

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

Whereas in 2005 and early 2006 the ACLU of New Mexico (hereinafter, "ACLU-NM"), in conjunction with its cooperating attorneys and the Youth Law Center of San Francisco, prepared for filing a class action lawsuit against the New Mexico Children, Youth and Families Department (hereinafter, "CYFD") to address what it perceived as the most pressing systemic safety, programmatic and procedural deficiencies in New Mexico's treatment of youth who are adjudicated juvenile delinquent,

Whereas on February 15, 2006, the parties entered into an Agreement Between CYFD and the ACLU-NM Concerning Services and Procedures for New Mexico Youth Adjudicated Juvenile Delinquent (hereinafter, the "2006 Agreement"),

Whereas on November 20, 2007, the ACLU-NM filed suit against CYFD alleging that CYFD was in violation of certain provisions of the 2006 Agreement, which allegations CYFD denies,

Whereas CYFD believes that it continues 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 pending lawsuit, and desire to work together in the future by sharing expertise about solutions to problems; and

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

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

1. The effective date of this amended Agreement and all appendices thereto (hereinafter, "this Agreement") is the date on which the first signature on this Agreement by a CYFD official occurs. This Agreement shall terminate on December 31, 2010, 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 after the expiration of the term of this Agreement, whether or not the action was filed prior to the termination date of this Agreement, nor may a court reform this Agreement nor provide relief of any kind or nature extending beyond December 31, 2010 under any circumstances whatsoever. This Agreement supersedes and otherwise replaces the 2006 Agreement between the parties, and all obligations established by the 2006 Agreement are hereby extinguished upon the effective date of this Agreement.

2. This Agreement and all agreed upon amendments or appendices are 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, subject to the enforcement deadline limitation set forth in paragraph 1, above. 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 to dismiss its pending lawsuit (*The American Civil Liberties Union of New Mexico v. The New Mexico Children, Youth and Families Department, et al.*, NM Dist. Ct., 1<sup>st</sup> Jud. Dist. No. D-0101-CV-2007-02921) and further agrees that it will not file any suit as to any CYFD juvenile justice services or policies addressed in this Agreement (including any amendments or appendices thereto) so long as this Agreement is in effect and the ACLU-NM believes CYFD is implementing the terms of this Agreement in a timely and appropriate manner.

4. Definitions. Throughout this Agreement (including any amendments or appendices thereto) 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 support staff 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. The term "TAC" means the Technical Advisory Committee established pursuant to Appendix A of this Agreement.

5. For good and valuable consideration which CYFD hereby acknowledges receiving, 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 circumstance provided in paragraph 7, below. All plans, policies and procedures required by this Agreement which are approved in whole or in part shall automatically become a part of this Agreement. The parts which are approved shall be added as addenda to this Agreement when they are approved in whole or in part through the process set forth in paragraph 6, below.

6. Whenever CYFD proposes to adopt a new plan, policy, procedure or other document that will have a substantial impact on this Agreement or its appendices, the following process shall be followed by the parties to this Agreement:

(a) CYFD shall mail or deliver a copy of the document to be reviewed simultaneously to all members of the TAC team and Daniel Yohalem, Philip B. Davis, 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 the TAC team and CYFD's General Counsel (currently Frank Weissbarth) within 20 days of receipt of the document;

(c) the version of the document adopted by the TAC shall be implemented by CYFD.

7. The ACLU-NM acknowledges that CYFD's ability to comply with certain provisions of 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 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. CYFD may raise insufficiency of funds and resources as a defense to any action brought by the ACLU-NM to enforce this Agreement, 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 implementing or otherwise complying with the terms of this Agreement, it shall give notice to CYFD and the parties shall meet in good faith to attempt to resolve the issue with the TAC team's assistance. If the parties and the TAC team are unable to resolve the issue, the parties may engage Paul Bardacke as a mediator to attempt to assist in such resolution. If there is no resolution, the ACLU-NM may bring suit to enforce those terms of the Agreement with which it believes CYFD is not in substantial compliance and/or to seek a remedy under other laws if it believes in good faith that CYFD is not implementing or otherwise complying with any term of this Agreement in a timely and appropriate manner. Under no conditions shall CYFD be liable for the actions or inactions of the TAC in its performance of any duty under this Agreement or the appendices attached hereto.

9. The TAC shall meet with the ACLU-NM every three months for the duration of this Agreement and every six months during 2011 and prior to those meetings shall provide the ACLU and CYFD with information in writing on CYFD's progress and compliance with the terms of this Agreement. CYFD shall provide the ACLU-NM a copy of all documents it provides to the TAC for purposes of the TAC's quarterly meetings, including but not limited to status reports, TAC meeting agendas and TAC meeting minutes. The Secretary of CYFD may have his or her general counsel present at the TAC meetings with the ACLU.

#### 10. Fees and Costs

(a) CYFD shall pay the ACLU-NM team attorneys' fees, expenses and costs in the total amount of \$500,000 (in addition to the \$10,000 remaining to be paid

under the parties' prior Agreement) and ACLU and its counsel shall make no further claim for fees and costs for the litigation entitled *The American Civil Liberties Union of New Mexico v. The New Mexico Children, Youth and Families Department, et al.*, NM Dist. Ct., 1st Jud. Dist. No. D-0101-CV-2007-02921, or for past monitoring or for future monitoring under the Agreement.

(b) Except as provided in subparagraph 10(a), above, 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-NM.

(c) Except as provided in subparagraph 10(a), above, in the event that the ACLU-NM brings a court action to enforce this Agreement, as provided for in paragraphs 2 and 3 of this Agreement, and the ACLU-NM prevails in such litigation, the ACLU-NM's attorneys fees and costs for such action shall be determined by the Court, applying the standards of the Prison Litigation Reform Act, 42 U.S.C. Section 1997 e(d)(3), unless another federal statute is also applicable to the lawsuit.

11. Unforeseen Circumstances. If any unforeseen circumstance occurs which might cause a failure to timely carry out any requirements 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. The notice shall describe the cause of the failure to timely perform and the measures taken to prevent or minimize the failure. CYFD shall implement all reasonable measures to avoid or minimize any such failure

12. This Agreement includes and incorporates Appendices A ("The Plan") and B (ACLU team addresses), attached hereto.

13. ACLU Contract with Paul DeMuro. ACLU shall enter into a contract with Paul DeMuro to perform all his duties as a permanent member of the TAC and the parties agree that payment to DeMuro on that contract shall be paid out of the \$500,000 payable in fees and costs to the ACLU and its counsel as set forth in subparagraph 10(a) above. The ACLU shall allocate at least \$110,000 of the \$500,000 to payment of the contract with DeMuro, or any successor in the event that DeMuro leaves the TAC prior to the expiration of this Agreement. In the event that the ACLU files suit to enforce this Agreement, any unexpended portion of the \$110,000 shall be refunded to CYFD. In the event that no suit is filed, at the expiration of this Agreement, any unexpended portion of the \$110,000 allocated to the DeMuro contract shall be retained by the ACLU to cover claims for uncompensated fees.

Notwithstanding his employment as an independent contractor for ACLU, DeMuro retains absolute and total independence to act as he determines necessary in regard to the services he performs pursuant to his contract.

(a) Nothing in his contract shall be construed to empower ACLU to exercise control over DeMuro's independence in regard to his investigations, observations,

statements, conclusions or recommendations, whether written or oral, and without limitation, in the course of his work undertaken pursuant to the terms of his contract.

(b) Nothing in this contract shall be construed to prevent DeMuro from having unlimited and unfettered communication with representatives of the ACLU-NM team or with anyone else of his choosing who has information regarding youth involved in New Mexico's delinquency system or expertise deemed useful to him in fulfilling his duties as a TAC member.

(c) Nothing in this contract shall be construed to prohibit or limit DeMuro from serving as an expert consultant and/or expert witness for ACLU-NM at ACLU's and DeMuro's sole discretion in the event of any litigation contemplated or brought by the ACLU-NM concerning conditions or rights of youth incarcerated in CYFD facilities at the sole cost of ACLU-NM. If at any time the ACLU reasonably believes that they will pursue litigation and DeMuro agrees to become the ACLU's expert consultant or witness, the ACLU shall notify CYFD and DeMuro shall immediately resign from the TAC. If DeMuro resigns from the TAC, another person mutually selected by the parties shall take his place; if the parties are unable to agree on a replacement, the TAC, including DeMuro, shall select the replacement TAC member.

**AGREED:**

**For the ACLU-NM:**

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

Date: \_\_\_\_\_

**For CYFD:**

\_\_\_\_\_  
Dorian Dodson, Secretary

Date: \_\_\_\_\_

\_\_\_\_\_  
Frank Weissbarth, General Counsel

Date: \_\_\_\_\_