

**AGREEMENT BETWEEN CYFD AND THE ACLU-NM  
CONCERNING SERVICES AND PROCEDURES  
FOR NEW MEXICO YOUTH ADJUDICATED JUVENILE DELINQUENT**

Whereas the ACLU of New Mexico (hereinafter, "ACLU-NM"), in conjunction with its cooperating attorneys and the Youth Law Center of San Francisco, has prepared for filing a class action lawsuit to address what it perceives as the most pressing systemic safety, programmatic and procedural deficiencies in New Mexico's treatment of youth who are adjudicated juvenile delinquent,

Whereas the New Mexico Children, Youth and Families Department (hereinafter, "CYFD") believes that it is proceeding to improve its Juvenile Justice services and procedures in a way that is in the best interests of these New Mexico youth,

Whereas the parties have met numerous times, have reached an agreement on the steps CYFD will take to address the issues that are the subject of the ACLU-NM's proposed lawsuit, and desire to work together sharing expertise about solutions to problems in the future; and

Whereas the parties desire to resolve the issues between them at this time without the necessity of litigation,

Now, therefore, the ACLU-NM and CYFD hereby agree as follows:

1. The effective date of this Agreement is the date on which the first signature on this Agreement by a CYFD official occurs. The Agreement shall terminate four years after the effective date, unless extended by mutual agreement of the parties. All rights and obligations established by this Agreement shall terminate when this Agreement terminates. A court may not enforce this Agreement by the contract remedy of specific performance after the expiration of the term of this Agreement, whether or not the action was filed prior to the termination date of this Agreement.

2. This Agreement is a fully enforceable contract, the terms of which may be enforced like any other contract through an action by the ACLU-NM for damages, specific performance and/or declaratory and injunctive relief. However, nothing in this Agreement shall create in any individual any right to sue for damages or for specific performance as a third party beneficiary of this Agreement. The right of the ACLU to sue for damages under this Agreement shall be limited to attorneys' fees and costs as set forth hereinafter. The parties expressly agree there may be no punitive damages for violation of this contract.

3. The ACLU-NM agrees not to file its lawsuit against the State of New Mexico, CYFD, or any other State government agency regarding the issues addressed in this Agreement or Appendix A hereto at this time, and further agrees that, except as provided in this Agreement, it will not file any suit as to any of the CYFD juvenile justice services or policies addressed in this Agreement so long as this Agreement is in effect.

and so long as CYFD is implementing the terms of this Agreement in a timely and appropriate manner.

4. Definitions. Throughout this Agreement and its Appendix A the terms: "youth" means anyone adjudicated in New Mexico to be a juvenile delinquent and held in a CYFD facility, unless a different meaning is specifically indicated, and "ACLU" or "ACLU team" means the ACLU-NM cooperating attorneys, the attorneys from the Youth Law Center of San Francisco, and their paralegals who are working on this project, as listed in Appendix B to this Agreement. Appendix B may be modified from time to time by the ACLU, which shall notify CYFD in writing of any modifications.

5. For good and valuable consideration which CYFD hereby acknowledges receiving, CYFD agrees to implement fully all the actions set forth in Appendix A to this Agreement in accordance with all timelines set forth in that Appendix, except for the limited circumstance provided in paragraph 7, below. All plans, policies and procedures required by Appendix A which are approved in whole or in part shall automatically become a part of Appendix A and of this Agreement. The parts which are approved shall be added as addenda to Appendix A when they are approved in whole or in part through the process set forth in paragraph 6, below.

6. Whenever Appendix A requires review and comment by the ACLU or the ACLU team, the following process shall be followed by the parties to this Agreement to satisfy this requirement:

(a) CYFD shall mail or deliver a copy of the document to be reviewed simultaneously to Daniel Yohalem, Peter Cubra and Alice Bussiere at the addresses set forth in Appendix B;

(b) the ACLU team shall provide one set of comments and recommended changes or a statement that there are no comments or changes to Daniel Pearlman (CYFD General Counsel) within 30 days of receipt of the document;

(c) during the next 30 day period (or longer period if agreed to by the parties) CYFD and the ACLU-NM shall negotiate in good faith to resolve any differences they may have. The parties may agree to use third party mediation services to help resolve any differences. At the end of the 30 day negotiation period (or longer period if agreed to by the parties), CYFD shall provide Yohalem, Cubra and Bussiere with a copy of the revised document along with a written explanation why any ACLU-NM recommendations were not adopted; and

(d) within 15 days of receiving CYFD's revised document the ACLU shall provide CYFD written notification either that the plan, policy or procedure is approved in whole, disapproved in whole because of a disagreement with the entire document, or approved only in part because a disagreement remains, in the latter two cases the issues about which there are disagreement shall be clearly described by the ACLU-NM.

Any issue(s) about which there is disagreement shall thereby be removed from the prohibition contained in paragraph 3 of this Agreement and may be the subject of litigation by the ACLU-NM to enforce CYFD's compliance with the Provisions of Appendix A during the term of this Agreement and/or any other legal basis for suit. The parts of the plans, policies and procedures that have been approved shall be implemented as provided in Appendix A and in paragraph 5, above. The ACLU-NM agrees that enforcement litigation will be brought only in response to what the ACLU-NM determines in good faith to be a systematic failure by CYFD to implement a provision of Appendix A, and that such litigation will only be brought after good faith efforts to resolve differences and to consider CYFD's resource limitations as described in paragraph 7 of this Agreement.

7. The ACLU-NM acknowledges that CYFD's ability to comply with certain provisions of Appendix A, as set forth in Appendix C to this Agreement, is dependent in part on the New Mexico Legislature making available sufficient resources for such compliance. CYFD shall make its best efforts to obtain sufficient funding to fully effectuate this Agreement. In the event that despite these best efforts the Legislature does not provide CYFD with the funds and other resources (e.g. FTE) necessary for implementation of the sections designated in Appendix C, the ACLU-NM will negotiate in good faith with CYFD to tailor the actions to be taken with the funds and resources available to support such actions. CYFD may raise insufficiency of funds and resources as a defense to any action brought by the ACLU-NM to enforce Appendix A, but this shall not prevent the ACLU from rebutting that defense and/or seeking a remedy under other laws.

8. If at any time during the term of this Agreement the ACLU-NM believes that CYFD is not in substantial compliance with the Agreement, as defined in Section 13 herein, it shall give notice to CYFD and the parties shall meet in good faith to try and resolve the issue. If after a period of 30 days the parties are unable to resolve the issue, they shall engage Paul Bardacke as a mediator to attempt to assist in such resolution. If after 30 days there is no resolution, the ACLU-NM may bring suit to enforce those Sections of the Agreement with which it believes CYFD is not in compliance and/or to seek a remedy under other laws if CYFD is not implementing any term of this Agreement in a timely and appropriate manner.

9. The CYFD Deputy Secretary for Juvenile Justice Services shall provide the ACLU-NM with a written report every three months for the first year and every six months thereafter setting forth in detail the status of compliance with this Agreement and with the requirements of each section of Appendix A.

10. CYFD shall compensate the several individual youth who have retained the ACLU-NM team to represent them for violations of their civil rights by CYFD and its agents a total amount of \$85,000, which CYFD will cause to be paid no later than 30 days after the effective date of this Agreement, which amount constitutes full and

complete compensation for all claims of all ACLU-NM staff's clients, who are:

Complete releases from said youth and their guardians will be provided.

11. CYFD shall pay the ACLU-NM's staff and cooperating attorneys and the attorneys for the Youth Law Center their reasonable attorneys' fees, expenses and costs under the standards set forth in applicable federal statutes incurred through the effective date of this Agreement. The parties mutually agree for purposes of settlement that this amount is \$220,000, which CYFD will cause to be paid to Daniel Yohalem no later than 30 days after the effective date of this Agreement for his disbursal to all the other attorneys involved. This sum constitutes complete compensation for all time and expenses for the ACLU-NM team up to the effective date of this Agreement and no claim shall hereafter be made for attorneys' fees for time spent prior to the effective date of this Agreement

12. (a) CYFD further agrees that it shall be liable for the reasonable attorneys' fees and costs incurred by the ACLU-NM, its cooperating attorneys and the Youth Law Center for all reasonable and necessary work they perform: (i) monitoring compliance with this Agreement, and (ii) reviewing and commenting on plans, policies and procedures as provided in Appendix A and this Agreement. The total amounts claimed under (i) and (ii) of this Section shall be supported by itemized billing statements, and shall not exceed \$400,000 total over the four years of this Agreement, with no more than \$130,000 of that amount payable in any one year period of this Agreement (years to start with the effective date of this Agreement).

(b) The parties to this Agreement shall attempt to resolve through negotiation any issues that arise concerning the payment of attorneys' fees and costs under this paragraph. If the parties cannot agree on an amount of attorneys' fees and costs, then the matter of fees and costs shall be presented for binding arbitration to a panel of two attorneys consisting of Robert R. Rothstein and Stephen G. French, which panel may in its discretion award attorneys' fees and costs as well as the costs of arbitration as it deems fair and appropriate.

(c) This provision shall not be evidence that a claim for fees is or would be applicable to any lawsuit that could have been, or may in the future be, brought by the ACLU

(d) In the event that ACLU-NM brings a court action to enforce this Agreement, as provided for in this Agreement, and the ACLU-NM prevails in such litigation, attorneys fees and costs for such action shall be determined by the Court, applying the standards of the Prison Litigation Reform Act, 42 USC Section 1997 e(d)(3), unless another federal statute is also applicable to ACLU-NM's lawsuit.

13. (a) If the identified expert in Sections III, IV or V of Appendix A certifies substantial compliance by CYFD for his or her respective Section, that specific Section

of Appendix A shall cease to be enforceable in Court by the ACLU and the requirement for expert reports every six months as to that Section shall cease for the remainder of the term of the Agreement, so long as CYFD remains in substantial compliance as to that Section of Appendix A. At any time before the end of the term of the Agreement, the ACLU may present evidence to the expert and request a determination that CYFD is no longer in substantial compliance. If the expert determines that CYFD is no longer in substantial compliance, the six month compliance reports by the expert as to that Section and the ACLU's right to enforce that Section in Court shall automatically be reinstated immediately.

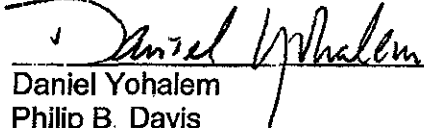
(b) For those Sections of Appendix A in which no expert is identified, CYFD shall notify the ACLU when CYFD believes it is in substantial compliance and provide satisfactory evidence of such compliance. The ACLU shall give notice of its agreement that CYFD is in substantial compliance with that Section, or of its nonconurrence. If the ACLU does not concur that CYFD is in substantial compliance with such Section, it shall set forth its reasons for that position in writing within 30 days, after which the parties will consult. If, after consultation, the parties disagree about CYFD's substantial compliance with that Section of Appendix A, the parties shall agree on an arbitrator to determine through binding arbitration whether CYFD is in substantial compliance with that Section. If the arbitrator determines that CYFD is in substantial compliance as to that Section of Appendix A, then that specific Section shall cease to be enforceable in Court by the ACLU for the remainder of the term of the Agreement, so long as CYFD remains in substantial compliance as to that Section of Appendix A. At any time before the end of the term of the Agreement, the ACLU may present evidence to the arbitrator and request a determination that CYFD is no longer in substantial compliance. If the arbitrator determines that CYFD is no longer in substantial compliance, the ACLU's right to enforce that Section in Court shall automatically be reinstated immediately.

(c) For purposes of "substantial compliance" under this Agreement, incidents of non-compliance do not necessarily prevent a finding of substantial compliance. The determination of substantial compliance shall take into account the extent to which exceptions to compliance are sporadic or isolated in nature, are unintentional and are promptly and properly addressed by corrective action.

14. Unforeseen Circumstances. If any unforeseen circumstance occurs which might cause a failure to timely carry out any requirements of this Agreement or Appendix A, the State shall notify the ACLU in writing within 20 calendar days of the time that the State becomes aware of the unforeseen circumstance and its impact on the State's ability to timely perform under the Agreement. The notice shall describe the cause of the failure to timely perform and the measures taken to prevent or minimize the failure. The State shall implement all reasonable measures to avoid or minimize any such failure.

**AGREED:**

**For the ACLU-NM:**

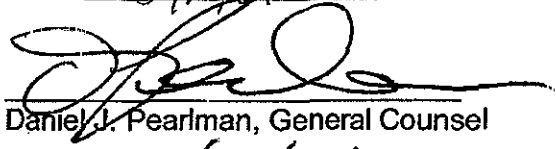
  
\_\_\_\_\_  
Daniel Yohalem  
Philip B. Davis  
Peter M. Cuba  
Alice Bussiere

Date: 2/15/06

**For CYFD:**

  
\_\_\_\_\_  
Mary-Dale Bolson, Secretary

Date: 2/15/06

  
\_\_\_\_\_  
Daniel J. Pearlman, General Counsel

Date: 2/15/06