IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO, MICAELA CADENA,
in her capacity as STATE REPRESENTATIVE,
and LINDA LOPEZ, in her capacity
as STATE SENATOR,

Petitioners,

v.

MICHELLE LUJAN GRISHAM, in her
capacity as GOVERNOR, and
VALERIE SANDOVAL, in her capacity
as ACTING CABINET SECRETARY
for the CHILDREN, YOUTH, AND FAMILIES
DEPARTMENT,

Respondents.

No. _____

EMERGENCY PETITION FOR WRIT OF MANDAMUS
AND REQUEST FOR STAY

INTRODUCTION

The American Civil Liberties Union of New Mexico (ACLU-NM), a statewide non-profit, nonpartisan organization whose mission is to protect and advance justice, liberty, and equity, and two state legislators bring this request for an emergency stay and petition for a writ of mandamus. Petitioners seek an order from this Court to prohibit Governor Michelle Lujan Grisham through the Secretary of the Children, Youth and Families Department (CYFD) from enforcing its directive relating to substance-exposed infants (hereinafter CYFD directive). The directive is attached as Exhibit 1 to this Petition. It requires CYFD to take custody of an infant at birth who tests positive for the substances enumerated in the directive and immediately file abuse and neglect petitions.

The CYFD directive is an unconstitutional official action that invades the fundamental liberty interest of parents to the care and custody of their children and deprives New Mexico families of procedural due process by failing to provide any procedures or processes prior to removing infants from their parents at birth. The CYFD directive attempts to displace the existing statutory scheme and regulations set forth in the Comprehensive Addiction and Recovery Act (CARA). [1] The CYFD

[1] The Comprehensive Addiction and Recovery Act of 2016 is a federal act that was incorporated into the laws of New Mexico with the passage of SB 42, NMSA 1978, Sections §§ 32A-31-1 to 32A-31-4 in 2024. COMPREHENSIVE

directive also neglects requirements under the Indian Family Protection Act (IFPA). Finally, the directive infringes on legislative authority in violation of Article III, Section I of the New Mexico Constitution (separation of powers).

JURISDICTION

This Court has original jurisdiction to issue writs of mandamus against "all state officers, boards, and commissions." N.M. Const. art VI, § 7. A writ of mandamus "has both compulsory and prohibitory effect[]" because it "may be used either to compel the performance of an affirmative act… or it may be used in a prohibitory manner to prohibit unconstitutional official action." *State ex rel. Torrez v. Bd. of Cnty. Comm'rs for Lea Cnty.*, 2025-NMSC-011, ¶ 13, 572 P.3d 837. The Court's exercise of prohibitory mandamus to restrain unconstitutional official action is long-standing. State ex rel. Clark, et al., v. Johnson, 1995-NMSC-048, ¶ 19, 904 P.2d 11. This Court has previously recognized that prohibitory mandamus is particularly justified "in instances where a petitioner s[eeks] to restrain one branch of government from unduly encroaching or interfering with the authority of another branch in violation of Article III, Section 1 of our state constitution." *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M.

ADDICTION AND RECOVERY ACT OF 2016, PL 114-198, July 22, 2016, 130 Stat 695.

272, 980 P.2d 55. The Court may exercise its original jurisdiction over a petition even when the petition could have been brought in district court. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15, 125 N.M. 343, 961 P.2d 768. Furthermore, where, as here, the issues presented "implicate[] fundamental constitutional questions of great public importance," mandamus is an appropriate vehicle for the expeditious resolution of claims, and the Court may confer standing to private parties "to vindicate the public interest." *Clark*, 1995-NMSC-048, ¶¶ 15, 17; *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031, ¶ 7, 539 P.3d 690.

This petition raises two such "fundamental constitutional questions of great public importance": the due process rights of parents as guaranteed by Article II, § 18 of the Due Process and Equal Protection Clause of the New Mexico Constitution, and separation of powers under Article III, Section I of the New Mexico Constitution.

PARTIES

1. Petitioners are American Civil Liberties Union of New Mexico, and New Mexico State Legislators, Representative Lara Cadena and Senator Linda Lopez.
2. Respondents are Governor Michelle Lujan Grisham and Valerie Sandoval, Acting Cabinet Secretary of the Children, Youth, and Families Department.

FACTUAL BACKGROUND

Relevant New Mexico Law on Substance Exposure

1. For nearly twenty years, New Mexico courts have recognized that prenatal exposure to substances alone does not constitute neglect under the state's Abuse and Neglect Act. *See State ex rel. Children, Youth, & Families Dep't. v. Amanda H.*, 2007 NMCA-029, ¶ 23, 141 N.M. 299, 154 P.3d 674.
2. In 2019, the New Mexico Legislature amended NMSA 1978, Section 32A-4-3(G) to provide that a finding that a pregnant woman is using or abusing drugs shall not alone form a sufficient basis to report child abuse or neglect.
3. In 2024, the legislature passed SB 42, NMSA 1978, Sections §§ 32A-31-1 to 32A-31-4. The law primarily amended portions of the Children's Code to incorporate the federal Comprehensive Addiction and Recovery Act (CARA) and moved the CARA program from the Children Youth and Families Department (CYFD) to the Health Care Authority (HCA). It also requires hospitals and birthing centers to create Plans of Care. The law further requires the HCA to promulgate rules consistent with the statute.

CYFD Directive History

4. On July 7, 2025, the Acting Chief General Counsel of CYFD, issued a directive entitled "Filing Petitions for Drug Exposed Infants," to all protective services staff of CYFD. The directive requires that "children born

exposed to methamphetamines, fentanyl, poly-substance, or diagnosed with fetal alcohol syndrome… must be taken into custody" immediately after birth. The directive also requires CYFD to file abuse and neglect petitions pursuant to NMSA 32-4-2(B)(1) (abuse) and NMSA 32A-4-2(G)(2) (neglect). Memorandum from the Secretary of Children, Youth, and Families Dept. (July 7, 2025) (on file with the CYFD) [Exhibit 1].

5. On July 11, 2025, the CYFD Cabinet Secretary issued a "Follow-up to 7/7/25 Memo regarding Filing Petitions for Drug Exposed Infants." Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (on file with the CYFD) [Exhibit 2]. The memo attempts to clarify that the July 7 Directive is "not based solely on a finding that a mother is using or abusing drugs," but rather is "necessary to prevent potentially imminent physical harm." Further the memo claims, without citation, that the directive is consistent with federal and New Mexico laws, and that an abuse and neglect finding is not precluded even if a Plan of Care is created for the family.
6. In response to the July 7th directive, the President and CEO of the New Mexico Hospital Association stated that none of New Mexico's birthing hospitals were contacted for any conversations or consultation prior to the issuance of the directive and noted confusion with how to proceed. It was

also reported that the administration asserted that in these situations, CYFD would take the child into a 72-hour hold prior to discharging them from the hospital. [2]

7. On July 25, 2025, the ACLU of New Mexico submitted two Inspection of Public Records Act (IPRA) requests to Governor Michelle Lujan Grisham and CYFD requesting all records and communications related to the CYFD directive. The IPRA requests did not yield any additional information that was not already publicly available.

8. On December 11, 2025, New Mexico health care providers published a sign-on letter with Physicians for Reproductive Health condemning the CYFD directive as "dangerous and unlawful" and contrary to evidence-based practices.[3]

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[2] Daniel Chacon and Esteban Candelaria, *Memo outlines New Mexico hospitals' concerns over governor's policy change on drug-exposed infants*, (July 22, 2025, updated August 18, 2025) https://www.santafenewmexican.com/localnews/memo-outlinesnew-mexico- hospitals'-concerns-over-governors-policy-change-on-drug-exposed-infants/article_baf8862a-db0a-462b-9cc8-3f1f1c568502.html accessed on 11/16/25

[3] PHYSICIANS FOR REPRODUCTIVE RIGHTS, https://prh.org/ [https://prh.org/resource/new-mexico-newborn-separation-harms-families/](last visited May 15, 2026).

9. On February 11, 2026, Governor Michelle Lujan Grisham publicly expressed regret for signing SB 42 into law stating that "20/20 hindsight. I regret that I signed the bill in [20]19 for CARA."[4]

10. Reports place the number of infants "impacted" by the directive at 167 as of March 2026.[5]

11. On March 10, 2026, the New Mexico Health Care Authority issued a notice of rulemaking to promulgate New Mexico Administrative Code (NMAC) rule 8.3.2: Family Health and Well Being, Plan of Safe Care for Substance-Exposed Infants. While largely an attempt to codify the directive, the rule appears to provide an even broader definition of "substance-exposed infant" than in the original directive to include any infant "who was exposed in utero to a substance that has the potential to impact the health or development of the infant, including an illicit substance such as fentanyl, methamphetamine or heroine, prescribed medication such as opioids, methadone, buprenorphine, or legal substances including alcohol, tobacco,

[4] Jason McNabb, *New Mexico governor regrets signing law linked to infant deaths*, KOAT 7 (Feb. 11, 2026), https://www.koat.com/article/new-mexico-governor-regrets-signing-law- linked-to-infant-deaths/70307578.

[5] Esteban Candelaria, *New Mexico says new effort to aid drug-exposed newborns is working,* Santa Fe New Mexican (Mar. 20, 2026),https://www.santafenewmexican.com/news/legislature/new-mexico-says-new-effort-to-aid-drug-exposed-newborns-is-working/article_1df996f3-93a2-4eb7-aadf-245d879c262c.html.

and marijuana." A public hearing for the proposed rule was held on April 9, 2026. The proposed rules have not yet been finalized.[6] 8.3.2.1-15 NMAC [proposed rule- Exhibit 3]

ARGUMENT

I. Issuance of a Writ of Mandamus is Warranted because the CYFD Directive Violates New Mexicans' Constitutional Rights

Petitioners ask this Court to issue a writ of mandamus to prohibit ongoing unconstitutional official action by the executive branch through CYFD. The Court's exercise of the extraordinary writ power is warranted in this case to prevent further violations of New Mexicans' constitutional rights. As implemented, the CYFD directive causes immediate and irreparable harm to New Mexico families and poses a "clear threat[] to the essential nature of state government guaranteed to New Mexico citizens under their Constitution." State ex rel. *Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277. In short, the Executive's attempts to override a person's right to due process and its exercise of legislative authority warrants the immediate issuance of a writ of mandamus.

[6] Petitioners do not challenge the proposed rule in this petition but draw the Court's attention to the fact that the challenged CYFD directive has been incorporated in the proposed rule.

The Requirements for Mandamus are Satisfied

The Court's exercise of mandamus is guided by the *Sandel* test under which mandamus will lie

> "when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal." *Sandel*, 1999-NMSC-019, ¶ 11.

The *Sandel* three-part test is plainly established here. The petition presents two "fundamental constitutional questions of great public importance": whether the CYFD directive violates the substantive and procedural due process rights of New Mexico families and whether the directive infringes on the legislature's authority to create substantive law in violation of separation of powers. The issues presented are purely legal and concern non-discretionary duties of CYFD officials charged with administering New Mexico's laws and promulgating regulations consistent therewith. The existence and implementation of the challenged directives is not in dispute. Thus, this is a straightforward challenge to the facial constitutionality of the CYFD directive and the executive branch's authority under the state Constitution and laws of New Mexico to create the directive. Lastly, New Mexicans' constitutional rights and the state legislature's authority are impeded by the CYFD directive, warranting expeditious resolution by this Court.

II. The CYFD Directive Violates Substantive and Procedural Due Process

The due process issues are twofold. First, by removing infants from their parents at birth the CYFD directive invades parents' protected liberty interest in the "care, custody, and control" of their children in violation of the Due Process Clause of the New Mexico Constitution. N.M. Const. art. II, § 18 *see also Troxel v. Granville*, 530 U.S. 57, 65, (2000) (holding that "the liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up children and to control the education of their own") (internal quotations omitted). The violations of due process equally extend to the children impacted by the directive. *See* NMSA§ 32A-1-16 (recognizing that children are afforded the same basic rights as adults); *see also In re Gault*, 387 U.S. 1, 13, (1967), 87 S.Ct. 1428, (holding that the Fourteenth Amendment and the Bill of Rights apply to children).

Second, the directive bypasses procedural processes outlined in NMSA 1978, Sections 32A-4-3 and 32A-3A-13 of the Children's Code by purporting to grant CYFD the authority to take custody of *any* infant who tests positive for exposure to certain drugs or poly-substances[7]. Consequently, the directive

[7] The directive defines poly-substance as "the presence of two or more illegal substances or the presence of one illegal substance with THC and/or alcohol." Memorandum from the Secretary of Children, Youth, and Families Dept. (July 7, 2025) (on file with the CYFD).

undermines procedural due process by depriving parents of any process prior to suspension (or termination) of their parental rights.

In short, the CYFD directive not only plainly interferes with a parent's fundamental liberty interest but does so while neglecting constitutional and statutory processes designed to safeguard the rights of parents to the care of their children and children to right of the care from their parents.

A. The CYFD Directive Violates New Mexico's Guarantee of Substantive Due Process

The New Mexico Constitution requires that no person "shall be deprived of life, liberty or property without due process of law." N.M. Const. art II, § 18. The Due Process Clauses of the federal and state constitutions have been universally interpreted by courts to hold that a parent has a fundamental liberty interest in "the care, custody, and control of their children." *See State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 18, 36 N.M. 53, 94 P.3d 796. Indeed, this right has been referred to as "perhaps the oldest of the fundamental liberty interests." *Troxel*, 530 U.S. at 65. Correspondingly, New Mexico courts have recognized that "[t]he parent-child relationship is one of basic importance in our society . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *State ex rel. Children, Youth & Families Dep't v. Anne McD.*, 2000-NMCA-020, ¶ 22, 128 N.M. 618, 995 P.2d 1060. When a liberty interest protected by the Due Process Clause is deemed

fundamental, the government's actions are reviewed under *strict scrutiny*. *See Morris v. Brandenburg*, 2015-NMCA-100, ¶ 1, 356 P.3d 564 (applying strict scrutiny to decide the constitutionality of a statute as applied to physicians aiding a dying patient). Consequently, "any infringement must be 'narrowly tailored to serve a compelling state interest'." *Id.*

The CYFD directive threatens a parent's protected liberty interest to the "care, custody, and control of their children" and fails when evaluated under strict scrutiny. CYFD's stated interest justifying the removal of an infant from their parents at birth is to "prevent potentially imminent physical harm." Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (on file with the CYFD). Even assuming arguendo that a Court deemed the State's interest to be sufficiently compelling, the CYFD directive is not narrowly tailored to serve its stated purpose. On the contrary, the directive is troublingly overbroad and erects a dragnet that ensnares every birthing person regardless of their history of substance abuse or, indeed, the risk of imminent harm to the child. For example, studies have found that postpartum urine toxicology tests for fentanyl—one of the enumerated substances identified in the directive— are often positive when a birthing person was administered fentanyl during an epidural and the drug crosses

into the placenta.[8] The CYFD directive overrides clinical discretion and makes no apparent distinction between prescribed versus recreational use, intermittent versus chronic substance use, and whether the use is ongoing or has ceased prior to the discovery of the pregnancy.

Moreover, under New Mexico law a positive toxicology screen alone is an insufficient basis upon which to report abuse and neglect. *See* NMSA 1978, § 32A-4-3(G). Therefore, the removal of a child on that basis is not supported by law, and the deprivation of parental care is unconstitutional. CYFD's assertion that "removal is not based solely on a finding that a mother is using or abusing drugs," and is instead a policy meant to curb "the risk concerns concomitant with exposure," is a distinction without a difference and does not cure the directive's constitutional infirmity. Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (on file with the CYFD). Under this zero-tolerance policy, newborns are removed from their parents at birth, deprived of developmentally crucial bonding time,[9] and ushered into a system with a proven

[8] Molly R. Siegel, MD et al., *Fentanyl in the labor epidural impacts the results of intrapartum and postpartum maternal and neonatal toxicology tests*, 228 American J. of Obstetrics and Gynecology 741.el (2023). https://advances.massgeneral.org/obgyn/journal.aspx?id=2409

[9] Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. OF LAW & SOC. CHANGE 523, 527-534 (2019).

lack of capacity to provide adequate care.[10] Meanwhile, the non-birthing parent is also deprived of the right to custody and is forced to navigate an uncertain legal landscape. Family separation policies are not new, and these policies disproportionately impact low-income and people of color.[11] History instructs that the ends rarely justify the means.[12] Although this Court need not decide whether the CYFD directive satisfies strict scrutiny in order to grant the writ of mandamus, Petitioners emphasize that the directive is not only contrary to New Mexico law but invades the fundamental liberty interest of parents to the care of their children.

B. The CYFD Directive Violates New Mexico's Guarantee of Procedural Due Process

Even if the Court determines that the CYFD directive does not give rise to a violation of substantive due process, Petitioners assert that it also violates procedural due process. It is well established that "process is due when a proceeding affects or interferes with the parent-child relationship." *State ex rel. Children, Youth Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 24, 136 N.M. 53,

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[10] CTR FOR THE STUDY OF SOC. POL'Y, KEVIN S., ET AL. V. BLALOCK AND SCRASE, CO-NEUTRALS' 2024 ANNUAL REPORT (2024).

[11] Trivedi, *supra* note 9, at 13.

[12] PREGNANCY JUSTICE, THE RISE OF PREGNANCY CRIMINALIZATION 22 (2023) https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf.

94 P.3d 796. Here the directive eschews due process rights by neglecting to provide any process prior to suspending parental rights.

The vast statutory scheme comprising the Abuse and Neglect Act delineates "a continuum of proceedings which begins with the filing of a petition for neglect or abuse and culminates in the termination of parental rights." *Maria C.*, 2004-NMCA-083, ¶ 25; NMSA 1978, §§ 32A-4-1 to -35. The Act prescribes procedures and timelines that CYFD must follow when asserting a claim of abuse or neglect on behalf of a child. *See* § 32A-4-4. In the context of petitions for abuse or neglect, the process proceeds as follows. First, a report of abuse or neglect triggers an investigation. § 32A-4-4(A). At the investigatory stage, CYFD engages other relevant agencies and apprises the persons involved of the allegations contained in the report. § 32A-4-4(C). Upon completion of its investigation, CYFD determines whether to recommend or refuse the filing of a petition based on the criteria established for abuse and neglect. § 32A-4-4(D). If CYFD takes custody of a child, the department must file a petition within three days of assuming custody or relinquish the child to a parent or guardian once the statutory period for filing has expired. § 32A-4-4(E)-(D).

Importantly, however, these procedures do not define the minimum due process requirements mandated by our constitution. *See Maria C.*, 2004-NMCA-083, ¶ 24. The minimum due process accorded is instead determined by "the nature

of the proceeding and the interests involved, as well as the nature of the subsequent proceedings." *Id.* ¶ 25. (*citing Santosky v. Kramer*, 455 U.S. 745, 758 (1982)). Hence, "the more vital the proceeding is to a parent's interest, the more process they are due." *Id.* Where, as here, a decision threatens substantial prejudice to parental rights, the parent has the right to due process of the law. *Id.* ¶ 30.

New Mexico courts have adopted the three-part balancing test announced in *Mathews v. Eldrige*, to determine whether due process has been afforded in the context of CYFD proceedings. 424 U.S. 319, 335 (1976); *See State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.,* 1999-NMCA-035, ¶ 21, 126 N.M. 670, 974 P.2d 164. Under this test the Court considers: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of the interest given the procedures used; and 3) the government's interest including the government's fiscal and administrative burden. *Id.*

The CYFD directive fails to satisfy procedural due process under each prong of the test. First, the nature of the private interest here weighs in favor of the parent and against the government because the interest concerns a constitutionally protected fundamental right. *Id.* ¶ 23. Second, the risk of erroneous deprivation given the procedures used is significant because the directive does not comport with established standards for evaluating abuse and neglect under New Mexico law, NMSA 1978, § 32A-4-3(G), and the Court of Appeals holding in *State ex rel.*

Children, Youth, & Families Dep't. v. Amanda H, 2007 NMCA-029, ¶ 25, 141 N.M. 299, 154 P.3d 674 (holding the child's positive toxicology result and mother's admissions of narcotics use during her first trimester were insufficient to establish neglect under Section 32A-4-2(E)(2)).

Further, by creating a presumption of abuse and neglect and foregoing the investigation stage, the directive suspends parental rights based on evidence that provides only "a vague inference of future harm." *Id.* ¶ 29 (*quoting Shawna C.*, 2005-NMCA-066, ¶ 22). In *Santosky*, the United States Supreme Court cautioned against just this, holding that "[a]t the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge." 455 U.S. at 760. The Court recognized, moreover, that "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54. Recognizing that *Santosky* addressed termination of parental rights, its reasoning is nonetheless availing here because of the severity of the lifelong consequences arising from parental separation at birth and because of broader protections afforded under the New Mexico Constitution.[13]

[13] Trivedi, *supra* note 9, at 13.

Finally, the government's interest here does not tilt the balance in favor of CYFD because the state is not impacted by affording procedures consistent with the laws of the state. In fact, by creating a parallel system, the state assumes a greater fiscal and administrative burden than it would otherwise if it simply adhered to the existing procedures. In sum, the CYFD directive violates procedural due process and therefore enforcement of the directive is an unconstitutional official action.

III. The CYFD Directive Violates Separation of Powers

The CYFD directive creates new policy in conflict with the existing statute thereby usurping the authority of the legislature by creating substantive law in violation of the separation of powers doctrine. Article III is clear: the Legislative branch has the exclusive authority to create law. *See Taylor*, 1998-NMSC-015, ¶ 21. This Court has recognized that "the constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function." *Id.* ¶ 23 (*quoting Mowrer v. Rusk***,** 95 N.M. 48, ¶ 53, 618 P.2d 886, 891). Correspondingly, this Court has acknowledged that policymaking is inherent in the work of administrative agencies. *See Sandel*, 1999-NMSC-019, ¶ 12. For this reason, courts do not scrutinize the policymaking function incidental to administrative agencies, but that which "conflicts with or infringes upon what is the essence of legislative authority--the making of law." *Id.* In analyzing whether the

administrative body has impermissibly exercised legislative authority, a court evaluates whether the "administrative agency [has gone] beyond the existing New Mexico statutes or case law it is charged with administering and claims authority to modify this existing law or to create new law on its own." *Id.* The directive does just that.

A. The Directive Goes Beyond Existing Statute

A violation of separation of powers occurs when the executive exercises legislative power and contravenes legislative intent. In *State ex rel. Clark v. Johnson*, the New Mexico Supreme Court considered a mandamus petition alleging that the New Mexico Governor violated the separation of powers by exercising legislative authority to unilaterally enter into revenue sharing agreements with various presidents and governors of New Mexico Pueblos. 1995-NMSC-048, ¶¶ 2-3. The Court held that the Governor's actions violated the separation of powers doctrine stating that "[t]he Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature." *Id.* ¶ 34. The test articulated by the *Clark* Court to determine if a violation of separation of powers has occurred "is whether governor's action disrupts the proper balance between the executive and legislative branches." *Id*. In *State ex rel. Taylor v. Johnson*, the Court further clarified that an "administrative agency's discretion may not justify altering, modifying or

extending the reach of a law created by the Legislature." 1998-NMSC-015, ¶ 22. That is, an agency may not make "substantive policy changes reserved to the Legislature." *Id.* ¶ 25.

Here, CYFD directive is disruptive to, and encroaches on, legislative authority because it creates substantive policy change by extending the reach of the Abuse and Neglect Act. *See* NMSA 32-4-2(B)(1); NMSA 32A-4-2(G)(2). In essence, the directive creates a standard under which a positive test for substance exposure amounts to a *per se* violation of the Abuse and Neglect Act; a standard which is neither supported by statute nor case law. Further, it grafts a new standard, "potentially imminent physical harm" onto CYFD's evaluation of abuse and neglect cases thereby modifying the standards outlined in statute. *See* Memorandum from the Secretary of Children, Youth, and Families Dept. (July 7, 2025) (on file with the CYFD).

In 2025, the Legislature amended portions of the Children's Code to require the HCA, in consultation with several stakeholders, including CYFD, to develop rules to guide hospitals, birthing centers, providers, Medicaid managed care organizations (MCOs) and private insurers, in their management of prenatal substance exposure. NMSA 1978, Sections §§ 32A-31-1 to 32A-31-4. Yet, despite forming a part of the consultation process for the regulations, CYFD now claims the authority to modify existing law by creating parallel guidelines that

substantially contradict and diverge from both statute and regulation. That, it cannot do.

The directive departs from statute and regulation in several significant ways. To begin, the directive disregards requirements under the Voluntary Placement and Family Services Act and regulations implementing the federal CARA which require hospitals and providers to develop a "Plan of Care" for parents and caregivers prior to the discharge of a substance-exposed child. *See* NMSA 1978, § 32A-3A-13; 8.10.5.9(A) NMCA. In effect, the Plan of Care is an offer of support services "jointly created by the healthcare professional and the family" intended to assist families navigating care for a newborn while managing substance use. *See* 8.10.5.9(A) NMCA; 8.10.5.9(B) NMCA. Once created, the Plan of Care is also submitted to CYFD and the Health Care Authority providing notification of a positive test for substance exposure in a newborn. Therefore, the Plan of Care requirement is two-fold: a reporting mandate for healthcare facilities and an offer of support services to families. For this reason, neither statute nor regulation impose adverse actions on families who decline a Plan of Care. [14] *See* 8.10.5.8(A)(c); §32A-3A-13(C).

[14] Importantly, families are not required to accept a Plan of Care. Instead, "[families] may request a referral for services at a later time, *even if they have declined these services*, by communicating with their health insurance care coordinator or the CARA navigator, whose contact information shall be provided by the health care provider." 8.10.5.8(A)(c). Additionally, statute provides that "[r]eports made pursuant to Paragraph (3) of Subsection B of this section shall be collected by the department as distinct and separate from any child abuse report as captured and held or

CYFD's directive undermines this legislative choice by instead requiring that upon a positive toxicology test, CYFD *must* assume custody of the child and file a petition alleging the child was abused under NMSA 32A-44-2(B)(1) and neglected under NMSA 32A-4-2(G)(2). Memorandum from the Secretary of Children, Youth, and Families Dept. (July 7, 2025) (on file with the CYFD). Thus, the directive undermines not only the regulatory scheme outlined in the CARA regulations but also the Act's purpose

> "to ensure continuity and engagement of support services for the newborn and caregivers...to support [the family] to obtain resources and services that sustain family relationships and support the health and well-being of the infant and family members." NMSA 1978, § 32A-3A-13(8)(a)

Moreover, current CARA regulations and the Voluntary Placement and Family Services Act already address the exceptional scenario in which a referral to CYFD for suspected abuse or neglect is necessary prior to discharge from the hospital and both provide mechanisms through which such referrals are made. *See* § 32A-3A-13(C); § 32A-4-3(H); 8.10.5.9(J) NMAC. Thus, the directive's divergence from established procedures appears to be motivated less by addressing a gap in existing guidelines and more by the department's desire to enact punitive measures aimed

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investigated by the department, such that the reporting of a plan of safe care shall not constitute a report of suspected child abuse and neglect and shall not initiate investigation by the department or a report to law enforcement." §32A-3A-13

at birthing people with substance use issues or disorders—a purpose which runs counter to the legislative intent animating these provisions.[15]

Specifically, the directive dictates a mandatory protocol for reporting that runs contrary to statute. Under NMSA 1978, § 32A-4-3(G),

> "[a] finding that a pregnant woman is using or abusing drugs made pursuant to an interview, self-report, clinical observation or routine toxicology screen shall not alone form a sufficient basis to report child abuse or neglect to the department pursuant to Subsection A of this section."

Thus, while CYFD may file a petition alleging other violations under Section 32A-4-2, Section 32A-4-3(H) expressly directs a contractor or staff of a hospital providing prenatal or perinatal care to create a Plan of Care and provide notification to the Health Care Authority; not make a report of child abuse or neglect.

B. The CYFD Directive Contravenes Legislative Intent

The CYFD directive expressly contravenes legislative intent by enacting punitive measures inconsistent with the Children's Code. The *Clark* Court considered the legislative intent as dispositive in separation of powers claims. There, the Court reasoned that by entering into "permissive compacts" with the Pueblos "the Governor contravened the legislature's expressed aversion to commercial gambling and exceeded his authority." *Clark*, 1995-NMSC-048, ¶ 37.

[15] *See* NMSA 1978 § 32A-1-3, purpose of act.

So, too, does the CYFD directive contravene the legislature's "expressed aversion" to punitive family separation policies.

The Children's Code is unique amongst state statutes for its detailed purpose statement. In this preamble, the New Mexico Legislature articulates how the statute is to be "interpreted and construed to effectuate" the legislative purpose. § 32A-1-3. The purpose declared by the legislature is

> "the care, protection and wholesome mental and wholesome mental and physical development of children coming within the provisions of the Children's Code, then to preserve the unity of the family whenever possible. A child's health and safety shall be the paramount concern." § 32A-1-3(A).

Importantly, the legislature recognized the reality of separation of children from a family when severe injury or abuse has occurred, but reiterated "[i]t is the intent of the legislature that, to the maximum extent possible, children in New Mexico shall be reared as members of a family unit." § 32A-1-3(A). Thus, the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -35, must also be interpreted to effectuate the legislative intent of the Children's Code. Furthermore, as noted, the legislature determined that a positive toxicology screening alone is not grounds for abuse and neglect. *See* § 32A-4-3(G).

Therefore, the CYFD directive explicitly undermines the legislative intent of the Children's Code and NMSA 1978, Sections §§ 32A-31-1 to 32A-31-4 by opting for punitive measures where none have been imposed by the laws of the state. Tellingly, the Governor's public statements about CARA legislation

underscore that the CYFD directive emerged in response to the executive's dissatisfaction with CYFD's inability to immediately assume custody of infants under the current regulatory scheme.[16] However, regulation by executive fiat is principally what the separation of powers doctrine is meant to deter. The New Mexico Legislature chose to implement policies that prioritized the well-being of children while preserving the family unit. As of 2024, twenty-four other states opted for a different legislative choice that includes prenatal substance exposure and substance use in the state's definition of child abuse.[17] The New Mexico Legislature could choose to amend our law, but has so far declined to do so and from its most recent changes to the Children's Code it is reasonable to infer that punitive policies that separate families are inconsistent with the legislative intent underpinning the Children's Code.

IV. The CYFD Directive Undermines IFPA

Finally, the petitioners briefly address the CYFD directive's silence on the Indian Family Protection Act (IFPA), to comment that the directive erodes important procedural safeguards for Indian families. NMSA 1978 § 32A-28-1 to -

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[16] Jason McNabb, *New Mexico governor regrets signing law linked to infant deaths*, KOAT 7 (Feb. 11, 2026), https://www.koat.com/article/new-mexico-governor-regrets-signing-law- linked-to-infant-deaths/70307578.https://www.koat.com/article/new-mexico-governor-regrets-signing-law-linked-to-infant-deaths/70307578

[17] LEGIS. ANALYSIS AND PUB. POLICY ASS'N, SUBSTANCE USE DURING PREGNANCY AND CHILD ABUSE OR NEGLECT SUMMARY OF STATE LAWS 3 (2024).

42. The directive makes no reference to specific procedures and safeguards for Indian children and their families established in state and federal law. By contrast, under CARA regulations, CYFD must inquire about tribal affiliation and coordinate with tribal social services. *See* 8.10.5.10(A)(1)(b) NMAC. Likewise, the Voluntary Placement and Family Services Act requires collaboration with the child's respective tribe to ensure that the Plan of Care is culturally responsive and that the tribe receives a copy of the plan. *See* § 32A-3A-13(C). Notably, under IFPA a tribe has exclusive or concurrent jurisdiction over any Indian child depending on whether the child is domiciled on tribal lands. *See* § 32A-28-7(A)-(B). Further CYFD is required to make active efforts to "prevent the breakup of the Indian family." *See* § 32A-28-18(A). Heightened protections such as these were "enacted to stem the alarmingly high percentage of Indian families being separated by removal of children through custody proceedings*." State ex rel. Children, Youth & Families Department v. Marlene C.*, 2011-NMSC-005, ¶ 17, 149 N.M. 315, 248 P.3d 863. Without clear guidance outlining how the directive incorporates requirements under IFPA, the directive runs afoul of the very procedures designed to mitigate further harm to Indian families and, more broadly to well-established principles of tribal sovereignty.

V. CONCLUSION

For all the foregoing reasons, Petitioners respectfully request this Court to issue an emergency stay and a writ of mandamus restraining CYFD officials from the continued enforcement of the CYFD directive.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Rule 504(H), I certify that this petition complies with the type-volume requirement of Rule of Appellate Procedure 12-504(G). It contains 5,812 words in the body of the petition, according to a count by Microsoft Word.

Deanna Warren

_____
Staff Attorney

VERIFICATION

I, Deanna Warren, attorney for Petitioner state under oath that I have read this *Emergency Verified Petition for Writ of Mandamus and Request for Stay*, and the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: May 18, 2026

Deanna Warren

_____
Staff Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Emergency Verified Petition for Writ of Mandamus and Request for Stay was personally served, served by email, and served by U.S. mail to Respondents on May 19, 2026, on the following persons and entities:

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Deanna Warren

_____
Staff Attorney

EXHIBIT 1

Children, Youth & Families Department
STATE OF NEW MEXICO

Michelle Lujan Grisham, Governor
Howie Morales, Lt. Governor
Teresa Casados, Cabinet Secretary
Kathey Phoenix-Doyle, Deputy Secretary
Valerie D. Sandoval, Deputy Secretary

To: All Protective Services Staff

From: Amanda M. Romero, Acting Chief General Counsel

Date: July 7, 2025

CC: Valerie Sandoval, Deputy Director of Protective Services and Juvenile Justice
Aaron Salas, Director of Protective Services
Cynthia Tessman, Acting Chief Children's Court Attorney

Subject: Filing Petitions for Drug Exposed Infants

Effective immediately, in an abundance of caution, we are moving toward ensuring the safety of children exposed to certain drugs. For all screened-in investigations involving children born exposed to methamphetamines, fentanyl, poly-substance[1], or diagnosed with fetal alcohol syndrome, the child must be taken into custody and an abuse/neglect petition must be filed prior to discharge from the hospital. There will not be any exceptions to this requirement.

The petition shall allege that the child is abused pursuant to NMSA 32A-4-2(B)(1) and neglected pursuant to NMSA 32A-4-2(G)(2). If the facts of the case justify alleging other sections of the Abuse and Neglect Act, that should be done in addition to (B)(1) and (G)(2).

If the family has CPS history, the reasonable efforts section of the affidavit should reflect the prior services offered and efforts made. If the family does not have any prior CPS history, the reasonable efforts section of the affidavit should reflect that due to the serious nature of these types of drugs, the department is taking custody to ensure the safety of the child and to ensure that the parent(s) will be court ordered to obtain necessary treatment to alleviate potential substance abuse risks.

If there are other children in the home, a staffing should occur. That staffing must include the Deputy Director of Investigations, Associate Deputy Director and the Investigator.

If you have any questions or concerns regarding this, please do not hesitate to contact me and I will be happy to assist you.

Thank you!

[1] Poly-substance means the presence of two or more illegal substances or the presence of one illegal substance with THC and/or alcohol.

EXHIBIT 2

Children, Youth & Families Department
STATE OF NEW MEXICO

Michelle Lujan Grisham, Governor
Howie Morales, Lt. Governor

Teresa Casados, Cabinet Secretary

Kathey Phoenix-Doyle, Deputy Secretary
Valerie D. Sandoval, Deputy Secretary

MEMORANDUM

To: All Protective Services Staff

From: Teresa Casados, Cabinet Secretary

Date: July 11, 2025

Subject: Follow-up to 7/7/25 Memo regarding Filing Petitions for Drug Exposed Infants

As set forth in the July 7, 2025 memo regarding filing petitions for drug exposed infants, for all screened in investigations, the department is taking custody and filing abuse/neglect petitions in all instances where an infant was born exposed to methamphetamines, fentanyl, poly-substance, or diagnosed with fetal alcohol syndrome.

This practice is necessary due to the continuously growing threat to the safety of children in New Mexico posed by pre-natal ingestion of alcohol, fentanyl and other high-potency synthetic drugs. For instance, since 2018, there has been an increase in the number of child fatalities and near fatalities involving fentanyl and other drugs. Further, fentanyl is a high-potency synthetic opioid and, according to the Centers for Disease Control and Prevention, is 50 times more potent than heroin and 100 times more potent than morphine. Even very small quantities of high-potency synthetic opioids may, and have been, lethal to a child.

Removal of infants exposed to such substances is necessary to prevent potentially imminent physical harm. Importantly, removal is not based solely on a finding that a mother is using or abusing drugs. Rather, the safety and risk concerns concomitant with exposure to these substances are unacceptably high and indicate that a child is at risk of suffering serious harm, which is how our laws define an “abused child.” Further, the safety and risk concerns resulting from the ingestion of such substances by a parent are also unacceptably high and indicate that the parent is unable to safely discharge that parent's responsibilities to a child due to a physical disorder or incapacity, which is how our laws define a “neglected child.”

This practice is also consistent with New Mexico and federal laws. Under these laws, a plan of safe care is required for all infants born affected by substance abuse. Such a plan must ensure the safety and well-being of such infant following release from the care of a health care provider. These laws also require that immediate steps be taken to ensure the safety of a child in danger of child abuse or neglect. These laws are not mutually exclusive – i.e., the creation of a plan of safe care does not preclude a finding of abuse and neglect. The guidance documents relied on by the federal Administration for Children and Families, found here https://ncsacw.acf.hhs.gov/files/posc-module-3.pdf recognize that a plan of safe care is created even in situations where an abuse/neglect investigation is conducted by the state child welfare agency.

EXHIBIT 3

TITLE 8 SOCIAL SERVICES
CHAPTER 3 FAMILY HEALTH AND WELL-BEING
PART 2 PLAN OF SAFE CARE FOR SUBSTANCE-EXPOSED INFANTS

8.3.2.1 ISSUING AGENCY: New Mexico Health Care Authority (HCA).
[8.3.2.1 NMAC – N, xx/xx/xxxx]

8.3.2.2 SCOPE: New Mexico health care authority, New Mexico managed care organizations (MCOs), private insurance, children, youth and families department (CYFD), department of health (DOH), early childhood education and care department (ECECD), primary care providers, hospitals, birth centers, supportive services providers, perinatal providers, substance-exposed infants, birthing parents and their families, and caregivers.
[8.3.2.2 NMAC – N, xx/xx/xxxx]

8.3.2.3 STATUTORY AUTHORITY: Sections 9-8-6 NMSA 1978; 27-2-12 NMSA 1978; and 32A-3A-13 NMSA 1978.
[8.3.2.3 NMAC – N, xx/xx/xxxx]

8.3.2.4 DURATION: Permanent.
[8.3.2.4 NMAC – N, xx/xx/xxxx]

8.3.2.5 EFFECTIVE DATE: July 1, 2026, unless a later date is cited at the end of a section.
[8.3.2.5 NMAC – N, xx/xx/xxxx]

8.3.2.6 OBJECTIVE: The objective of this part is to establish standards and procedures for identification of substance-exposed infants; development, implementation, and monitoring of plans of safe care; coordination among state agencies, licensed facilities, and medicaid contractors; data reporting; and training.
[8.3.2.6 NMAC – N, xx/xx/xxxx]

8.3.2.7 DEFINITIONS:

A. Terms beginning with the letter "A": "Active efforts" mean a series of affirmative, active, thorough, complete, and timely actions aimed at maintaining or reuniting children with their families. This standard is higher than "reasonable efforts", which mainly involve service referrals. Active efforts require agencies to actively engage and assist families in overcoming barriers to services. Key aspects of active efforts include actively helping parents obtain services rather than just providing referrals, ensuring efforts are culturally appropriate and involve collaboration with the child's tribe, working in partnership with the family and tribe, tailoring efforts to each family's specific needs, meticulously documenting all efforts, and initiating these efforts promptly and continuing them throughout the case.

B. Terms beginning with the letter "B": "Birthing facility" means a licensed hospital that provides labor and delivery services or a licensed birth center.

C. Terms beginning with the letter "C":

(1) "CARA navigator" means an individual designated by the New Mexico HCA or its designee or contractor. A CARA navigator receives plans of safe care and notifications of substance-exposed infants and provides care coordination services for infants, parents, and families impacted by substance exposure. For purposes of Section 32A-3A-2(C) NMSA 1978, a CARA navigator serves as the care coordinator for substance-exposed newborns under this part and is distinct from care coordinators employed by medicaid managed care organizations who perform the care-coordination functions required under 8.308.10 NMAC.

(2) "**CARA navigation program"** means a program overseen directly by the New Mexico Health Care Authority or its contractor that provides navigation services to CARA infants and families, including support for facility CARA navigators in birthing hospitals and other participating facilities.

(3) "**CARA supports system portal"** means the electronic record of care owned and managed by HCA to provide statewide access to plans of safe care and related documentation supporting care coordination efforts for CARA families within the CARA navigation program.

(4) "**Care coordinator"** means, within the context of the CARA program, a CARA navigator.

(5) "**Caregiver"** means child's parents, relatives, guardians, custodians or caregivers in the household who provides care and supervision for the child.

(6) "**Clinician"** means a physician, midwife, physician assistant, nurse practitioner, or other prescribing provider licensed to interpret lab results and prescribe medication.

(7) "**Comprehensive Addiction and Recovery Act (CARA)"** means federal legislation signed into law in 2016 (Pub. L. 114-198, 130 Stat. 695).

D. Terms beginning with the letter "D": [RESERVED]

E. Terms beginning with the letter "E": [RESERVED]

F. Terms beginning with the letter "F": "Facility CARA navigator" means an employee or contracted representative who has on-site presence at birthing hospitals or birth centers.

G. Terms beginning with the letter "G": "Guardian" means a person appointed as a guardian by a court or by a Native American nation or tribal authority.

H. Terms beginning with the letter "H":

(1) "Health care professional" means a physician, physician assistant, nurse practitioner, nurse, licensed social worker, midwife or other relevant professionals who provide health care treatment to expectant or new parents or infants.

(2) "**Home visiting"** means engagement with a program that delivers a variety of information, educational, developmental, referral and other support services for eligible families who are expecting or who have young children under the age of five. Home visiting programs provider services that promote parental competence and early childhood development by optimizing the relationships between parents and children in their home environment.

I. Terms beginning with the letter "I": [RESERVED]

J. Terms beginning with the letter "J": [RESERVED]

K. Terms beginning with the letter "K": "**Key household member"** means any individual who lives at the infant's discharge address who is 18 years or older and provides care for the infant listed on the plan of safe care.

L. Terms beginning with the letter "L": [RESERVED]

M. Terms beginning with the letter "M":

(1) "Managed care organization (MCO)" means an entity that contracts with the HCA to deliver covered Medicaid services to enrolled members, including to assist the state in meeting the requirements established under Section 27-2-12 NMSA 1978.

(2) "Member" means a person enrolled in medicaid or a medicaid managed care organization.

N. Terms beginning with the letter "N": "Navigation services" means activities performed by a CARA navigator to receive and review POSCs and notifications, coordinate referrals, document actions, and follow up with families and providers.

O. Terms beginning with the letter "O": [RESERVED]

P. Terms beginning with the letter "P":

(1) "Parent" means a biological or adoptive parent with a constitutionally protected liberty interest in the care and custody of the child, or a person who has lawfully adopted a Native American child pursuant to state law or tribal law or tribal custom.

(2) "**Plan of safe care (POSC)"** means a written plan co-created with the birthing parent and family by a health care professional or care coordinator intended to ensure the immediate and ongoing safety and well-being of a substance-exposed infant or to provide perinatal support to a pregnant, birthing, or postpartum person with substance use disorder by addressing the treatment needs of the child and any of the child's parents, relatives, guardians, custodians or caregivers to the extent those treatment needs are relevant to the safety of the child.

(3) "**POSC non-compliance"** means a failure by the infant's family or caregivers to take a required POSC action or to accept a POSC referral identified as necessary for infant safety and well-being.

(4) "**Primary care provider (PCP)"** means a physician, nurse practitioner, physician assistant, or certified nurse-midwife who provides, supervises, and coordinates primary health care for the member, initiates referrals as needed, and maintains continuity of care.

(5) "**Private insurer"** means a private insurance company from which an employer or an individual purchases a health insurance policy.

Q. Terms beginning with the letter "Q": [RESERVED]

R. Terms beginning with the letter "R": [RESERVED]

S. Terms beginning with the letter "S":

(1) **"Safety family assessment"** means a comprehensive assessment prepared by the children, youth and families department to determine the needs of a child and the child's parents, relatives, guardians, custodians or caregivers, including an assessment of the likelihood of:

(a) imminent danger to a child's well-being;

(b) the child becoming an abused child or neglected child; and

(c) the strengths and needs of the child's family members, including parents, relatives, guardians, custodians or caregivers, with respect to providing for the health and safety of the child.

(2) "**Safety"** means freedom from present or impending serious harm.

(3) **"Screening brief intervention referral to treatment (SBIRT)"** means an evidence-based model designed to identify, reduce and prevent problematic substance use or misuse and co-occurring mental health disorders as an early intervention approach. SBIRT includes a universal verbal screening specific to age, a face-to-face brief intervention for positive screening results, and a referral to behavioral health services if indicated.

(4) "**Service provider"** means any state or community agency working with CARA families as identified in the plan of safe care (POSC).

(5) "**Substance-exposed infant"** means an infant under one year of age for purposes of this rule who was exposed in utero to a substance that has the potential to impact the health or development of the infant, including an illicit substance such as fentanyl, methamphetamine or heroin, prescribed medication such as opioids, methadone, buprenorphine, or legal substances including alcohol, tobacco, and marijuana. A substance-exposed infant is a substance-exposed newborn as otherwise defined in state law.

(6) "**Statewide central intake (SCI)"** means the unit within the children, youth and families department protective services division (CYFD PSD) whose responsibilities may include but are not limited to receiving and screening reports of alleged child abuse or neglect and prioritizing and assigning accepted reports to the appropriate county office for investigation.

T. Terms beginning with the letter "T": [RESERVED]

U. Terms beginning with the letter "U": [RESERVED]

V. Terms beginning with the letter "V": [RESERVED]

W. Terms beginning with the letter "W": [RESERVED]

X. Terms beginning with the letter "X": [RESERVED]

Y. Terms beginning with the letter "Y": [RESERVED]

Z. Terms beginning with the letter "Z": [RESERVED]

[8.3.2.7 NMAC – N, xx/xx/xxxx]

8.3.2.8 **CARA PROGRAM:** The overall objective of the New Mexico's comprehensive addiction and recovery (CARA) program is to ensure the safety and well-being of infants. The CARA program also provides support and resources for families experiencing substance use disorder to keep families together when that option is safe for the infant. Need for a CARA plan of safe care (POSC) may be identified during prenatal care, during the delivery episode, or after a child is born.

[8.3.2.8 NMAC – N, xx/xx/xxxx]

8.3.2.9 **IDENTIFICATION OF SUBSTANCE-EXPOSED INFANTS:**

A. Providers must be using an evidence-based verbal screening brief intervention with referral to treatment (SBIRT) model at all prenatal or perinatal medical visits and live births to identify substance use in pregnancy.

B. Infants are identified as substance exposed as evidenced by toxicology results of the newborn or mother as interpreted by a clinician, or when the mother discloses substance use during pregnancy.

C. Hospitals, birth centers, and perinatal providers shall use an evidence-based tool to evaluate infants born affected by substance use or withdrawal symptoms resulting from prenatal drug exposure or fetal alcohol spectrum disorder.

D. Meconium, cord, and other lab toxicology shall be ordered as determined by clinicians when the results will impact the clinical or medical management of the child. They shall not be done without indication and discussion with the child's parents or guardians with the exception of a medical emergency.

[8.3.2.9 NMAC – N, xx/xx/xxxx]

8.3.2.10 **RESPONSIBILITIES REGARDING PLAN OF SAFE CARE CREATION:**

A. When an infant in New Mexico has been identified as substance exposed, a plan of safe care POSC must be created by the hospital, birthing center, or perinatal provider who receives this information. All

providers at hospitals, birthing centers, or providers who perform perinatal medical visits, must be routinely, verbally screening for substance use disorder in pregnant, birthing, and postpartum people and developing POSC when identifying substance use in pregnancy. If the POSC has not been developed in the prenatal period, it must be created prior to discharge from the hospital. Providers should access the CARA supports system portal (CSSP) to identify if a POSC has already been created. If not, these providers are required to create the POSC upon identification of the substance use. To the extent permitted by applicable federal and state privacy and confidentiality laws, including HIPAA and 42 C.F.R. Part 2, notification of the active POSC shall be shared with the following parties either in a physical copy, telecommunication or an electronic version within a reasonable timeframe but within no less than 24 hours of discharge.

(1) The child's primary care provider.

(2) The child's parent, relative, guardian or caregiver.

(3) The CARA navigator/care coordinator.

(4) If the child's parent, relative, guardian, custodian, or caregiver is a tribal member or resides on tribal land, the respective nation, pueblo, or tribe's responsible entity as identified by tribal leadership.

(5) If there is CYFD involvement due to submission of a statewide central intake (SCI) or a family assessment, the respective staff from CYFD will receive a copy from the CARA navigator if they are not able to access the POSC via the CSSP.

B. Plans of safe care should be signed by the parent, relative, guardian, or caregiver and the provider. This can be discharging hospital staff, the birthing center staff, or the perinatal provider who created the POSC. When parents, relatives, guardians, or caregivers refuse to sign the POSC that is considered POSC non-compliance and the provider shall initiate a referral to CYFD SCI to request a family assessment.

C. A CARA POSC seeks to engage the family in support and treatment and is not on its own a referral to CYFD. The CARA POSC does not replace a report to the SCI system of CYFD. If child abuse or neglect is suspected, a SCI report shall be made.

D. Emergency department or urgent care deliveries: In situations where a delivery occurs before transfer can occur to a birthing facility, the staff in the emergency or urgent care department shall initiate a POSC if the family qualifies for one based on verbal screening.

[8.3.2.10 NMAC – N, xx/xx/xxxx]

8.3.2.11 REQUIREMENTS OF THE PLAN OF SAFE CARE:

A. The POSC shall include the following components:

(1) Referral to substance use prevention and treatment programs for the pregnant or birthing parent or guardian.

(2) Referral for a home visiting program or an early intervention family infant toddler program for the infant overseen by ECECD.

(3) Indication that the CARA navigator is engaging in communication, collaboration, and consultation with a child's nation, pueblo, or tribal social services/Indian Child Welfare Act (ICWA) coordinator to ensure the POSC is developed in a culturally responsive manner for each Native American.

(4) Information about the child and the child's family, including:

(a) The child's name, if available at discharge

(b) Emergency contact name and phone number of at least one of the child's parents, relatives, guardians, custodians, or caregivers. If the parent or caregiver state they do not have a phone, they are required to provide contact information for someone they keep in regular contact with who would serve as a contact for the CARA Navigator.

(c) The address of the child's parent(s), relatives, guardian, custodian or caregiver who will be taking the child home from the birthing facility.

(d) The names of the parents, relatives, guardians, custodians, or caregivers who will be living with the child.

(e) In-utero exposures**:** If an infant is exposed to any substances during pregnancy, all exposures shall be documented in the POSC. Documentation of exposures includes exposures occurring during the timeframe in which the mother may not have known she was pregnant, and all substance exposures, including, but not limited to tobacco, fentanyl, heroin, methamphetamine, cocaine, alcohol, marijuana (medical or recreational), and medication assisted therapy such as methadone and buprenorphine.

(f) Substance use assessment: The parents, domestic partners and key household members shall be offered screening or referral for assessment for substance use disorders, as clinically appropriate

and with consent. If it is determined they have a substance use disorder, it shall be documented in the POSC. A copy of the POSC will be provided to individuals for whom such referrals are made.

(g) Services and referrals: The POSC shall also include the services for which the family agrees to be referred as well as services the family is already participating in. If the family declines services in their community, the healthcare professional clearly documents this within the POSC. Families shall be informed that they may request a referral for services at a later time, even if they have declined these services during the initial development of the POSC, by communicating with their CARA navigator(s). If families decline all services identified as necessary to address infant safety and well-being, the provider shall follow the non-compliance referral requirements in section 8.3.2.13 NMAC.

(h) The POSC shall include contact information for the infant and family's CARA navigator assigned to coordinate the implementation of the family's POSC pursuant to New Mexico Statutes section 32A-3A-13(B)(8) (2024).

(i) Health insurance and care coordinator information: The POSC shall identify the managed care organization (MCO) or private insurer that the mother and infant are enrolled with and include contact information for the insurer.

(j) Unknown information: If the individual completing the POSC does not have specific information necessary to complete the POSC, they shall fill it out to the best of their ability and write unknown where the information is not known. The assigned CARA navigator is responsible for completing the missing information once they receive the POSC. If a caregiver declines to participate in the creation of the POSC the staff member will indicate this on POSC and submit as notification to the CARA program and to CYFD.

B. In all situations where a SCI report or a CYFD family assessment referral is placed, the individual submitting the SCI report or a CYFD family assessment will access the POSC for the child in the CSSP and update the POSC to show that a SCI report or a CYFD family assessment has been placed.

C. If an infant enters CYFD custody after a POSC has been created, the POSC shall be modified by the CARA navigator to address the needs of the infant in the new setting. The updated POSC shall contain the resource family's information and shall be re-sent to all entities required to receive copies of the POSC.

D. The POSC may include the following referrals:

(1) Public health agencies;

(2) Maternal and child health services;

(3) Infant mental health providers;

(4) Public and private children and youth agencies;

(5) Early intervention and development services;

(6) Courts;

(7) Local education agencies;

(8) Managed care organizations; and

(9) Hospitals and medical providers.

[8.3.2.11 NMAC – N, xx/xx/xxxx]

8.3.2.12 IMPLEMENTATION OF THE CARA NAVIGATION PROGRAM:

A. All infants with a POSC shall receive care coordination services through a CARA navigator. HCA shall oversee and monitor implementation of this Part and shall assure compliance with applicable federal and state law, including CARA and Section 32A-3A-13 NMSA 1978, by designating CARA navigators, maintaining procedures for receipt and review of plans of safe care and notifications, and initiating corrective action when required.

B. CARA navigators and CARA navigation programs shall use an evidence-based intensive care coordination model that is listed in the federal Title IV-E prevention services clearinghouse or another nationally recognized EB clearinghouse for child welfare.

C. CARA navigators are direct agents of HCA or its subcontractors who are designated to manage the CARA program and the associated care coordination activities to:

(1) Ensure the plans of safe care are implemented and CARA families are supported;

(2) Assure compliance with the Comprehensive Addiction and Recovery Act and this Part; and

(3) Collaborate with all state agencies and service providers to ensure continuity of care and implementation of the CARA program.

D. CARA navigators shall:

(1) Complete a POSC if it was not completed by the infant hospital discharge staff upon their initial contact.

(2) Ensure that, if CYFD is involved, the POSC is provided to the assigned investigator or other CYFD service provider working with the family in the case of a family assessment.

(3) Send a copy of the POSC to the infant's PCP within five business days of receiving notification for a new POSC.

(4) keep the parent or caregiver updated and informed when changes are made to the POSC in a timely manner.

(5) Upon receiving a copy of or the notification of new POSCs for each infant with substance exposure review plans of care for completeness, ensure that a PCP is identified, assure that correct insurance information is on the plan, and verify that all referred services are complete or in process and moving towards completion.

(6) Work directly with the infant and family to ensure that necessary referrals are in place, appointments are scheduled and attended and to work with family on progression where progression has stalled to support the family in sustaining engagement with services that promote infant safety and well-being.

(7) Act as a liaison to MCOs or private insurances if there is any issue in accessing necessary resources available within their health plan such as substance use disorder treatment or home visiting services.

(8) Act as the primary point of contact to support coordination of the infant's POSC related services while the family is engaged in the CARA navigation program.

(9) If the CARA navigator is unable to establish contact with the family after documented outreach or identifies that the family has not engaged in POSC identified services such as home visiting or substance use disorder (SUD) treatment, the CARA navigator shall contact SCI within 24 hours to request a family assessment. Outreach shall include at least three attempts at different times of day and one in-person visit to the home.

(10) The CARA navigator shall make a report to CYFD SCI if the CARA navigator has immediate concerns for abuse or neglect.

(11) During any CYFD screening or investigation, continue plan of safe care coordination and outreach and document all contacts, services, and outcomes.

(12) If CYFD declines to open a case or closes a case without custody, the navigator shall, within five business days:

(a) attempt contact with the family at least three times using at least two modalities;

(b) escalate to CARA Navigation Leadership to review barriers and amend the plan of safe care as needed;

(c) schedule follow-up in the home to establish the necessary intensity of engagement given CYFD decision in not pursuing a custody situation within 14 days; and

(d) if safety concerns persist or new information arises, make a new referral to CYFD SCI.

(13) A navigation case may be closed only when navigation closure criteria in Subsection F of 8.3.2.12 NMAC are met.

E. Facility CARA navigator/care coordinator: Are direct agents of the HCA or its subcontractor, who add on-site presence of the CARA navigation program to hospitals. There shall be facility CARA navigator coverage at every birthing facility in the state. Facility CARA navigators shall:

(1) Ensure that all substance-exposed infants who have a plan of safe care receive care coordination to implement the plan of safe care.

(**2**) Communicate, collaborate and consult with a child's nation, pueblo, or tribe to ensure that plans of safe care are developed in a culturally responsive manner for each child.

(3) Identify appropriate agencies to be included in POSC based on an assessment of the needs of the child.

(4) Hospitals are required to ensure facility CARA navigators have the necessary information about CARA infants.

F. Navigation closure criteria: A navigator may close a case when one of the following occurs:

(1) the family graduates from the CARA program when the infant is 13 months old and the family and the CARA navigator mutually agree that services are no longer needed;

(2) the infant relocates out of state, or other circumstances documented by the navigator make continued navigation impracticable. The CARA navigator shall attempt to connect the infant and family to medicaid or care coordination in their new location; or

(3) For non-responsive, difficult to engage families the CARA Navigator shall check with Family Services at CYFD to see if they are engaged with the family.

(a) If family services is engaged with the family and provides services, navigator shall interact with family services to provide updated documentation in CARA system of family services involvement.

(b) If family is not engaged with family services, navigator should reach out again to determine if the family would like any support from the navigator. If family still refuses CARA navigation, the CARA navigator program shall have processes in place to monitor listed CARA participants for law enforcement activity and or emergent medical care activity that shall prompt a new SCI report until the child is 13 months old.

(4) the infant's nation, pueblo, or tribe has assumed full responsibility for a navigation case and has not requested state agency support. The CARA navigator shall document the name of the person responsible at the nation, pueblo, or tribe who advised the state the nation, pueblo, or tribe is assuming full custody.
[8.3.2.12 NMAC – N, xx/xx/xxxx]

8.3.2.13 REFERRAL TO CYFD FOR SAFETY FAMILY ASSESSMENT:

A. When a family is not compliant with a POSC then the provider or CARA navigator shall contact CYFD SCI within 24 hours to request a safety family assessment.

B. Based on the results of the safety family assessment, CYFD may offer or provide referrals for counseling, treatment, or other services aimed at addressing the underlying causative factors that may jeopardize the safety or well-being of the child. The child's parents, relatives, guardians, custodians or caregivers may choose to accept or decline any service or program offered subsequent to the family assessment; provided that if the child's parents, relatives, guardians, custodians or caregivers decline those services or programs, and the CYFD determines that those services or programs are necessary to address concerns of imminent harm to the child, the CYFD shall proceed with an investigation.

C. If CYFD does not assume custody following screening or investigation, the facility, MCO, and navigator responsibilities under 8.3.2.10 through 8.3.2.12 NMAC remain in effect until navigation is closed under Subsection F of 8.3.2.12 NMAC.
[8.3.2.13 NMAC – N, xx/xx/xxxx]

8.3.2.14 TRAINING REQUIREMENTS

A. HCA will provide training to hospitals on SBIRT and evidence-based assessment tools to evaluate infants born exposed to substances.

B. Hospitals and clinics that perform perinatal visits are required to ensure staff that interface directly with birthing people and infants have the necessary training.
[8.3.2.14 NMAC – N, xx/xx/xxxx]

8.3.2.15 DATA AND REPORTING REQUIREMENTS: The HCA shall be responsible for collecting data entered by hospitals, birthing facilities, health care providers and CARA navigators in the CARA supports system portal to meet federal and state reporting requirements, including the following from prenatal care offices, hospitals, birthing centers, and the CARA navigation program. All data collection and reporting under this section shall comply with applicable federal and state privacy and confidentiality laws, including HIPAA and 42 C.F.R. Part 2, as applicable.

A. The primary substance(s) the infant was exposed to.

B. The services that infants and families were referred to

C. The availability and uptake of the services

D. Whether an infant or an infant's family was subsequently reported to CYFD

E. Data will be shared with children's medical services, family health bureau, department of health, and CYFD for epidemiological analysis.
[8.3.2.15 NMAC – N, xx/xx/xxxx]