

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

No. _____

The AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO,

Plaintiff,

v.

**The NEW MEXICO CHILDREN, YOUTH AND
FAMILIES DEPARTMENT, BILL DUNBAR, Secretary,
New Mexico Children, Youth and Families Department,
and DEBRA PRITCHARD, Director, Juvenile Justice Services,
New Mexico Children, Youth and Families Department,**

Defendants.

**PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT**

Plaintiff, the American Civil Liberties Union of New Mexico (hereafter, "ACLU-NM"), through its counsel of record, moves this Court for a temporary restraining order and a preliminary injunction to prevent unlawful conduct by Defendants, the New Mexico Children, Youth and Families Department ("CYFD"), and officials thereof. As will be described below, Defendants' conduct, if not enjoined by this Court, will harm Plaintiff and its constituents on whose behalf it is acting, the New Mexico youth who have been adjudicated as delinquent, causing irreparable harm to Plaintiff and to those youth. Immediate injunctive relief is warranted under the circumstances because: 1) Plaintiff and its constituents on whose behalf ACLU-NM entered into a September 3, 2009 Agreement ("2009 Agreement") with Defendants, will suffer irreparable harm if such relief is not granted; 2) Plaintiff's threatened injury and the injury to its constituents who are the intended beneficiaries of the 2009 Agreement outweigh any harm that might be caused to Defendants as a result of granting such relief; 3) such relief is not adverse to

the public interest; and 4) Plaintiff has a substantial likelihood of success on the merits of the underlying case. Plaintiff provided counsel for Defendants (“CYFD”), Acting General Counsel Chris Romero, and Assistant CYFD General Counsel Scott Cameron, with a copy of this motion prior to its filing and telephoned them regarding same. Counsel for Defendants do not consent to this motion.

INTRODUCTION

1. This is an action for breach of contract and breach of the implied covenant of good faith and fair dealing which is brought by ACLU-NM on behalf of itself and all New Mexico youth who have been adjudicated as delinquent. This action challenges the failure of the named New Mexico officials and CYFD to comply with the 2009 Agreement reached between CYFD and ACLU-NM, which requires CYFD, *inter alia*, to protect the safety of these youth, to treat them fairly and to provide them with proper mental health treatment, substance abuse treatment and medical care. The 2009 Agreement is attached as Exhibit 1 to the Complaint filed herewith.

2. In 2003, because of complaints received by ACLU-NM from parents about the lack of mental health treatment and the abuse of their children in CYFD custody, ACLU-NM authorized its cooperating attorneys to investigate CYFD’s treatment of youth who have been adjudicated delinquent and placed in Defendants’ care, custody, and treatment.

3. During the first half of 2005, on behalf of these youth, ACLU-NM prepared a class action lawsuit to address what it perceived as the most pressing systemic safety, programmatic and procedural deficiencies. In August 2005, at CYFD’s request, settlement negotiations were undertaken before the case was filed. On February 15, 2006, ACLU-NM entered into an agreement on behalf of all New Mexico youth who have been adjudicated

delinquent.

4. In late 2007, ACLU-NM sued CYFD for its failure to comply with the 2006 Agreement.

5. On September 3, 2009, CYFD settled that lawsuit and entered the 2009 Agreement with ACLU-NM, on behalf of all New Mexico youth adjudicated delinquent, to rectify CYFD's violations of the original agreement.

6. After more than fourteen months, Defendants still have not implemented many important requirements of the 2009 Agreement, and their non-compliance is causing these youth to continue to suffer irreparable harm, in the form of violations of their rights both under the 2009 Agreement and under the New Mexico Constitution.

7. The 2009 Agreement resulted from misrepresentations by CYFD. At the time that ACLU-NM entered into the 2009 Agreement, it was unaware that a number of CYFD personnel had misled the ACLU-NM and its counsel about facts material to the 2009 Agreement. Moreover, since the 2009 Agreement was signed in September 2009, Defendants and other agents of the CYFD have continued to mislead the ACLU-NM and its counsel, knowingly and deliberately attempting to conceal their non-compliance with the 2009 Agreement. The misrepresentation of material facts prior to the entry of the 2009 Agreement, CYFD's on-going misrepresentations and concealment of facts material to the issue of CYFD's noncompliance with the 2009 Agreement, and Defendants' bad faith are important bases for the Court now granting remedial equitable relief to ACLU-NM and the youth in CYFD's custody.

8. The Complaint herein seeks *inter alia* to specifically enforce the terms of the 2009 Agreement and to obtain the following injunctive relief, based upon CYFD's bad faith and their continuing non-compliance with the 2009 Agreement:

A. Extending the term of the 2009 Agreement past its original termination date of December 31, 2010;

B. Mandating Defendants to comply with the 2009 Agreement by providing the programs, services, mental and medical health care and safe living conditions required by the Agreement, specifically including establishing a plan to address the needs of incarcerated youth over the age of eighteen;

C. Compensating the youth who are the beneficiaries of the 2009 Agreement for CYFD's non-compliance;

D. Awarding liquidated damages for those violations of the Agreement which were deliberate or in bad faith; and

E. Awarding reasonable attorneys' fees and costs.

Alternatively, the Complaint asks the Court to:

F. Vacate the September 3, 2009 Agreement and return ACLU-NM and CYFD to the positions they were in prior to September 3, 2009; in litigation regarding noncompliance with the original February 15, 2006 agreement.

9. This Motion for a Temporary Restraining Order and Preliminary Injunction seeks to maintain the status quo until the merits of the Complaint herein can be fully adjudicated by:

A. Ordering CYFD to continue to afford to ACLU-NM and its agents the same access to information, to the youth in CYFD's care and custody, and to CYFD's facilities, documents, and personnel that it currently affords ACLU-NM under the 2009 Agreement;

B. Requiring CYFD to continue to work with Missouri Youth Services Inc. to implement Cambiar New Mexico, including prohibiting CYFD from breaking up the groups of youth who live together in CYFD's secure facilities when they participate in their educational

programs;¹

C. Requiring CYFD to continue the operations of the Technical Assistance Committee (“TAC”); and

D. Requiring CYFD to continue to work together with the neutral experts who have worked with the parties since 2006, providing the experts with the same access to information and the same cooperation that CYFD has afforded them since September 3, 2009.

BACKGROUND

10. The 2009 Agreement, in its Appendix A, provides for concrete, comprehensive remedial steps that Defendants promised to implement in order to promptly remedy the many programmatic, safety and procedural deficiencies set forth above in the Complaint. The 2009 Agreement requires CYFD to implement fundamental reforms of its secure facilities by, among other things, contracting with a consulting organization, Missouri Youth Services Inc., to train staff, coach staff and their supervisors and to consult with CYFD’s leadership to implement ‘the Missouri Model’ of youth corrections services, called here in New Mexico “Cambiar New Mexico.”

11. Appendix A of the 2009 Agreement is entitled “The Way Forward” (“TWF”) and the subjects covered by Appendix A are:

- I. Quality Assurance
- II. Safety and Security
- III. Behavioral Health
- IV. Medical
- V. Other Issues

12. The mechanism for implementing the 2009 Agreement, and for establishing plans

¹ The 2009 Agreement provides, “CYFD is in the process of adapting the innovative Missouri model to meet the needs of the Department, its staff, and the youth in its care, and implement this adapted model –Cambiar New Mexico- in its facilities.” TWF, Appendix A, p. 1.

and procedures for the required reforms, was the Technical Assistance Committee (“TAC”). Paul DeMuro, a nationally recognized expert in juvenile justice issues who had been consulting with ACLU-NM, then-CYFD Secretary Dorian Dodson, and Dr. Pamela McPherson, a psychiatrist who is an expert in behavioral health services for youth involved in juvenile justice, were the leaders of the TAC. Paul DeMuro drafted the initial version of The Way Forward, then mediated its final form between the parties. The 2009 Agreement authorized the TAC to draft similar plans to address six other areas of juvenile justice. The TAC was also charged with providing on-going technical assistance and advice to CYFD with respect to juvenile justice issues.

**DEFENDANTS MISREPRESENTED MATERIAL FACTS
PRIOR TO SEPTEMBER 3, 2009 FORMATION OF 2009 AGREEMENT**

13. In October 2009, evidence was provided to ACLU-NM that, in the Spring of 2009, CYFD officials had deceived both ACLU-NM and the designated neutral medical expert, Dr. Robert Greifinger, by providing them with fabricated documents which falsely misrepresented that CYFD was conducting Quality Assurance Committee meetings for the purpose of identifying and correcting deficiencies with respect to the medical and psychiatric care provided to youth held in CYFD’s delinquency facilities. Fraudulent minutes of non-existent committee meetings were given to ACLU-NM and to Dr. Greifinger to create the false impression that CYFD was conducting such meetings periodically and that CYFD was taking timely corrective actions to address identified deficiencies in the medical and mental health care it provided to youth. Evidence of the deceit was provided to the ACLU-NM by a whistle-blower shortly before Dr. Greifinger’s October 2009 audit.

14. At the time that ACLU-NM entered into the September 3, 2009 Agreement, it was unaware that a number of CYFD personnel had misled ACLU-NM and its counsel about facts

material to the 2009 Agreement. Moreover, since the 2009 Agreement was signed in September 2009, Defendants and other agents of CYFD have continued to mislead ACLU-NM and its counsel, deliberately attempting to conceal their non-compliance with the 2009 Agreement. The misrepresentation of material facts prior to the entry of the 2009 Agreement, CYFD's ongoing misrepresentations and concealment of facts material to the issue of CYFD's compliance with the 2009 Agreement, and the bad faith by CYFD officials are important bases for the Court to now grant equitable remedial relief to ACLU-NM and the youth in CYFD's custody.

15. ACLU-NM could have brought this action earlier had not Defendants misrepresented their progress under the 2009 Agreement and concealed their violations. The Court could have easily granted effective injunctive relief within the timeline of the 2009 Agreement, before December 31, 2010, if not for Defendants' deceptions. Accordingly, equity requires injunctive relief, to remedy Defendants' misrepresentations, set forth below.

16. Misrepresentations by CYFD Underlying Dr. Greifinger's April 2009 Report

A. In his report dated April 25, 2009, Dr. Greifinger found CYFD in substantial compliance with the February 2006 Agreement with respect to medical services based, in part, on CQI information provided to him by CYFD: "The minutes of the quality improvement committee for the past three months demonstrate appropriate self-criticism and they contain action plans."

B. After entering into the September 3, 2009 Agreement, ACLU-NM obtained evidence that CYFD had deceived both ACLU-NM and Dr. Greifinger, by providing them with fabricated documents which falsely misrepresented that CYFD was conducting Quality Improvement Committee meetings for the purpose of identifying deficiencies with respect to medical care provided to youth held in CYFD's delinquency facilities. Fraudulent minutes of

non-existent committee meetings were given to ACLU-NM and Dr. Greifinger to create the false impression that CYFD was conducting such meetings periodically and that CYFD was taking effective corrective actions to address identified deficiencies in the medical and mental health care it provided to youth.

C. ACLU-NM received information that the minutes of Quality Improvement Committee meetings, which had been provided to Dr. Greifinger and ACLU-NM were fabrications. After Dr. Greifinger's April 2009 report was issued, an employee complained about the fraud to CYFD administrators. In response to that complaint, Deputy Director of Juvenile Justice Services Michael Bronson inaccurately replied: "The CQI meetings were reconstructed in May right before the Dr. Greifinger audit, the results of his most recent audit determined that the medical department did hold the required CQI meetings and met all ACLU obligations." Defendant Debra Pritchard, CYFD's Director of Juvenile Justice Services, later confirmed Bronson's incorrect determination, finding the nurse's complaint unsubstantiated.

D. When ACLU-NM transmitted to Dr. Greifinger in October 2009 the evidence that they had obtained, Dr. Greifinger investigated the allegations, and concluded in his October 15, 2009 report:

"In my last report, I noted that the minutes of the quality improvement committee for the past three months demonstrated appropriate self-criticism and action plans. During the week of my visit, it became apparent that some performance measurement has been carried out, but there had not been any quality improvement committee meetings during the 2009 calendar year. The minutes that had been presented were not minutes at all, but rather were summaries of problem identification and action steps taken by the nurse administrator, written from memory, in retrospect. My prior recommendations for training the nursing leadership on chart review and integration into the quality improvement activities were not followed. . . .

A staff member's complaint about erroneous minutes was ignored by a Deputy Secretary of CYFD....

CYFD is not in compliance with this element of this Agreement....

The quality management program needs a complete overhaul...."

October 12, 2009 Report, p. 3 (emphasis added).

**DEFENDANTS HAVE CONTINUED TO MISREPRESENT
MATERIAL FACTS SINCE ENTERING INTO SEPTEMBER 2009 AGREEMENT**

17. CYFD has continued to make material misrepresentations to Dr. Greifinger and to ACLU-NM. In May 2010, Dr. Greifinger conducted his next audit of medical care, as provided in the 2009 Agreement. He initially authored a report finding that CYFD had achieved substantial compliance with the commitments it had made to ACLU-NM with respect to medical care.

18. However, in late July 2010, the medical expert was contacted by an attorney representing a CYFD employee, who disclosed that during Dr. Greifinger's May 2010 audit several high-ranking CYFD employees, including Defendant Pritchard, had engaged in a cover up to conceal from Dr. Greifinger the truth regarding various deficiencies in medical care and to conceal that CYFD's quality management system for improving medical care was still not operating in the way that CYFD was claiming.

19. On August 21, 2010, Dr. Greifinger issued a revised report regarding his May, 2010 audit of medical care. The report stated:

On the basis of the information that I have obtained through documents and review of records since July 29, 2010, it is clear to me that the basis for my report, dated May 17, 2010, was flawed, due to deliberate suppression of information on significant deficiencies in medical care at SJDC [San Juan Detention Center] and the withholding of quality assurance information and activity. Based on facts that I have obtained and reviewed, I find that the medical care for each of the nine clients in custody of SJCJDC during April and early May was deficient. This is the finding I would have made in my May 17, 2010, had I been presented with the information I have now. This finding of non-compliance with the Agreement, in my role as medical expert for the parties, would have led to a return visit to assess compliance with the Agreement. Further, the quality management process at CYFD did not legitimately incorporate problems that had been identified and failed to verify whether the identified problems had actually been corrected. The CYFD is not compliant with the Agreement regarding medical care for youth in custody. I affirm the withdrawal of my report, dated May 17, 2010, based on a

misrepresentation of a material fact.

August 21, 2010 Report, p. 4 (emphasis added).

20. In response to the withdrawal of the May 2010 Report, a November, 2010 medical audit was conducted. That audit disclosed that CYFD has not performed the medical CQI studies that they told Dr. Greifinger in May 2010 would be performed during 2010 and that contract facilities housing youth committed to CYFD's custody have been excluded from any CQI or quality assurance processes.

21. Misrepresentation Regarding Practice of Restraints After Three Strikes

A. In a memorandum to all facility staff dated April 27, 2010, Defendant Pritchard declared:

There is NOT a "three strikes" directive allowing for use of force in our facilities, where uncooperative clients are to be given three chances to comply and if they do not, force can then be used against them.... This type of "use of force" to gain client compliance is not allowed under current JJS policy and procedure governing use of force. [Emphasis in original.]

B. However, for at least several months prior to this memorandum, Defendant Pritchard was copied on at least several grievances by youth alleging that they had been subjected to this very practice: they had been physically restrained by staff after their third refusal to follow orders by the staff. In addition, several of these same youth told ACLU-NM that Defendant Pritchard was present in the unit when they were subjected to restraints following their "third strike."

22. It is therefore inconsistent, and indeed disingenuous, for Defendant Pritchard to disclaim knowledge of a practice that she acknowledges violates JJS policy and procedure when she was aware of the practice and may very well have been present for its implementation.

23. Misrepresentations to Legislative Finance Committee in ACLU-NM's

Presence in May 2010

A. During the Legislative Finance Committee hearings in Las Cruces on May 12, 2010, Defendant Pritchard stated that “87.7% of clients that completed their supervised release since July 1, 2009 were successful.” ACLU-NM questioned CYFD regarding this figure, requesting the basis for this calculation.

B. CYFD responded that the basis for its 87.7% figure could be found on the PowerPoint slide used by Defendant Pritchard at the LFC hearing. That slide made the identical conclusion to that noted above, underneath three graphs indicating the total number of clients during that time period released to family, released to community programs, and released to reintegration centers, respectively, and the proportion of clients in each of the three categories whose release was either completed or revoked.

C. ACLU-NM made its own calculation of the success of clients placed on supervised release since July 1, 2009 based on documents earlier provided by CYFD, and the result flatly contradicted the 87.7% figure provided by CYFD to the LFC.

24. Misrepresentation Regarding Modified Programming of J.M. in June 2010

A. ACLU-NM met with CNYC client J.M. on June 4, 2010. She told them that she had been, and continued to be, locked down in her room on “modified programming” since May 30 after receiving two incident reports on May 27. She was not told how long she would be on the program, of what the program consisted, or how she might complete the program. She did not have her hearing for the two Incident Reports (“IRs”) until June 4. She did not want to be locked in her room, and was growing increasingly depressed as she had spent the vast majority of a week sitting in her room.

B. On June 7 ACLU-NM requested from CYFD documentation of her IRs, the

hearings, and her modified programming, in a letter that also set forth what ACLU-NM learned as stated in the preceding paragraph. The next day, June 8, J.M., as well as one other girl on her unit who was also presently on modified programming, were abruptly and without explanation removed from such programming by order of the CNYC Superintendent.

C. On June 10 Defendant Pritchard addressed this issue herself, stating:

After talking to our staff as part of our own investigation into the issue, the assigned therapist and the case manager provided the following details on [J.M.]: She was and is in her room between one and one and a half hours a day (besides sleeping time).... She has been attending school which is now on break.... [W]e will provide you with the documentation you request so that you can review it as we are to see what happened.”

D. ACLU-NM reviewed the documents provided by CYFD and performed its own review of J.M.’s files, and found no evidence that she either attended or was suspended from school. In addition, even if she did attend school, CYFD’s own documents make clear that J.M. was only otherwise out of her room for 30 minutes on the morning shift and 30 minutes on the evening shift (her “30/30”). ACLU-NM later learned that at least 6 other CNYC clients had been placed on such programming since January 1, 2010, with five of them on such programming for between 5 and 32 days, during which time they also only received their 30/30 out of their rooms.

25. First Misrepresentation Regarding Access to Youth in August 2010

A. Under the 2009 Agreement, ACLU-NM members “are authorized to interview any youth for purposes of monitoring the implementation of this Plan” and “may also review any information pertaining to the needs of adjudicated youth (in either redacted form or with a youth’s consent as to documents in which youth are personally identified),” including all information in a youth’s files.

B. On August 2, 2010, ACLU-NM requested copies of documents it had identified

and marked for copying while reviewing the files for three youth on July 21 (K.B.) and 27 (J.M. and S.C.).

C. CYFD responded the next day that its delay in providing copies of the documents was because “a couple of the clients first stated verbally that they wished to rescind their HIPAA releases and asked that we hold their records, and then (while we were seeking to document that) they withdrew their requests and authorized release.”

D. In response to ACLU-NM’s request to know who were these clients and the circumstances of their supposed refusal to permit access by ACLU-NM to their records, CYFD responded that “apparently [J.M.] and [K.B.] told [the grievance officer] and/or [the CNYC Superintendent] last week that they didn’t want the ACLU to file grievances for them or have access to their records. When we asked them to put that in writing, they changed their minds. If you need more specifics than that, you should ask the girls.”

E. ACLU-NM spoke with both J.M. and K.B., and neither of them confirmed the story ACLU-NM had been told by CYFD.

26. Second Misrepresentation Regarding Access to Youth in August 2010

A. On August 9, 2010, ACLU-NM requested the opportunity to review the files of S.D., a former CNYC resident, to investigate allegations of mistreatment.

B. On August 16, Defendant Pritchard responded by implying that CYFD would refuse to provide ACLU-NM access to S.D.’s files because the files might be sealed: “I do not know if her file has been sealed.... I need to check.”

C. On August 17, CYFD added:

[S.D.] discharged from CYFD custody on May 14[, 2010]. I think that once a client discharges from CYFD custody, we are under no obligation to continue to provide documents that relate to events that may or may not have occurred while they were in our care

D. On August 18, ACLU-NM renewed its request:

Yes, I knew that CYFD had already discharged [S.D.] from its custody at the time I made my request on August 9 to review her files. However, I am surprised and disturbed that you present [S.D.'s] discharged status as a basis for refusing to comply with my request to review her files. Under The Way Forward, "[m]embers of the ACLU team may also review any information pertaining to the needs of adjudicated youth," provided that such information "may not be used for any purpose other than monitoring the implementation of this Plan or discussions with and/or reported to CYFD or the TAC." As I stated in my request, I wish to review [S.D.'s] files "[i]n order to better determine whether her concerns, in fact, implicate CYFD's implementation of The Way Forward."

Since the The Way Forward became effective a year ago, CYFD has never refused to comply with a request by the ACLU for copies of a client's documents or access to a client's files simply because CYFD had discharged that client from its custody. In fact, CYFD has recently complied with at least two such requests made on behalf of clients whom CYFD had discharged from its custody. Why has CYFD now changed its practice with regard to the ACLU's access to clients and information under The Way Forward?

Please let me know when [S.D.'s] files will be ready for my review, or whether the ACLU will need to take further action to enforce CYFD's compliance with The Way Forward.

E. The next day, August 19, CYFD completely and abruptly reversed its unprecedented and unfounded position, and simply stated, without further ado: "Your request to review [S.D.'s] file has been approved; please contact Josefina Sandoval to make arrangements."

27. Misrepresentation Regarding Efficacy of Separation in August 2010

A. CYFD implemented its new procedure on separation, Procedure 21.18, on August 23, 2010. Under the Procedure, "Separation may not continuously last for more than 8 hours." ACLU-NM discovered, after reviewing client files at CNYC, that at least five CNYC clients had been separated for much longer than 8 hours. On November 5, ACLU-NM made the following request to CYFD:

According to the documentation you provided, these five clients were on continuous separation for the following durations of time starting on October 4: [A.G.] (nearly 1 full day), [B.L.] (at least 2 full days), [S.C.] (nearly 3 full days), [C.C.] (nearly 3 full days), and [F.M.] (at least 5 full days). According to the

procedure on separation, Procedure 21.18, as well as the Separation Checklist & Log designed to document any instance of separation, "Separation may not continuously last for more than 8 hours." Please explain when, if ever, it is appropriate to maintain a client on separation longer than 8 hours, and please explain why each of these clients was maintained on separation much longer than 8 hours.

B. As part of its response, CYFD told ACLU-NM and the TAC that "[t]hese clients were not separated for much longer than 8 hours. 98% of the time clients' acting-out issues are addressed within the 8-hour period set in policy."

C. Since August 23, 2010, according to documents provided to ACLU-NM by CYFD, 21 clients have been separated from their peers. Of those 21, 11 clients have been separated from their peers in excess of the 8-hour time limit established by JJS procedure. This proportion of youth on separation within the 8-hour time limit is 48%, and not 98%. Before December 6, when questioned about this number by both ACLU-NM and the TAC, neither Defendant Pritchard nor other CYFD personnel could explain how they had arrived at the number 98%.

D. On December 6, JJS Deputy Director Bronson finally explained that the figure of 98% "was not a calculated figure but an estimate over the last 2 years, not just since the new policy was released." However, not only does that belated response fail to explain how CYFD estimated the figure to be 98%, and fail to explain why CYFD bases its estimation on a 2-year period, but it wholly fails to explain why CYFD initially responded with its figure of 98% when the question clearly involved, and only involved, separation of youth since the August 23, 2010 effective date of the new procedure on separation, Procedure 21.18.

E. As part of his December 6, 2010 defense of CYFD's implementation of its new separation procedure, Mr. Bronson proceeded to place the many failures of the separation procedure and its implementation on the shoulders of the same youth CYFD had chosen to

subject to the procedure and its failed implementation: “These clients were either unwilling or unable” to commit to returning to normal programming; “[t]heir behaviors and their lack of ability to make a commitment not to harm self or others determined that.” Unfortunately for Mr. Bronson, his assertion finds no support in any of the separation documentation requested and reviewed by ACLU-NM. At best, as Mr. Bronson pleads, at least “these policies are well-intentioned”

CYFD HAS NOT MET DEADLINES IN 2009 AGREEMENT

28. CYFD has also failed to comply with other essential requirements of the 2009 Agreement. The 2009 Agreement contained numerous deadlines, including the December 31, 2010 date for termination of the 2009 Agreement. That date was set for several reasons, and ACLU-NM agreed to that date because it is the same date as the last deadline for CYFD to meet under the 2009 Agreement; full implementation of Cambiar. CYFD has failed to fully implement Cambiar by the agreed deadline.

29. A number of other CYFD obligations also had specific deadlines, for late 2009 through December 2010.

Preparation for Cambiar training in the Albuquerque facilities will begin in July 2009, with all training and complete implementation in all units by December 2010 (sooner if resources allow), barring extenuating circumstances. [TWF, p. 7.]

Unit based management will be fully implemented by July 2010, barring extenuating circumstances. [TWF, p. 8.]

Since the last review by the medical expert indicated that the Department’s medical services had been significantly improved and that no major medical issue needed to be addressed, the medical expert will conduct one more review of the medical services during 2009. Unless new and significant medical issues are identified in this review, no further external reviews of the medical program will be conducted. [TWF, p. 11.]

This Plan will be revised and expanded to include: (1) Gender-specific (girls’) issues ... (2) Community-based Behavioral Health Issues over which CYFD has control; (3) Supervised Release Issues; (4) Appropriate Interventions for older

youth (ages 18 to 21) both in the facilities and the community; (5) Interventions for severely high-risk youth; (6) Classification [Section VII of Appendix A]. Draft language for the additional topics listed as (1) through (6), above, will be completed by the TAC and presented to the parties for review by December 31, 2009. The parties shall have 20 days to submit comments on the draft language to the TAC. After reviewing the parties' comments, the TAC will decide upon the content of each new section to be added to this Appendix A, without the necessity for agreement by the parties. [TWF, p. 16.]

30. The 2009 Agreement required CYFD to work with the TAC, under Paul DeMuro's leadership, to develop plans and procedures to address six other elements of CYFD's juvenile justice system, "Other Issues," by December 31, 2009. None of those six plans were completed during 2009. Moreover, CYFD unilaterally decided to forego altogether the required plan to address the needs of older youth, those over the age of eighteen. Although over 60% of the youth in CYFD's secure facilities are over eighteen, CYFD has never established the required plan to address their needs.

31. The further evidence of bad faith on the part of CYFD is that, in spite of negotiations with ACLU-NM, in which ACLU-NM participated in good faith, to extend the deadlines for many of CYFD's obligations under the 2009 Agreement, for which ACLU-NM could have instead chosen to sue for specific performance and breach of contract, CYFD now maintains that their obligations under the 2009 Agreement will still end on December 31, 2010; even though they do not deny that many of CYFD's obligations remain unfulfilled. ACLU-NM negotiated the 2009 Agreement, and held off on suing CYFD, precisely in exchange for specific, identifiable objectives paired with specific timelines.

32. ACLU-NM specifically identified and agreed to December 31, 2010 as the termination date for the 2009 Agreement because it allowed ACLU-NM's monitoring of the Agreement and presence in the facilities through the last of the deadlines for CYFD's obligations under the 2009 Agreement. The termination date was not arbitrary, but does and was intended to

precisely coincide with the last of CYFD's obligations. It is important to note that, while the original 2009 Agreement had a precise termination date, in the very same sentence the parties made sure to qualify it by providing that this date could be "extended by mutual agreement of the parties." The reasons for providing for this flexibility are set forth in numerous places in the 2009 Agreement.

This document ... provides a method to identify and develop specific measurable outcomes and data points that are necessary to track CYFD's progress in implementing the specific requirements of this rewritten agreement. The outcomes of this Plan will be tracked by an enhanced quality assurance and continuous quality improvement process that is described in this document. This Plan also establishes timelines for each outcome contained herein. [TWF, P. 1]

It is important to note that this Plan is a goals-based, evolving document As the Department moves forward, this Plan will be updated as appropriate by the TAC to reflect both improved understanding and changing realities This Plan is an evolving document, and CYFD has used its best efforts to include reasonable dates for achieving the various objectives contained in this Plan. In the event that CYFD anticipates that it will be more than two weeks late in achieving an objective with a state completion date, ... it will provide written notice to the TAC stating the reasons why the objective will not be achieved by the date set forth in the Plan and the date on which CYFD believes it will achieve the objective. The TAC will decide the date that is appropriate. [TWF, P. 1]

This Plan details the Department's Quality Assurance process and the manner by which the Quality Assurance process will report on the progress of implementing the specific provisions contained in this Plan.... This Plan will, for the topics discussed, identify the issue being addressed; what the Department has done and will do to address the issue; and anticipated outcomes, target dates, and related quality assurance measures designed to track the anticipated outcomes. [TWF, P. 2]

CYFD agrees to implement fully all the actions set forth in this Agreement (and any amendments or appendices thereto) in accordance with all timelines, except for the limited circumstances provided in paragraph 7, below, and subject to paragraph 11. [2009 Agreement ¶ 5]

In the event that despite these best efforts the Legislature does not provide CYFD with the funds and other resources ... necessary for implementation of this Agreement the TAC team will work with ACLU-NM and CYFD to negotiate in good faith to tailor the actions to be taken with the funds and resources available to support such actions. [2009 Agreement, ¶ 7]

If any unforeseen circumstance occurs which might cause a failure to timely carry out any requirement of this Agreement, CYFD shall notify the TAC team and the ACLU in writing within 20 calendar days of the time that CYFD becomes aware of the unforeseen circumstance and its impact on CYFD's ability to timely perform under this Agreement. [2009 Agreement, ¶ 11]

33. CYFD agreed to fully implement all objectives in the 2009 Agreement according to these timelines, and to comply with all extensions of those timelines agreed to by the parties.

**CYFD IS NOT IN COMPLIANCE
WITH SUBSTANTIVE PROVISIONS OF 2009 AGREEMENT**

34. The Complaint filed herewith sets forth with specificity the most significant violations of each of the five sections of the 2009 Agreement. *See* Complaint, pp. 25-47. In the interest of judicial economy, those allegations are incorporated herein by reference as if fully set forth herein. There is no dispute that CYFD has failed to comply with numerous provisions of the 2009 Agreement and has failed to substantially comply with its terms.

ARGUMENT

IMMEDIATE EQUITABLE INJUNCTIVE RELIEF IS WARRANTED AT THIS TIME

Courts in New Mexico will grant injunctive relief like a temporary restraining order and a preliminary injunction upon establishment of the following four factors: 1) Plaintiff will suffer irreparable injury unless the injunctive relief is granted; 2) Plaintiff's threatened injury outweighs any damage the injunctive relief might cause Defendants; 3) issuance of the injunctive relief will not be adverse to the public's interest; and 4) there is a substantial likelihood that Plaintiff will prevail on the merits. *See LaBalbo v. Hymes*, 115 N.M. 314, 317-18, 850 P.2d 1017, 1020-21 (Ct. App. 1993) ("In the absence of New Mexico authority concerning the factors a trial court must consider in ruling on a motion for a preliminary injunction, we turn to federal cases interpreting Federal Rule of Civil Procedure 65, which is similar to SCRA 1986, 1-066.") (citing *Tri-State v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986)); *National Trust for*

Historic Preservation v. City of Albuquerque, 117 N.M. 590, 595, 874 P.2d 798, 803 (Ct. App. 1994)(quoting *LaBalbo*); *NM Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 60, 126 N.M. 788, 806 (1998)(citing *National Trust for Historic Preservation* for list of requirements for preliminary injunction); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1258 (10th Cir. 2004); *Bank of NY v. Mehner*, 375 F. Supp. 2d 1316, 1319 (D.N.M. 2005) (citing four factors and stating “[t]he requirements for the issuance of a temporary restraining order are similar to those for the issuance of a preliminary injunction”). Plaintiff satisfies all four factors for granting a temporary restraining order and a preliminary injunction in this case.

In determining whether such [injunctive] relief should issue, the court may consider a number of factors and should balance equities and hardships where required. Factors for the trial court to consider include: (1) [T]he character of the interest to be protected, (2) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (3) the delay, if any, in bringing suit, (4) the misconduct of the plaintiff if any, (5) the interest of third persons, (6) the practicability of granting and enforcing the order or judgment, and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.

Appel v. Presley Cos., 111 N.M. 464, 467, 806 P.2d 1054, 1057 (1991) (quotations and citations omitted). *See also Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611, 995 P.2d 1053 (quotations and citations omitted).

I. PLAINTIFF WILL SUFFER IRREPARABLE INJURY UNLESS INJUNCTIVE RELIEF IS GRANTED.

New Mexico youth who have been adjudicated delinquent will suffer irreparable harm if injunctive relief is not granted.

A. ACLU-NM Access to Facilities and Youth. Since 2004, ACLU-NM attorneys have had access to CYFD secure juvenile justice facilities as advocates for the youth in those facilities. ACLU-NM has established a presence in these secure facilities that has served important functions. First, ACLU-NM being in the facilities, speaking with youth and staff, making

observations and reviewing documentation has a prophylactic effect. Staff's awareness of ACLU-NM's presence reduces the likelihood that the rights of a youth will be violated or that policies will be ignored by a staff member. Ending the current access of ACLU-NM attorneys would remove this prophylactic effect and increase the likelihood of harm to youth in CYFD secure facilities.

Secondly, the incarcerated youth know that ACLU-NM attorneys are accessible and will be visiting the housing units. Youth committed to CYFD facilities have come to rely on ACLU-NM when they experience harm or a threat of harm and they do not trust internal reporting procedures or have been intimidated into not using them. Though the 2009 Agreement revised the abuse investigation and grievance processes, CYFD has failed to consistently implement these new processes such that they effectively function. *See, e.g.*, November 23, 2010 DeMuro report. If youth could no longer count on the presence of or access to ACLU-NM attorneys, they will feel unsafe and are likely to suffer irreparable harm due to significant emotional distress.

Finally, the presence of ACLU-NM in the facilities has brought to light safety and other problems that would not have otherwise been addressed. For instance, on May 13, 2010 J.L., a youth at YDDC, alleged that he had been sexually molested by his two roommates. A Serious Incident Report ("SIR") was never completed until at least four days after ACLU-NM inquired into the incident and three months after the incident itself. On July 27, 2010 an altercation was alleged between A.V., a youth at JPTC, and Superintendent Jean Tomlinson, after which A.V. punched a wall and seriously injured his hand. The SIR and three other reports regarding this incident, including one by the JPTC Superintendent, were not completed until 4-5 days after ACLU-NM made a request for this documentation and 27-28 days after the incident itself. S.C. alleged that she was sexually abused by a staff member at CNYC. Unit staff failed to follow

appropriate reporting procedures and the CNYC Superintendent conducted his own “investigation” in which he called each youth from the unit, including S.C., into a room in which some of the abuse was alleged to have happened and questioned each individually and in the presence of the alleged perpetrator. ACLU-NM brought this matter to the attention of TAC on September 17, 2010 and requested an investigation of CYFD’s investigation. The results of the subsequent investigation have not yet been provided, but the CNYC Superintendent was demoted shortly after ACLU-NM brought this issue to the TAC’s attention and CYFD clarified the staff abuse reporting procedure. On June 7, 2010 ACLU-NM received documentation that since January 1, 2010, at least 7 youth in CNYC were placed on modified programming, during which the youth were permitted to be out of their rooms for no more than 30 minutes during the day shift and 30 minutes during the evening shift, in violation of JJS procedure. There is no evidence that these clients attended school or that they were suspended from school during their programming. J.M., S.C., K.B., B.Q., and S.D. were placed on such programming for between 5 and 32 days. ACLU-NM questioned CYFD about modified programming on June 7, 2010. The following day the two clients who remained on modified programming at that time were abruptly and without explanation removed from this programming, by order of the CNYC Superintendent. CYFD later informed ACLU-NM that such programming would not be utilized and ACLU-NM has received no further reports that modified programming has been used. The presence of ACLU-NM in CYFD secure facilities brought the harms or alleged harms in the above examples to light and resulted in investigation, and in some instances, corrective actions by CYFD. Interruption of ACLU-NM access to these facilities and youth will cause irreparable harm as abuse and other violations of policy that threaten the safety and welfare of youth may not be discovered.

B. Implementation of Cambiar New Mexico. The Missouri Model for juvenile justice programs, implemented by CYFD as Cambiar New Mexico (“Cambiar”), uses a rehabilitative and therapeutic approach, rather than a corrections model. The model fosters an environment in which youths are treated with dignity and respect. The Cambiar model has been shown to improve the likelihood of rehabilitation, resulting in reduced recidivism and improved educational outcomes. Youth and staff report less violence between youths and fewer uses of force from staff since the implementation of Cambiar. On units where Cambiar has been more fully embraced youth report feeling safer. Despite the benefits of Cambiar, if the requested relief is not granted it is unlikely that Cambiar will be maintained. During a recent visit by ACLU-NM to JPTC staff stated that they had been directed to discontinue compliance with Cambiar with respect to education. During a meeting on September 27, 2010, Defendant Dunbar acknowledged that only \$250,000 has been requested to continue implementation of Cambiar, a 50% reduction in annual funding. The loss of Cambiar in CYFD secure facilities would cause irreparable harm to the youth at these facilities, as the reduced violence, increased safety, improved likelihood of rehabilitation and other benefits would not be maintained.

C. Operation of TAC. Paul DeMuro and Dr. Pamela McPherson advise CYFD as members of the TAC regarding changes that need to be made to improve quality of care and how to implement those changes. In addition to this advisory role, Mr. DeMuro and Dr. McPherson conduct monitoring visits in the facilities. Both the advising and monitoring performed by Mr. DeMuro and Dr. McPherson improve the care and safety of youth. CYFD has not been successful at self monitoring and quality improvement. At this time, fifteen months after the 2009 Agreement was signed, the OQA has only completed two CQI studies, although the 2009 Agreement listed more than twenty that should be conducted before the end of 2010. If the

requested relief is not granted it is unlikely that the TAC will be maintained. It is vital that the TAC continue, including the advice and monitoring by independent experts, to support safety of youth and quality of care in CYFD secure facilities. Youth will suffer irreparable harm if the TAC ceases.

D. Expert Monitoring. Since 2006 Dr. McPherson and Dr. Greifinger have been monitoring mental health and medical care at CYFD secure facilities. Drs. McPherson and Greifinger have issued reports resulting in substantial improvements. Their most recent report indicates some deficiencies persist in the medical and mental health care services to youth. Further monitoring by these experts is needed to bring CYFD into compliance and to help provide for the safety and well-being of youth. If the requested relief is granted, it is unlikely that Drs. McPherson and Greifinger will continue in their respective monitoring roles. CYFD has stated that they are not interested in having Dr. Greifinger continue. Furthermore, CYFD has not committed to keeping Dr. McPherson in place. The progress that has been made since Drs. McPherson and Greifinger have been in place is at jeopardy if the requested relief is not granted. The improvements that still need to be made are unlikely to be accomplished unless expert monitoring continues. Youth will suffer irreparable harm if expert monitoring is discontinued.

Plaintiff and all New Mexico youth who have been adjudicated as delinquent will suffer other irreparable harm if the requested relief is not granted. The 2009 Agreement, and the New Mexico Constitution, require CYFD, *inter alia*, to protect the safety of these youth, to treat them fairly and to provide them with proper mental health treatment and medical care. CYFD has failed to comply with significant requirements of the 2009 Agreement, causing irreparable harm. These youth are not safe: CYFD has mishandled serious allegations of abuse of youth in their custody; and in creating the “safety unit” CYFD failed to follow their own procedures. These

youth also are not treated fairly: the grievance procedure is ineffective; and CYFD continues to separate youth excessively and in violation of their own policies and has provided inaccurate and misleading information to Plaintiff about their separation practices.

Evidence also suggests that CYFD is not providing proper mental health and medical care to these youth: CYFD has fabricated documents and mislead Plaintiff and the neutral medical expert, falsely suggesting that corrective actions were being taken to address deficiencies in mental health and medical care; and the neutral medical and mental health experts and CYFD's own medical director recently determined that the CQI does not meet professional standards, finding that the CQI program failed to conduct performance measurements as required and that the studies that were conducted were not meaningful. CYFD has failed to establish the required planning for youth over eighteen years of age, who comprise a majority of the youth presently in CYFD secure facilities, suggesting that, in addition to the other identified failures, the particularized needs of these youth are not being adequately addressed.

CYFD has demonstrated that they are unwilling or unable to monitor and improve services through meaningful CQI. For example, the November 23, 2010 DeMuro report states: "Key policies, programs and procedures are not consistently implemented and monitored. Many staff at all levels are not held accountable – unless and until (or after) a major problem occurs. Data is not used to inform decision-making. When a problem is uncovered, CYFD often finds itself in a reactionary posture, explaining or justifying its actions." CYFD has demonstrated that they are unwilling or unable to manage their own staff without oversight, as evidenced by their utilization of "Modified Plans of Care" in violation of JJS policy until brought to the attention of CYFD management by ACLU-NM. Thus, continuing the involvement of ACLU-NM, MYSI and TAC, oversight of neutral experts, and monitoring by ACLU-NM and enforcing CYFD

compliance with the 2009 Agreement, is crucial to preventing further irreparable harm.

II. PLAINTIFF'S THREATENED INJURY OUTWEIGHS ANY DAMAGE INJUNCTIVE RELIEF MIGHT CAUSE DEFENDANTS.

Plaintiff here is simply seeking a continuation of the status quo until the Court rules upon Plaintiff's claims that injunctive relief and specific enforcement the 2009 Agreement are required. Plaintiff is not asking that additional services be provided prior to trial. ACLU-NM's involvement and the assistance of MYSI and the neutral experts will increase the likelihood that CYFD will protect the safety of these youth, treat them fairly and provide them with proper mental health treatment and medical care. Maintaining the same arrangements that CYFD has operated under since 2006 will not harm Defendants.

III. ISSUANCE OF INJUNCTIVE RELIEF WILL NOT BE ADVERSE TO PUBLIC'S INTEREST.

There is a significant public interest in enforcing Defendants' compliance with the 2009 Agreement. Public interest is better served by New Mexico youth who have been adjudicated as delinquent being safe and receiving the programming and services contemplated by the 2009 Agreement. CYFD has failed to comply with significant provisions of the 2009 Agreement. If the requested relief is not granted it is unlikely that the steps that have been taken to implement Cambiar NM will be maintained. CYFD has already proposed a 50% reduction in the budget to maintain Cambiar NM, even before the initial training and coaching of staff required by the 2009 Agreement has been completed. It is even more unlikely that CYFD will make any further progress towards meeting the unmet goals set forth in the 2009 Agreement if the requested relief is denied. Continuing the involvement of MYSI and TAC, oversight of neutral experts, and monitoring by ACLU-NM and enforcing CYFD compliance with the 2009 Agreement, will help

support implementation of Cambiar NM and the investment that has already been made to begin to establish this juvenile justice model.

IV. THERE IS A SUBSTANTIAL LIKELIHOOD PLAINTIFF WILL PREVAIL ON MERITS.

In *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969), the court explained “In hearings upon motions for temporary or preliminary injunctive relief, the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought.” Plaintiff can readily meet the burden of demonstrating Defendants’ breach of contract and breach of the implied covenant of good faith and fair dealing. The three reports issued by the neutral experts during November 2010 are clear and convincing evidence of the failure of Defendants to comply with significant provisions of the 2009 Agreement. The reports by Dr. Greifinger are clear and convincing evidence that Defendants misled ACLU-NM regarding their medical services and their Continuous Quality Improvement systems both before the 2009 Agreement was reached and repeatedly thereafter. Moreover, the Defendants’ misrepresentations during 2010 regarding their noncompliance with the 2009 Agreement, and with the deadlines contained therein, caused ACLU-NM not to initiate enforcement action against CYFD prior to this time. It would be inequitable for CYFD to benefit from their deceit and from their breaches of the covenant of good faith and fair dealing.

It is unnecessary for this Court to conclude at this stage that Plaintiff will certainly prevail on the claims. Plaintiff need only demonstrate a “substantial likelihood” of success. *See LaBalbo* 115 N.M. at 18. Moreover, “[u]nder some circumstances, the Tenth Circuit has recognized a relaxed ‘modified likelihood of success’ requirement.” *County of Los Alamos v. United States DOE*, 2006 U.S. Dist. LEXIS 27262, *22-23 (D.N.M. Jan. 13, 2006). “If a plaintiff establishes that the latter three factors ‘tip strongly’ in his or her favor, the likelihood of success

inquiry is modified somewhat, and the plaintiff may establish likelihood of success by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1083-84 (10th Cir. 2004) (citation and quotation omitted); *see Walmer v. United States DOD*, 52 F.3d 851, 854 (10th Cir. Kan. 1995)(same); *Benjamin H.*, 1999 U.S. Dist. LEXIS 22469, at *35 (preliminary injunction should be granted when other factors weigh “heavily in favor of the plaintiffs, and if the plaintiffs have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation, then the preliminary injunction should be granted”)(quotation and citation omitted).

It is likely that Plaintiff will succeed on the merits of its Complaint. A court should reform an agreement when one of the contracting parties conceals the truth. *See In re: Broadview Hospitality Holdings, LLC*, No. 04-16882-11, 2006 Bankr. LEXIS 126, at *41-42 (D. Kan. 2006). Furthermore, when a party acts dishonestly in fulfilling the terms of an agreement, a court should reform the agreement. *See Winslett v. Rice*, 128 So.2d 94, 98 (Ala. 1960) (“We do not consider that a court of equity should condone or place its stamp of approval on such [acts, omissions or concealments].”); *see also Kaufer v. Carson*, 230 N.W.2d 500, 504 (Iowa 1975) (a court should reform an agreement when there is inequitable conduct on the part of one party); *Sioux County State Bank v. Veenstra*, 372 N.W.2d 309, 312 (Iowa Ct. App. 1985) (same). A court in equity can reform a contract when the “[f]acts and circumstances [are] sufficiently compelling to constitute an effectual appeal to the conscience of the court and prompt it to interfere [.]” *Id.* at 311. A court should reform an agreement to “prevent manifest injustice[.]” *Bevis Constr. Co. v. Grace*, 134 So.2d 516, 519 (Fla. Ct. App. 1961); *see also GE Supply v.*

Thomas, No. 93-1008, 1993 U.S. App. LEXIS 21435, at *5 (4th Cir. Aug. 23, 1993) (courts will reform a contract if the “the remedy is essential to the ends of justice.”).

Generally, in order to set aside or void a written settlement, there must be evidence of misrepresentation, fraud, undue influence, coercion or mutual mistake, and such evidence must be clear and convincing. *Woods v. City of Hobbs*, 75 N.M. 588, 408 P.2d 508 (1965); *Durham v. Gulf Interstate Engineering Company*, 74 N.M. 277, 393 P.2d 15 (1964); *Mendenhall v. Vandeventer*, 61 N.M. 277, 299 P.2d 457 (1956). The terms of a settlement agreement are controlling, unless the terms produce a result that is unfair to a party who has proceeded in good faith.

Alternatively, should the Court choose not to specifically enforce the terms of the 2009 Agreement and grant equitable relief and damages, ACLU-NM seeks to vacate the 2009 Agreement and return ACLU-NM and CYFD to the positions they were in prior to September 3, 2009: in litigation regarding noncompliance with the original February 15, 2006 Agreement. Misrepresentations by one party to a contract can make the contract voidable by the other party. Under New Mexico law, “rescission is allowed where there has been a misrepresentation of a material fact, the misrepresentation was made to be relied on, and has in fact been relied on.” *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 672 P.2d 1137, 1140 (1983). “A representation or concealment of a fact is material if it operates as an inducement to the [party] to enter into the contract, where, except for such inducement, it would not have done so . . .” *Id.* “If misrepresentations be made, or information withheld, and such be material to the contract, then it makes no difference whether the party acted fraudulently, negligently, or innocently.” *Modisette v. Foundation Reserve Insurance Co.*, 77 N.M. 661, 667 (1967) (citations omitted); *Robison*, 94 N.M. at 319 (a misrepresentation can result in the voiding or rescission of a contract

“irrespective of the good or bad faith of the party making the misrepresentation.”); *Hendren*, 100 N.M. at (“If a material misrepresentation is made or material information withheld, it does not matter whether the culpable party acted fraudulently, negligently, or innocently; rescission may follow.”).

Under New Mexico law, rescission is the specified remedy for a misrepresentation in the negotiation of a contract. In order to obtain rescission, Plaintiff must show that (1) there was a misrepresentation that was (2) material or fraudulent and which (3) induced them to enter into the settlement agreements, and that (4) their reliance on the misrepresentation was justified.

The New Mexico Supreme Court in *Modisette* quoted with approval the following from *Metropolitan Life Ins. Co. v. Becraft*, 213 Ind. 378, 12 N.E.2d 952 (1938)(emphasis added):

[I]f misrepresentations be made, or information withheld, and such be material to the contract, then it makes no difference whether the party acted fraudulently, negligently, or innocently.” (Citations omitted). 77 N.M. at 667, 427 P.2d 21. *Modisette* quoted with approval the following from *Metropolitan Life Ins. Co. v. Becraft*, 213 Ind. 378, 12 N.E.2d 952 (1938): “Whether there was fraudulent intent or actual fraud is immaterial. An unqualified statement that a fact exists or does not exist, made for the purpose of inducing another to act, implies that the person who makes it is acquainted with the facts; and, if action is induced by the representation and false statement, the law will impute to him who made the false representation a fraudulent purpose. . . . It is the injury caused by the misrepresentation of fact that the law protects against. If the misrepresentation was brought about by forgetfulness [sic] or mistake it is just as injurious as an intentional fraud. It accomplishes a fraud upon the other contracting party by inducing him to act upon a false premise, where he would not have acted had he known the truth. Whether it be caused by negligence, or actual fraudulent purpose, good intention or bad, the result is the same. There is no meeting of the minds

For these reasons, it is likely that Plaintiff will prevail on the merits of its Complaint.

Due to the nature of this motion, seeking to maintain the status quo, and due to the indigence of the youth on whose behalf ACLU-NM is acting, the Court should waive the posting of any bond by Plaintiff, in the interest of justice.

CONCLUSION

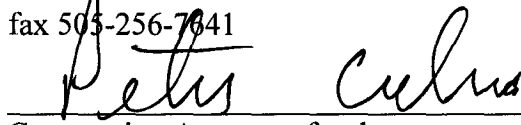
For the reasons set forth above, Plaintiff is entitled to both a temporary restraining order and a preliminary injunction because all of the requirements for granting such injunctive relief are satisfied.

WHEREFORE Plaintiff respectfully requests that this Court issue the attached temporary restraining order and a preliminary injunction ordering that Defendants, their agents, representatives, those acting under their direction and control, and those acting in concert with them be enjoined from changing the status quo that was established under the September 2009 Agreement until the Court adjudicates the claims in Plaintiff's Complaint.

Respectfully submitted,

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VERIFICATION

I hereby verify under the penalty of perjury that the facts set forth herein are true and correct based upon information known by me.



John Hall Esq.

CERTIFICATE OF SERVICE

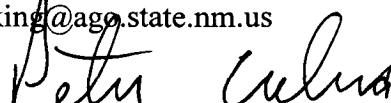
I hereby certify that on the 14th day of December 2010, I hand delivered a copy of the foregoing to:

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I also hereby certify that on the 15th day of December 2010, I emailed a copy of the foregoing to:

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Counsel for Plaintiff

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

No. _____

The AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO,

Plaintiff,

v.

**The NEW MEXICO CHILDREN, YOUTH AND
FAMILIES DEPARTMENT, BILL DUNBAR, Secretary,
New Mexico Children, Youth and Families Department,
and DEBRA PRITCHARD, Director, Juvenile Justice Services,
New Mexico Children, Youth and Families Department,**

Defendants.

TEMPORARY RESTRAINING ORDER

This matter having come before the Court on the Plaintiffs' December 15, 2010 *Motion For A Temporary Restraining Order And Preliminary Injunction And Memorandum In Support*, and the Court, having considered the verified motion and the points and authorities therein, being fully advised in the premises;

FINDS that the Motion is well taken, that Injunctive relief is authorized pursuant to Rule 1-066 of the New Mexico Rules of Civil Procedure, and that the Motion should be granted.

WHEREFORE, IT IS HEREBY ORDERED:

1. CYFD shall continue to afford to the ACLU-NM and its agents the same access to information, to the youth in CYFD's care and custody, and to CYFD's facilities, documents, and personnel that it currently affords the ACLU-NM;
2. CYFD shall continue to work with Missouri Youth Services Inc. to implement Cambiar New Mexico, and CYFD shall not break up the groups of youth who live together in

CYFD's secure facilities when they participate in their educational programs.

3. CYFD shall continue the operations of the Technical Assistance Committee ("TAC");
and

4. CYFD to continue to work together with the neutral experts who have worked with the parties since 2006, Dr. McPherson and Dr. Greifinger, providing the experts with the same access to information and the same cooperation that CYFD has afforded them since September 3, 2009.

5. Because the Plaintiff is seeking only to maintain the status quo; the Plaintiff has brought this action on behalf of children and youth of limited means; the matters raised herein are matters of great public importance; and the Defendants are agents of the State obligated to serve the youth on whose behalf Plaintiff has brought this action, the giving of security by the Plaintiffs is waived.

IT IS SO ORDERED

DISTRICT COURT JUDGE

Done this _____ day of December 2010.