-Neutrals with a draft policy to assess for compliance with this Performance Standard, or for consideration of approval. Based on the information provided by the State, the Co-Neutrals assess the State has not met the Performance Standard for this TO.
12. App. C, TO 4.1 CYFD is committed to having Native Children in ICWA-preferred placements. By December 1, 2020, when a Native Child is in a non-ICWA-preferred placement, the placement will be reviewed every 30 Days. (Due 12/1/2020)	The Co-Neutrals cannot validate the reported performance until the State provides final data. The Co-Neutrals make no Performance Standard determination on the State's performance. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.
13. App. C, TO 4.2 CYFD will establish protocols governing the 30-Day review process to include families, tribal representatives, legal representatives, and Resource Families. The protocols will require that the aim of the placement review will be to determine what actions, services and supports will enable the child to be moved to an ICWA-approved placement. If State ICWA legislation is passed and is more protective than the federal ICWA, a placement may meet this standard by being preferred by or consistent with the State ICWA legislation. The Co-Neutrals shall approve the protocols, but the Co-Neutrals shall not withhold approval of the protocols if they are reasonably calculated to achieve the Goals of this	The State has developed protocols for the required 30-day review process of Native children placed in out-of-preference placements. The Co-Neutrals approved the protocols in January 2021 but have not yet evaluated implementation, and make no Performance Standard determination on the State's compliance with the protocols. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals' report.

<p>Agreement. The Co-Neutrals will evaluate compliance with the protocols. (Due 12/1/2020)</p>	
<p>14. App. C, TO 4.3 CYFD will work with New Mexico Tribes and Pueblos to identify any tribal placement preferences that deviate from ICWA. CYFD will create procedures that enhance accountability for ICWA placement preferences, including allowing the child’s tribe or pueblo and extended family members to participate in ICWA-preferred placement reviews, Individualized Planning Meetings and case decision making meetings. (Due 12/1/2020)</p>	<p>The State has developed protocols for the required 30-day Review process of Native children placed in OOPP to enhance accountability for ICWA placement preferences. The protocols allow for participation by a Native child’s Tribe, Pueblo, or Nation and extended family in OOPP meetings. The Co-Neutrals approved the protocols in January 2021, but have not yet evaluated implementation, and make no Performance Standard determination on the State’s implementation of the procedures, as the procedures have not yet been finalized beyond issuance of a Guidance Memorandum and PIG, dated March 24, 2021. The Co-Neutrals will assess implementation of this TO in a future Co-Neutrals’ report.</p>
<p>15. App. C, TO 5.1 CYFD will develop an ICWA training plan by December 1, 2020. The Co-Neutrals shall approve the ICWA training plan, but the Co-Neutrals shall not withhold approval of the training plan if it is reasonably calculated to achieve the Goals of this Agreement. The Co-Neutrals will evaluate implementation of the training plan.²¹⁴ (Due 12/1/2020)</p>	<p>This TO was not completed by the required due date of December 1, 2020. The State has made consistent efforts to improve the development of the Plan, and as of the writing of this report, the State is close to finalizing an ICWA Training Plan that can receive the Co-Neutrals’ approval. Because the Plan is nearing finalization, additional time is needed for the Co-Neutrals to assess whether the State has met the Performance Standard for</p>

²¹⁴ ICWA trainings will be developed collaboratively with the CYFD’s Academy for Training and Professional Development Team, Protective Services Tribal Liaison, CYFD Tribal Liaison, Tribal Advisors, and culturally responsive experts. The ICWA training will include specific information on the history of ICWA, historic relations between Native American people and state and national government, and the history of culturally insensitive social work practices. It will also include skills development in working with Native families and communities, historical trauma, engagement, cultural humility and culturally responsive intervention techniques for Native American parents and youth and community engagement with New Mexico Tribes and Pueblos, as well as best practices for ICWA. The training will include information on New Mexico Tribes and Pueblos, sovereignty, and jurisdictional issues.

	development of the Plan. The Co-Neutrals will assess implementation of the Plan in future reports.
Appendix D: Behavioral Health Services	
Implementation Targets Due December 1, 2020 and June 1, 2021	
Commitment	Status of September 1, 2021
1. App. D, IT 1.1 HSD and CYFD will create a Behavioral Health Care Workforce Development Review with the objective of supporting and expanding provider capacity to provide community-based mental and behavioral health services with reasonable promptness that are accessible throughout the State, and particularly in rural areas... The Co-Neutrals must approve the Behavioral Health Care Workforce Development Review. ²¹⁵ (Due 6/1/2021)	The State continues to make progress toward this IT. However, the Co-Neutrals have not been able to approve the State's proposed Review and Plan. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.
2. App. D, IT 2.1 To assess need, HSD and CYFD will define initial expected service utilization for screening/assessment, High Fidelity Wraparound services, evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, intensive case management, mobile crisis response services and intensive home-based services. The Co-Neutrals must approve the methodology for predicting expected utilization of these services. (Due 6/1/2021)	The State continues to make progress toward this IT. However, the Co-Neutrals have not yet been able to approve the State's proposed methodology. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.

²¹⁵ The Behavioral Health Care Workforce Development Review will describe in writing the expected nature, scope, capacity, and structure of the workforce necessary to meet the obligations described in this Agreement, including how HSD works with MCOs on increasing capacity to make available screening/assessment, High Fidelity Wraparound services, evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, intensive case management, mobile crisis response services and intensive home-based services to every Child in State Custody for whom they are medically necessary. HSD will either create or require MCOs to create a specific hiring/contracting plan that identifies, by county, the number of staff and credentials required to meet the objectives identified in the Behavioral Health Care Workforce Development Review.

<p>3. App. D, IT 3.1a HSD will produce to the Co-Neutrals and Plaintiffs’ counsel a detailed interim progress report on the State’s efforts to develop and publish reimbursement methodology, billing rate information, and guidance for providers. (Due 12/1/2020)</p>	<p>The Co-Neutrals assess that the State has met the Performance Standard for this IT.</p>
<p>4. App. D, IT 3.1 HSD will develop and publish reimbursement methodology, billing rates (taking into account validated information regarding adequate rates), and guidance for providers for screening/assessment, High Fidelity Wraparound services, evidence-based, well-supported, or promising therapeutic treatment for children with complex trauma, intensive case management, mobile crisis response services and intensive home-based services, leveraging Medicaid whenever possible. The methodology and guidance will include provider eligibility criteria as well as billing and coding procedures. (Due 6/1/2021)</p>	<p>The State provided a draft of material relevant to this IT, but did not complete this IT by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to review the documents once finalized and promulgated by the BHSD and assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals’ report.</p>
<p>5. App. D, IT 4.1a CYFD, with input from HSD and Dr. George Davis, will publish in the public record for comment proposed regulations governing medication protocols to ensure that Children in State Custody are not overmedicated, while ensuring timely access to medically necessary medication and treatment. (Due 12/1/2020)</p>	<p>The Co-Neutrals assess that the State has met the Performance Standard of this IT.</p>
<p>6. App. D, IT 4.1 CYFD, with input from HSD, will adopt regulations governing medication protocols to ensure that Children in State Custody are not overmedicated, while ensuring timely access to medically necessary medication and treatment. The regulations will include a mandatory clinical review process provided by an independent mental health professional with a license to prescribe psychotropic medication for all children prescribed psychotropic medication while in state custody and will include guidance aimed to ensure that medication is not misused as a primary response to trauma-related behaviors. In addition, the regulations will require specific review of: 1) any use of polypharmacology; 2) dosage for all prescribed medication; and 3) use of atypical anti-psychotics. Co-Neutrals must approve the final form of these regulations. (Due 6/1/2021)</p>	<p>The Co-Neutrals assess that the State has met the Performance Standard for this IT.</p>

<p>7. App. D, IT 5.1 HSD will monitor implementation of a term in all contracts with its designees to require that care coordination include identification of physical, behavioral health, and long-term care needs, and providing services to address said needs, in compliance with Section 4.4 of Centennial Care 2.0 Managed Care Organization contracts with HSD. (Due 6/1/2021)</p>	<p>This IT was not completed by the required due date of June 1, 2021, but the State is close to finalizing the documents necessary to achieve this IT. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard of this IT until a future Co-Neutrals' report.</p>
<p>8. App. D, IT 6.1 HSD will reinstate language in its Medicaid contracts to prevent children from being rejected or removed from behavioral health services providers. HSD will work with providers to identify and remove other administrative barriers to providing services. (Due 6/1/2021)</p>	<p>This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding this IT until a future Co-Neutrals' report.</p>
<p>9. App. D, IT 7.1 HSD will revise its Notice of Action and grievance protocols to require a Notice of Action be provided to the child's caregiver, legal representative, and legal custodian whenever a service recommended by an Individualized Planning Meeting Team is reduced, modified, delayed, or denied, or if the service or is not approved within 10 Days. (Due 6/1/2021)</p>	<p>This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p>10. App. D, IT 8.1 HSD and CYFD will review and identify the responsibilities shared by both Departments and create a joint process for offering services and supports include screening, assessing, referring, treating and providing transition services to Children in State Custody of the department, including Children in State Custody who were never removed from Respondents' homes or children who have returned to Respondents' homes but who remain Children in State Custody. The goal of this joint process shall be to maximize each child's access to services and to create unified process for offering services and supports. (Due 6/1/2021)</p>	<p>This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>

<p>11. App. D, IT 9.1 HSD or its designees will require training through its contracts for those providing care coordination for children in state custody who receive Medicaid, consistent with the requirements in place under Section 3.3.5 and 4.4 of the Centennial Care 2.0 MCO contracts with HSD. HSD will require this training in any and all future contracts with its designees. (Due 6/1/2021)</p>	<p>This IT was not completed by the required due date of June 1, 2021. A period for further observation is necessary to allow the Co-Neutrals to assess whether the State has met the Performance Standard for this IT. The Co-Neutrals will delay their determination regarding the Performance Standard until a future Co-Neutrals' report.</p>
<p align="center">Target Outcomes Due December 1, 2020 and June 1, 2021</p>	
<p align="center">Commitment</p>	<p align="center">Status of September 1, 2021</p>
<p>12. App. D, TO 3.1a HSD will produce to the Co-Neutrals and Plaintiffs' counsel a detailed progress report on the State's efforts to build High-Fidelity Wraparound capacity. (Due 12/1/2020)</p>	<p>The Co-Neutrals assess that the State has met the Performance Standard for this TO.</p>

C. Parties' Extension Agreement

August 4, 2020

Dear Co-Neutrals,

This letter memorializes the agreement between the parties to the *Kevin S. v. Blalock* (No. 1:18-cv-00896) settlement agreement (collectively, the "Parties") to extend by 180 days the deadline for compliance with some of the commitments scheduled to be completed in 2020 in the settlement agreement. The Parties have agreed to these extensions in light of the significant impact of the COVID-19 pandemic that arose subsequent to the negotiation and execution of the agreement.

The Parties agree that CYFD and HSD will meet the following commitments in 2020:

1. The commitments and deliverables identified by the State in its letter of June 16, 2020 (attached hereto as Exhibit 1) as those for which the State did *not* seek an extension of time will be completed and subject to Co-Neutral review on the dates indicated in the settlement agreement.¹
2. Appendix A, Implementation Target 1.1 will be completed and subject to Co-Neutral Review on the date indicated in the settlement agreement. ("CYFD, with input and collaboration from HSD, will establish Child and Adolescent Needs and Strengths ("CANS") and functional trauma assessment criteria for access to intensive home-based services in consultation with clinical experts agreed upon by Defendants and Plaintiffs."). The Parties further agree that Dr. George Davis (at no cost to the State), Bryce Pittinger, and Dr. Neal Bowen will serve as the above-referenced clinical experts.
3. By December 1, 2020, CYFD and HSD will identify, and Co-Neutrals will approve, the form of the Child and Adolescent Needs and Strengths Crisis Assessment Tool ("CANS-CAT") and comprehensive CANS screening tools referenced in Appendix A, Implementation Target 1.
4. Appendix B, Target Outcome 1.1 will be completed and subject to Co-Neutral² Review on the date indicated in the settlement agreement (prohibition on placement in any hotel, motel, out-of-state provider, office of a contractor, or state agency office unless in extraordinary circumstances necessary to protect the safety and security of the child and with proper documentation, approval, and notice).

¹ As indicated in May 18, 2020 letter from Co-Neutrals to Defendants, for commitments that require Co-Neutral review and approval, a draft will need to be submitted to Co-Neutrals at least 60 days before the deadline, or in this instance by October 1, 2020.

² As indicated in May 18, 2020 letter from Co-Neutrals to Defendants, for any commitments that require data verification, methodology and baseline data for related metrics will need to be submitted to Co-Neutrals with time for review. Co-Neutrals have asked Defendants to identify dates when such deliverables will be provided.

5. By December 1, 2020, HSD will produce to the Co-Neutrals and Plaintiffs' counsel a detailed interim progress report on the State's efforts to implement the commitment in Appendix D, Implementation Target 3.1 (development and publication of reimbursement methodology, billing rate information, and guidance for providers). The deadline for completion and Co-Neutral review of Appendix D, Implementation Target 3.1 will be extended by 180 days.
6. By December 1, 2020, CYFD, with input from HSD and Dr. George Davis, will publish in the public record for comment proposed regulations governing medication protocols to ensure that Children in State Custody are not overmedicated, while ensuring timely access to medically necessary medication and treatment. These proposed regulations will comply in all respects with the terms of Appendix D, Implementation Target 4. The deadline for adoption of these proposed regulations, as specified in Appendix D, Implementation Target 4, will be extended by 180 days.
7. By December 1, 2020, HSD will produce to the Co-Neutrals and Plaintiffs' counsel a detailed progress report on the State's efforts to build High-Fidelity Wraparound capacity.

The Parties further agree that, except as specified above, the deadline for completion and Co-Neutral review of all other commitments scheduled to be completed during 2020 will be extended by 180 days.

Nothing in this letter agreement is intended to alter or amend any other commitment or provision described in the *Kevin S. v. Blalock* settlement agreement.

Sincerely,



On Behalf of Plaintiffs

James Cowan

Digitally signed by James Cowan
Date: 2020.08.06 21:19:05 -06'00'

On Behalf of Defendants

D. ICWA Guidance Memorandum

State of New Mexico
CHILDREN, YOUTH and FAMILIES DEPARTMENT

MICHELLE LUJAN GRISHAM
GOVERNOR

HOWIE MORALES
LIEUTENANT GOVERNOR



BRIAN BLALOCK
CABINET SECRETARY

TERRY L. LOCKE
DEPUTY CABINET SECRETARY

ICWA - Foster and Adoptive Placement of American Indian/Alaskan Native Children

To: All CYFD, Pueblos/Nations/Tribes, and additional stakeholders/partners
From: Brian Blalock, Cabinet Secretary [Include Signature Here]
Issue Date: December 1, 2020

Effective Immediately

Purpose

The purpose of this Guidance Memorandum is to inform all CYFD employees, Pueblos/Nations/Tribes, and other stakeholders/partners of CYFD's commitment and the steps it is taking to comply with the Indian Child Welfare Act 25 U.S.C. §§ 1901-63 (ICWA) in its letter and intent. The Indian Child Welfare Act (ICWA) provides protections for Indian children in PSD custody and helps them remain connected to their families, culture and communities. Indian children in the custody of PSD must be placed in accordance with the ICWA placement preferences and efforts should primarily focus on placement with relatives. Placement settings include foster care and pre-adoptive or pre-guardianship placements. A placement should be in a setting that is least restrictive, is most like family, is within reasonable proximity to the child's family, and meets any special needs the child might have. CYFD is committed to the placement of American Indian/Alaskan Native children in foster/adoptive homes which are compliant with ICWA Placement Preferences. As required by the ICWA, preference must be given in descending order as listed below, to placement of the child, unless the Tribe or Pueblo has a different placement preference or there is a documented good cause to place the child elsewhere, as determined by a court.

FOSTER CARE OR PREADOPTIVE PLACEMENT PREFERENCES (25 U.S.C. § 1915 (b)):

- (1) A member of the Indian child's extended family;
- (2) A foster home that is licensed, approved, or specified by the Indian Child's tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

ADOPTIVE PLACEMENT PREFERENCES (25 U.S.C. § 1915 (a)):

- (1) A member of the child's extended family;
- (2) Other members of the Indian child's tribe; or
- (3) Other Indian families.

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If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child. Consideration should also be given, where appropriate, of the preference of the Indian child or the Indian child's parent. Prior to a placement occurring or a placement change, the PSD worker will contact and consult with the Tribe or Pueblo. The worker will ask if the tribe or pueblo has a different order of preference and will accommodate that preference. Proper documentation shall be kept as to the reasoning a different order of placement is used, and the worker(s) shall work directly with the Pueblo/Nation/Tribe to ensure preferred placement preferences are met. This documentation will be memorialized on the "ICWA Out of Preferred Placement staffing form."

Documentation of efforts made to have the Indian child placed in an ICWA preferred placement will be documented on the "ICWA Out Of Preferred Placement staffing form." This form will be uploaded into FACTS in the case record in the Administrative icon under "ICWA Staffing" narrative.

If a child is in an out-of-preferred-placement (OOPP) setting, the Office of the Secretary-Tribal Affairs Division shall be notified within 48 hours of the placement by the child's worker. The CYFD Office of the Secretary-Tribal Affairs is responsible for scheduling and conducting an out-of-preferred placement meeting (OOPP) for each Indian child in an out of preferred placement at least every 30 days until a preferred placement is made. An OOPP meeting shall occur every 30 days until the child is an ICWA-/Tribal-preferred placement. The following individuals will be invited to participate in the OOPP meeting: Director of Tribal Affairs and/or delegate; Tribal Representative and Tribal caseworker, if available; PPW and Supervisor; CCA; parents/guardians and their attorneys; guardian ad litem/youth attorney; the resource family; and the youth as appropriate.

American Indian/Alaskan Native children will not be placed in a concurrent adoptive home which is outside of the Pueblo/Nation/Tribe's or ICWA's placement preferences for adoptive placement. Guardianship and/or Tribal Customary Adoption shall be considered appropriate permanency options, unless a tribe has indicated a termination of parental rights would not be appropriate and would contradict the Pueblo/Nation/Tribe's cultural practices.

History and Guiding Statutes/Regulations/Mandates

Prior to the enactment of the Indian Child Welfare Act (ICWA) in 1978, studies revealed a large number of American Indian/Alaskan Native children were separated from their parents, extended families and communities by state child welfare and private adoption agencies. Research found that 25% - 35% of all American Indian/Alaskan Native children were being removed; of these 85% were placed outside of their families and communities – even when fit and willing relatives were available. Although some progress has been made as a result of ICWA, out-of-home placement continues to occur more frequently for American Indian/Alaskan Native children than it does for the general population. Native families are still four times more likely to have their children removed and placed in foster care than their White counterparts.

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Congressional testimony documents the devastating impact of these practices on Native children, families, and tribes. The intent of Congress under ICWA is to “protect the best interest of Indian children and to promote the stability and security of the Indian tribes and families” (25 U.S.C. § 1902). ICWA (25 U.S.C. § 1915(b)) requires States to place Indian children in foster care first with their extended families. When this is not possible, placement should be with a foster family licensed or approved by the child’s tribe. In situations where neither of these options are available, then placement should be with an Indian family licensed by a non-Indian agency. In regards to adoptions, ICWA ((25 U.S.C. § 1915(a)) requires States to place first with extended family, then a family of the child’s tribe, then another Indian family. If the child’s tribe establishes a different order of preference, States shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child ((25 U.S.C. § 1915(c)).

One of the goals of the *Kevin S. Settlement Agreement* is to set up practices and procedures to enable the State to comply with ICWA and provide culturally appropriate and relevant care to children in State custody, and to their families. CYFD is committed to having Native children in ICWA-preferred placements. By December 1, 2020, when a Native child is in a non-ICWA-preferred placement, the placement will be reviewed every 30 days to seek, develop and support placements in accordance with ICWA preferences. CYFD will work with NM Pueblos/Nations/Tribes to identify any tribal placement preferences that deviate from ICWA. (*KEVIN S., et al. v. BLALOCK, et al.*, No. 1:18-cv-00896.)

Process

The following actions will be implemented in order to demonstrate compliance to guiding statutes, regulations, and mandates:

Out of Preference Placements (OOPP): When an Indian child is in the custody of CYFD, the first active effort will be to secure a relative placement for the child. The CYFD caseworker will utilize family history, genograms, ancestry charts, Seneca searches, and other methods to obtain information on relatives and fictive kin to the child. If efforts to locate and place with a family member or fictive kin are not successful, and the child is placed in a non-preferred placement, the CYFD Office of the Secretary - Tribal Affairs is notified by email within 48 hours of the non-preferred placement by the child’s worker. The CYFD Office of the Secretary - Tribal Affairs is responsible for documenting any request received on a tracking spreadsheet. The OTS Director of Tribal Affairs will be responsible for scheduling and conducting an out-of-preference placement (OOPP) meeting for each child in an out of preference placement at least every 30 days until a preferred placement is made. The Director or their designee will utilize the “ICWA Out of Preferred Placement Staffing Form” to document this meeting.

1. At a minimum, the OTS – Tribal Affairs delegate, the permanency planning worker, and the permanency planning supervisor must participate in the out-of-preference placement meeting. The CCA is strongly encouraged to attend. The OTS – Tribal Affairs delegate will also ensure a representative from the child’s Tribe(s) is aware of the meeting and

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will be invited to participate in a meaningful manner. Other attendees should include the resource family, the Guardian Ad Litem or Youth Attorney, the child's parents, the parents' attorneys, and grandparents and other extended family members and the youth, as appropriate.

2. The OTS – Tribal Affairs delegate must ensure that the following issues are addressed and documented in FACTS:
 - a. status of diligent extended family search and efforts being made to assess any identified extended family members, as identified through a CYFD search or a search by the child's tribe;
 - b. recommendations of specific actions and timeframes to identify an ICWA preference placement;
 - c. recommendations for culturally responsive services, supports or interventions needed to support an ICWA preference placement; and
 - d. recommendations for transition of the child to the preferred placement including specific supports needed to make the transition successful; a plan to ensure that medical, dental, and behavioral health services that the child is receiving continue; and a transition calendar.
3. The OTS – Tribal Affairs delegate will address and document in writing the following discussion questions during the OOPP meeting:
 - a. Why can't the child be with members of the child's family or extended family?
 - b. Why is the child in an out-of-preference placement, and how long has the child been there? What are the barriers to finding a preferred placement?
 - c. What additional services, support and community resources could be made available to allow the child to live in a preferred placement?
 - d. Are there other preference placements available? Such as:
 - i. foster homes licensed by the Tribe or Pueblo; or
 - ii. members of the Indian child's Tribe or other Indian families.
 - e. Are the siblings placed together, if not, why?
 - f. What is the status of the relative/extended family search, who was ruled out and why, and who do we need to contact again? Is contact information needed?

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- g. What extended family members have been documented in FACTS and sent the Notice of Right to Request Placement?
 - h. What is the permanency goal?
 - i. Who else is important to the child, and who else is this child important to, including the resource family and others?
 - j. What is the tribe's position on and recommendation for placement? (Where does the tribe want the child to be placed?)
 - k. What are the recommendations and next steps to move the child into a preferred placement, and who are the responsible parties?
 - l. Is there consensus in the meeting on the recommendations and next steps? If not, opposition to the recommendations and who is opposed should be noted in the case record.
4. The recommendations and decisions made during OOPP meeting will be documented in the FACTS Administrative Icon, under the "ICWA Staffing" narrative.
 5. The PPW will be responsible for follow through with the recommendations and decisions from the meeting. Meetings will be held monthly until the goal of placing the Indian child in a preferred placement is achieved.
 6. The completed Out of Placement Preference forms will be provided to the court at every judicial review and permanency hearing.

Timeline for Implementation:

Beginning February 1, 2021, the Office of Tribal Affairs will receive notice of all instances of an Indian child being placed in State custody as a result of a PS investigation. The PS investigator is responsible for sending this notice. The Director of Tribal Affairs or their delegate will begin tracking these cases and will staff all cases in which an Indian child is not in a preferred placement.

Cases filed before January 2021 will be identified and tracked by the Office of Tribal Affairs starting in January 2021. These cases will be identified through FACTS case demographics, the legal icon, and the placement icon. A tiered staffing plan will be used to identify and staff these cases until all cases are up to date. The Director of Tribal Affairs will determine the number of cases to be staffed per month, with the goal that all cases filed before January 2021 will have an OOPP staffing held by July 1, 2021. Cases will be staffed in order of length of time in care, with

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the oldest cases to be staffed first. A case may also be reviewed by the Director of Tribal Affairs at any time per request of the PPW, supervisor, CCA, or a tribal representative.

In the event there are questions or concerns in implementing this process, please contact:

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