

**STATE OF NEW MEXICO
OFFICE OF THE STATE AUDITOR**



**EXAMINATION REGARDING THE AGREEMENTS BETWEEN THE
CHILDREN, YOUTH AND FAMILIES DEPARTMENT AND THE
AMERICAN CIVIL LIBERTIES UNION-NEW MEXICO
CONCERNING SERVICES AND PROCEDURES FOR NEW MEXICO
YOUTH ADJUDICATED JUVENILE DELINQUENT FOR THE PERIOD
FROM FEBRUARY 15, 2006 THROUGH DECEMBER 31, 2010**

**Hector H. Balderas
State Auditor
June 28, 2011**

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Independent Accountant's Report

June 28, 2011

Ms. Yolanda Berumen-Deines
Cabinet Secretary Designee
Children, Youth & Families Department
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We have examined the Agreement Between Children, Youth and Families Department (CYFD) and the American Civil Liberties Union-New Mexico (ACLU-NM) Concerning Services and Procedures for New Mexico Youth Adjudicated Juvenile Delinquent (the Agreement), and the related Amended Agreement Between CYFD and the ACLU-NM Concerning Services and Procedures for New Mexico Youth Adjudicated Juvenile Delinquent (the Amended Agreement) of CYFD for the period from February 15, 2006 through December 31, 2010 for the purpose of expressing an opinion as to whether:

- (a) the CYFD expenditures and claims and judgment liabilities in the CYFD financial statements from fiscal years 2006 through 2010 were fairly stated, in all material respects in conformity with accounting principles generally accepted in the United States of America;
- (b) the Agreement, the Amended Agreement and the CYFD contract with Keleher & McLeod, PA for legal services (Contract No. 09-690-8452) expenditures were made in accordance with the requirements of the agreements and the Contract, respectively, and applicable statutory and regulatory requirements;
- (c) Contract No. 09-690-8452 and the CYFD contract with Doctor Greifinger (Contract No. 10-690-11286) for medical audit services provided in May 2010, were procured in accordance with the New Mexico Procurement Code;
- (d) CYFD complied with specific requirements of the Amended Agreement; and
- (e) the ACLU-NM initiated any current legal action against CYFD for noncompliance with the Amended Agreement.

CYFD management is responsible for:

- (a) reporting the ACLU-NM expenditures and claims and judgment liabilities under the Agreement and the Amended Agreement in the CYFD financial statements in conformity with accounting principles generally accepted in the United States of America;
- (b) making the expenditures for the Agreement, the Amended Agreement, and Contract No. 09-690-8452 for legal services in accordance with the requirements of the Agreement, the Amended Agreement and the Contract, respectively, and the applicable statutory and regulatory requirements;
- (c) procuring Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services, and Contract No. 10-690-11286 with Doctor Greifinger for medical audit services provided May 2010, in accordance with the New Mexico Procurement Code;
- (d) CYFD's compliance with the Amended Agreement; and
- (e) informing the examination team of the status of any recent legal action the ACLU-NM may have initiated against CYFD for noncompliance with the Amended Agreement.

Our responsibility is to express an opinion based on our examination.

Our examination was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants and accordingly, included examining, on a test basis, evidence supporting that:

- (a) CYFD's reporting of the ACLU-NM expenditures and claims and judgment liabilities related to the Agreement and Amended Agreement were presented in conformity with accounting principles generally accepted in the United States of America in the CYFD financial statements;
- (b) CYFD's expenditures for the Agreement, the Amended Agreement and Contract No. 09-690-8452 for legal services, were made in accordance with the requirements of the Agreement, the Amended Agreement, the Contract and the applicable statutory and regulatory requirements;
- (c) CYFD's Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services, and CYFD's Contract No. 10-690-11286 with Doctor Greifinger for medical audit services provided in May 2010, were procured in accordance with the New Mexico Procurement Code;
- (d) CYFD complied with specific requirements of the Amended Agreement; and
- (e) CYFD's statements were correct regarding whether the ACLU-NM initiated recent legal action against CYFD for alleged noncompliance with the Amended Agreement.

We also performed such other procedures as we considered necessary in the circumstances. We believe that our examination provides a reasonable basis for our opinion. Our examination does not provide a legal determination on the entity's compliance.

The attached document provides the following information regarding the CYFD and ACLU-NM Agreement and Amended Agreement: an executive summary; background regarding the agreements; purpose and scope of the work performed; methodology and procedures performed by the examination team; results of the procedures performed; events subsequent to December 31, 2010; findings; recommendations; referrals; and exit conference information.

In our opinion, based on the criteria cited:

- (a) CYFD expenditures and claims and judgment liabilities in the CYFD financial statements from fiscal years 2006 through 2010 were fairly stated, in all material respects in conformity with accounting principles generally accepted in the United States of America;
- (b) CYFD's expenditures under the Agreement, the Amended Agreement and Contract No. 09-690-8452 were made in accordance with the requirements of the agreements and the Contract, respectively, and with Sections 6-5-8 and 13-1-158 NMSA 1978, and an applicable section of the Department of Finance and Administration *Model Accounting Practices Manual* (FIN 5.10) that requires payment vouchers to be generally supported by an original invoice from the vendor;
- (c) CYFD's Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services and the CYFD's Contract No. 10-690-11286 with Doctor Greifinger for medical audit services provided in May 2010 were procured in accordance with the New Mexico Procurement Code;
- (d) CYFD complied with the following specific requirements of the Amended Agreement:
 - i. updates to the Plan were approved by the CYFD Cabinet Secretary and the ACLU-NM contractor Paul DeMuro pursuant to Appendix A, Preliminary Note;
 - ii. CYFD did continue to contract with Dr. Greifinger in order to fulfill the monitoring and reporting requirements of the original agreement pursuant to Section IV (Medical) of Appendix A of the Amended Agreement; and
 - iii. CYFD and the Technical Advisory Committee (TAC) did conduct six quarterly TAC meetings in person every 3 months from 9/3/09 to 12/31/10 pursuant to Section 9 of the Amended Agreement;

However, as discussed in the attached document:

- (a) the TAC did not provide CYFD and the ACLU-NM with written information regarding CYFD's progress and compliance prior to the required TAC meetings that

occurred from September 3, 2009 to December 31, 2010, as required by Section 9 of the Amended Agreement; and

- (b) It appears that the ACLU-NM did not fully meet its obligations under Section 8 of the Amended Agreement to meet with CYFD and attempt to resolve noncompliance issues with the TAC's assistance after notifying CYFD of ACLU-NM's belief that CYFD was in non-compliance with the terms of the Agreement, and prior to filing legal action against CYFD.

Office of the State Auditor ✓

Office of the State Auditor

June 28, 2011

I. EXECUTIVE SUMMARY

Based upon the procedures that were performed, the Office of the State Auditor (OSA) believes:

- the Children, Youth and Families Department (CYFD) expenditures and claims and judgment liabilities in the CYFD financial statements from fiscal years 2006 through 2010 were fairly stated, in all material respects in conformity with accounting principles generally accepted in the United States of America;
- the CYFD expenditures related to the Agreement, the Amended Agreement, and CYFD's Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services were made in accordance with the requirements of the Agreement, the Amended Agreement and the Contract, respectively, and other applicable requirements;
- CYFD's procurement of Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services and Contract No.10-690-11286 with Doctor Greifinger for medical audit services complied with the Procurement Code;
- CYFD complied with specific requirements of the Amended Agreement that were tested, but the Technical Advisory Committee (TAC) and the American Civil Liberties Union-New Mexico (ACLU-NM) did not comply in some instances, as explained in the "Results" section of the report; and
- It appears that the ACLU-NM did not fully meet its obligations under Section 8 of the Amended Agreement to meet with CYFD and attempt to resolve noncompliance issues with the TAC's assistance after notifying CYFD of ACLU-NM's belief that CYFD was in non-compliance with the terms of the Agreement, and prior to filing legal action against CYFD, as explained in the "Results" section of the report.

In addition to the costs of implementing the CYFD programs and policy changes required by the ACLU-NM agreements, the State of New Mexico has paid out a total of \$1,530,338 related to this CYFD and ACLU-NM legal dispute. Risk Management Division (RMD) of the General Services Department paid \$85,000 to settle with various defendants, plus \$620,000 for ACLU-NM legal fees pursuant to the original Agreement. CYFD paid \$500,000 for ACLU-NM legal fees pursuant to the Amended Agreement, and \$325,338 to Keleher & McLeod, PC for legal assistance in the ACLU-NM matter.

II. BACKGROUND

The initial agreement between CYFD and ACLU-NM, known as the Agreement Between CYFD and the ACLU-NM Concerning Services and Procedures For New Mexico Youth Adjudicated Juvenile Delinquent, was signed on February 15, 2006 (the Agreement). At the time that the Agreement was signed, the ACLU-NM, in conjunction with its cooperating attorneys and the Youth Law Center of San Francisco, had prepared for filing a class action lawsuit to address what it perceived as systemic safety,

programmatic and procedural deficiencies in New Mexico's treatment of youth who were adjudicated juvenile delinquent. In part, the Agreement provides that:

- "it is the result of the parties desire to resolve the issues between them without the necessity of litigation" (Introductory paragraph);
- the ACLU-NM agrees not to file any lawsuit as long as CYFD is implementing the terms of the Agreement in a timely and appropriate manner (Section 3);
- CYFD agrees to implement fully all the actions set forth in Appendix A to the Agreement in accordance with all timelines set forth in that Appendix, except for limited circumstance provided in paragraph 7, below, including all plans, policies and procedures required by Appendix A which are approved in whole or in part that automatically become a part of Appendix A of the Agreement, through the process set forth in paragraph 6 (Section 5);
- CYFD will compensate individual youth who retained the ACLU-NM team a total of \$85,000 (Section 10);
- CYFD shall pay the ACLU-NM's staff and cooperating attorneys and the attorneys for the Youth Law Center their attorneys' fees and expenses for all their time and expenses up to the effective date of the Agreement a "settlement" amount of \$220,000 (Section 11);
- CYFD shall pay \$400,000 for ACLU-NM attorney fees and costs, its cooperating attorneys and the Youth Law Center for work they perform: (1) monitoring compliance with the Agreement; and (2) reviewing and commenting on CYFD plans, policies and procedures as provided in Appendix A of the Agreement (Section 12).

RMD paid the following amounts pursuant to the Agreement: \$85,000 in fiscal year 2006 to individuals who retained the ACLU-NM attorneys; and \$220,000 in fiscal year 2006 to the ACLU attorneys. RMD also paid the ACLU attorneys a total amount of \$400,000 in the following amounts pursuant to the Agreement:

- \$130,000 in fiscal year 2007;
- \$130,000 in fiscal year 2008;
- \$130,000 in fiscal year 2009; and
- \$10,000 in fiscal year 2010.

The original Agreement was scheduled to terminate on February 15, 2010, four years after the effective date of the agreement which was February 15, 2006. As documented in the Amended Agreement, on November 20, 2007, the ACLU-NM filed suit against CYFD (*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) alleging that CYFD was in violation of certain provisions of the 2006 Agreement. CYFD has denied the allegations.

The second agreement, known as the Amended Agreement Between CYFD and the ACLU-NM Concerning Services and Procedures For New Mexico Youth Adjudicated Juvenile Delinquent (the Amended Agreement), was signed by CYFD and the ACLU-NM on September 3, 2009. The Amended Agreement indicates that it is the result of “the parties having met numerous times and reached an agreement on the steps CYFD will take to address the issues that are the subject of the ACLU-NM’s pending lawsuit.” The Amended Agreement became effective when it was signed on September 3, 2009 and was scheduled to terminate on December 31, 2010, “unless extended by mutual agreement of the parties.” The Amended Agreement superseded and replaced the 2006 Agreement. In part, the Amended Agreement provides that:

- “The ACLU-NM agrees to dismiss its pending lawsuit” (Section 3);
- “The ACLU-NM will not file any suit as to any CYFD juvenile justice services or policies addressed in the Agreement (including any amendments or appendices thereto so long as the Amended Agreement is in effect and the ACLU-NM believes CYFD is implementing the terms of the Agreement in a timely and appropriate manner” (Section 3);
- “CYFD agrees to implement fully all 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 below” (Section 5);
- “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.” (Section 8);
- “The Technical Advisory Committee (TAC) shall meet with the ACLU-NM every 3 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.” (Section 9); and
- “CYFD shall pay the ACLU-NM team attorneys’ fees, expenses and costs in the total amount of \$500,000 and the 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.” (Section 10)

The Technical Advisory Committee (TAC) was established by the Amended Agreement. The core members of the TAC are the CYFD Secretary, and the ACLU-NM experts, Paul DeMuro and Pamela McPherson, MD. The Amended Agreement requires that all decisions of the TAC be by consensus of its core members. It should be noted that two of the three core members are ACLU-NM experts. The TAC consists of both CYFD decision-makers and outside experts on juvenile justice corrections and rehabilitation as both permanent and pro tem members. The responsibilities of the TAC are set forth throughout the Amended Agreement.

The CYFD paid a total of \$500,000 to the ACLU attorneys in October 2009 pursuant to the Amended Agreement: 1) \$200,000 in fiscal year 2010 that the Department previously accrued as a liability at the end of fiscal year 2008; and 2) an additional \$300,000 budgeted in fiscal year 2010.

During fiscal years 2009 and 2010, CYFD also incurred \$325,338 of legal expenses related to a contract with Keleher & McLeod, PC for professional legal representation and paralegal support services for the CYFD and the CYFD employees named as defendants in the matter between CYFD and the ACLU-NM.

On December 15, 2010, ACLU-NM filed a breach of contract complaint and motion for Temporary Restraining Order (TRO) against CYFD, Bill Dunbar, CYFD Cabinet Secretary, and Debra Pritchard, Director of CYFD Juvenile Justice Services. As of January 13, 2011, District Judge Clay Campbell reduced elements contained in the TRO request, and ordered that the parties to participate in a settlement facilitation regarding the breach of contract complaint.

III. PURPOSE AND SCOPE

The OSA determined that an examination engagement in accordance with the applicable American Institute of Certified Public Accountants (AICPA) requirements should be made regarding the CYFD and ACLU-NM Agreement and Amended Agreement. The scope of the examination covered the period of time from the fiscal years ended June 30, 2006 through December 31, 2010. The examination included procedures to determine whether: 1) the CYFD financial statements correctly reflected claims and judgments related to the ACLU-NM lawsuits and Agreements; 2) CYFD's payments complied with the Agreement, the Amended Agreement, the contract for legal fees and other applicable requirements; 3) two CYFD contracts related to the ACLU-NM matter were procured in accordance with the Procurement Code; 4) CYFD, the TAC and the ACLU-NM complied with specific requirements of the Amended Agreement; 5) and the ACLU-NM had filed any recent legal action against CYFD.

IV. METHODOLOGY AND PROCEDURES

The objectives of the engagement are set forth in the first paragraph of the Independent Accountant's Report. To accomplish these objectives, the OSA examination team performed the following procedures:

- 1) Obtained an understanding of CYFD's internal controls over financial reporting of ACLU-NM related claims and judgments, procurement, disbursements, and compliance with the Amended Agreement;
- 2) Reviewed and summarized CYFD's legal file on ACLU-NM related matters;
- 3) Compared the ACLU-NM legal issues disclosed in the CYFD financial audit legal letters for fiscal years 2006 through 2010 to the claims and judgment amounts and disclosures in the CYFD financial statements for the same period of time, testing for compliance with generally accepted accounting principles;
- 4) Obtained and tested all documentation regarding payments made pursuant to the Agreement, the Amended Agreement, Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services and Contract No.10-690-11286 with Doctor Greifinger for his May 2010 audit of CYFD medical services provided;
- 5) Tested the procurement of Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services and Contract No.10-690-11286 with Doctor Greifinger for medical audit services provided May 2010, for compliance with the New Mexico Procurement Code;
- 6) Reviewed documented changes to "the Plan" for CYFD Cabinet Secretary's and ACLU-NM's contractor Paul DeMuro's approval (required by the third paragraph of Appendix A of the Amended Agreement);
- 7) Reviewed reports that Doctor Greifinger generated as a result of his medical audit performed in May 2010 (Appendix A, Section IV, of the Amended Agreement);
- 8) Interviewed CYFD's acting Chief Legal Counsel and CYFD's ACLU Project Manager to obtain an understanding of CYFD's position regarding Dr. Greifinger's claims of CYFD noncompliance set forth in Dr. Greifinger's updated report;
- 9) Reviewed Technical Advisory Committee (TAC) meeting minutes and related documentation for the quarterly TAC meetings held September 23, 2009, December 7, 2009, March 17, 2010, June 15, 2010, and September 27, 2010 (required by Paragraph 9 of the Amended Agreement);
- 10) Requested and reviewed financial information from the ACLU-NM attorney who received the ACLU settlement payments pursuant to the Agreement and the Amended Agreement;
- 11) Interviewed CYFD's ACLU Project Manager regarding receipt of TAC information regarding CYFD's progress and compliance prior to the TAC meetings;
- 12) Obtained and reviewed numerous newspaper articles on the subject of the CYFD and ACLU-NM matter during the course of the examination;
- 13) Reviewed the following documents regarding whether the ACLU provided "notice" required by Section 8 of the Amended Agreement:
 - The December 3, 2010 letter from ACLU-NM to CYFD Secretary Dunbar alleging CYFD has failed to comply with the terms of the Amended Agreement,

and requesting that CYFD extend the term of the Amended Agreement for one additional year or face litigation lawsuit by the ACLU; and

- The December 9, 2010 letter from CYFD Acting General Counsel to the ACLU disagreeing ACLU-NM's assertions made in its December 3, 2010 letter and declining to extend the term of the Amended Agreement.
- 14) Reviewed the following documents regarding the December 15, 2010 ACLU-NM legal actions against CYFD:
- The American Civil Liberties Union of New Mexico 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, No. D-0202-CV-2010-14328, in Second Judicial District, County of Bernalillo, Complaint for Declaratory, Injunctive and Compensatory Relief ;
 - ACLU-NM v. CYFD, Bill Dunbar, Secretary, and Debra Pritchard, Director, Juvenile Justice Services, Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction and Memorandum in Support (also No. D-0202-CV-2010-14328); and
 - CYFD's Response to the Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction and Memorandum in Support.
- 15) Reviewed the following documentation related to Paul DeMuro's \$110,000 contract with the ACLU-NM for his participation on the TAC team pursuant to Section 13 of the Amended Agreement:
- ACLU-NM documentation of payments to Paul DeMuro through December 15, 2010;
 - CYFD Acting General Counsel's December 15, 2010 email to ACLU-NM demanding for repayment of the unpaid balance of the \$110,000 pursuant to Section 13; and
 - ACLU-NM's December 15, 2010 email response.

V. RESULTS

The following are the results of our examination.

Result 1:

All contingent liabilities and expenditures related to the Agreement and the Amended Agreement were found to be included in the fiscal year 2006 through fiscal year 2010 CYFD financial statements and notes in accordance with generally accepted accounting principles.

The following expenditures made by RMD for CYFD were found to be in compliance with the requirements of the Agreement:

- \$85,000 paid to compensate several individual youth who retained the ACLU-NM attorneys to represent them for violations of their civil rights, with complete releases from said youth and their guardians provided, pursuant to paragraph 10 of the Agreement;
- \$220,000 paid to an ACLU-NM attorney for complete compensation for all time and expenses for the ACLU-NM team up to the effective date of the Agreement, February 15, 2006, pursuant to paragraph 11 of the Agreement; and
- \$400,000 over four years, with no more than \$130,000 of that amount paid in any one-year period, paid to an ACLU-NM attorney for attorney fees and costs related to monitoring compliance with the Agreement and reviewing and commenting on plans, policies and procedures related to the Agreement, pursuant to paragraph 12 of the Agreement.

However, the examination team noted the following facts of interest. The ACLU-NM letters requesting payment of the \$400,000 over the four-year period indicate that the ACLU-NM did not restrict its legal expenses to the amount that the Agreement allowed for reimbursement. Prior to the ACLU-NM lawsuit filed against CYFD on November 20, 2007, ACLU-NM sent a letter dated October 19, 2007 to CYFD for the purpose of requesting the second \$130,000 payment. The letter indicated that ACLU-NM attorney fees and costs already exceeded the allowable annual cap for the first two years of \$260,000, by \$61,275. The letter also stated that those rolled-forward excess attorney fees and costs would be “included in a bill submitted in the third Agreement-year.” An ACLU-NM letter dated December 12, 2008, which requested the third CYFD payment of \$130,000 (for a cumulative total of \$390,000), indicated that the cumulative ACLU-NM attorney fees were \$488,244 and exceeded the annual \$130,000 cap by a cumulative amount of \$98,244. The letter goes on to state the following: “This \$98,244 owed will be included in a bill submitted in the fourth Agreement-year.” However, by the fourth year of the Agreement, the portion of the \$400,000 settlement payment that remained unpaid was only \$10,000, pursuant to paragraph 12 of the Agreement. This shows that the ACLU-NM did not limit its attorney fees and costs to the amount set by the caps indicated in the Agreement.

The RMD provided the examination team with “abstracts” that contained relevant information of the payments made pursuant to the Agreement. The “abstract” information enabled the accountants to perform test procedures on the payments. RMD did not have the payment vouchers and invoices related to these settlement payments that the examination team requested.

Result 2:

The following expenditures made by CYFD were found to be in compliance with the requirements of Paragraph 10 of the Amended Agreement and the statutory and

Department of Finance and Administration (DFA) Model Accounting Practices documentation requirements:

- \$300,000 paid on October 20, 2009 on warrant number B1001726651; and
- \$200,000 paid on October 20, 2009 on warrant number B1001726652.

Result 3:

The payments totaling \$323,338 made by CYFD to Keleher & McLeod, PC for legal services pursuant to Contract No. 09-690-8452 related to the ACLU-NM matter were found to be in compliance with the statutory and DFA Model Accounting Practices documentation requirements.

Result 4:

CYFD procured Contract No. 09-690-8452 with Keleher & McLeod, PA for legal services and Contract No. 10-690-11286 with Dr. Greifinger for medical audit services provided in May 2010 in accordance with the New Mexico Procurement Code.

Result 5:

Regarding tests for compliance with specific requirements of the Amended Agreement, the examination team found the following.

- All finalized updates to “the Plan” received the written approval of the CYFD Cabinet Secretary and the ACLU-NM contractor Paul DeMuro as required by the third paragraph of the Preliminary Note section of the Amended Agreement;
- CYFD did contract with Dr. Greifinger to fulfill the monitoring reporting requirements referred to in Section IV (Medical) in Appendix A of the Amended Agreement;
- The TAC did conduct six quarterly meetings in person every three months from September 3, 2009 through December 31, 2010, as required in Paragraph 9 of the Amended Agreement;
- The TAC did not provide CYFD and the ACLU-NM with written information regarding CYFD’s progress and compliance prior to the required TAC meetings that occurred from September 3, 2009 to December 31, 2010, as required by Section 9 of the Amended Agreement. As previously mentioned, the TAC is made up of core members consisting of the CYFD Cabinet Secretary, and two ACLU-NM experts, Paul DeMuro and Pamela McPherson, MD. The TAC also includes CYFD decision-makers and outside experts on juvenile justice corrections and rehabilitation as both permanent and pro tem members;
- It appears that the ACLU-NM did not fully meet its obligations under Section 8 of the Amended Agreement to meet with CYFD and attempt to resolve noncompliance issues with the TAC’s assistance after notifying CYFD of ACLU-

NM's belief that CYFD was in non-compliance with the terms of the Agreement, and prior to filing legal action against CYFD. Section 8 provides the following: "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 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 . . ." On December 3, 2010, the ACLU-NM sent CYFD a letter notifying it of ACLU-NM's belief that CYFD had failed to comply with the terms of the Amended Agreement. In its letter, ACLU-NM stated that "[o]ne way to rectify the situation is for the ACLU to again sue CYFD." ACLU-NM went on to state, "[h]owever, we would prefer for CYFD to extend the term of the Agreement for an additional year, to avoid the expense and distraction of a lawsuit." The ACLU-NM gave CYFD a deadline of five days to respond as to whether CYFD would agree to an extension of the Agreement for an additional year. The ACLU-NM letter does not include, as an option to resolving the issues discussed in the letter, the Amended Agreement's requirement to meet with CYFD to resolve the issues with the TAC's assistance. Additionally, the ACLU-NM's five-day deadline expired prior to the TAC's two-day meeting scheduled to begin on December 13, 2010.

In a letter dated December 9, 2010 to the ACLU-NM, CYFD's Acting General Counsel informed ACLU-NM that CYFD "must decline" the request to extend the term of the Agreement. At the conclusion of the TAC meeting on the evening of December 14, 2010, the ACLU-NM provided the CYFD Acting General Counsel with a draft of the ACLU-NM's Complaint for Declaratory, Injunctive and Compensatory Relief (the Complaint). At 10:23 a.m. on December 15, 2010, the ACLU-NM provided CYFD via email with a complete draft of the Complaint as well as the Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum in Support (TRO). In that same email, ACLU-NM stated that it would file the Complaint and the Motion for TRO at 1:00 p.m. on December 15, 2010 if CYFD did not agree to extend the 2009 Agreement.

Based on these communications, it appears that ACLU-NM did not fully meet its obligations under Section 8 of the Amended Agreement after notifying CYFD by ACLU-NM's December 3, 2010 letter that ACLU-NM did not believe CYFD was implementing or otherwise complying with the terms of the Agreement. Subsequent to the December 3, 2010 notice provided to CYFD pursuant to Section 8 of the Agreement, the Agreement required the parties to "meet in good faith to attempt to resolve the issue with the TAC team's assistance." The ACLU-NM letter does not include, as an option to resolving the issues discussed in the letter, the Amended Agreement's requirement to meet with CYFD to resolve the issues with the TAC's assistance. Rather, the expiration of the five-day deadline ACLU-NM imposed on CYFD to respond to the December 3, 2010 letter's request to extend the Amended Agreement preceded a two-day TAC meeting.

Result 6:

The ACLU-NM documentation of payments to Paul DeMuro, for his \$110,000 contract with the ACLU-NM for his participation on the TAC team, revealed that Mr. DeMuro had been paid \$95,715 with an unpaid balance of \$14,285 as of December 31, 2010. Section 13 of the Amended Agreement provides the following: “In the event that the ACLU files suit to enforce this Agreement, any unexpended portion of the \$110,000 shall be refunded to CYFD.” ACLU filed suit on December 15, 2010. In an email to the ACLU-NM dated December 15, 2010, CYFD’s Acting General Counsel demanded the refund of the unpaid balance pursuant to Section 13 of the Amended Agreement. The ACLU-NM responded via email that “CYFD’s breaches of the agreement call into question whether the provision [Section 13] should be followed, ” but “we understand your position and are willing to discuss this with you in order to attempt to resolve that issue.” An email sent that same day from Paul DeMuro to CYFD’s Assistant General Counsel indicated that the remaining unpaid portion of the contract should be about \$33,000 to \$36,000. CYFD Acting General Counsel stated that CYFD is going to let the judge determine the amount of the DeMuro contract-related refund that is due to CYFD from the ACLU-NM pursuant to Section 13 of the Amended Agreement.

VI. SUBSEQUENT EVENTS

A hearing was held on January 10, 2011. An Albuquerque Journal article dated January 12, 2011, stated that District Judge Clay Campbell granted the ACLU-NM another seven months of oversight at San Juan based on ACLU-NM allegations contained in the legal action filed on December 15, 2010. The judge also stated that the independent auditor (of medical services) can visit the site and examine its records. The ACLU-NM had asked that it be allowed to continue to monitor three other CYFD sites, but Campbell denied that request as well as the ACLU’s request that the rest of the agreement be extended. Campbell also said that the CYFD must continue to work with contractors to put into effect Cambiar New Mexico, a program designed to reduce the jail-like atmosphere of juvenile detention facilities.

A hearing was held on May 2, 2011, at which time Judge Clay Campbell required CYFD to respond within 30 days to specific ACLU-NM inquiries/accusations to enable the ACLU-NM to determine the extent to which CYFD’s quality control system is in place. The judge also told CYFD that they had 30 days from the date of the mediation to respond to the remainder of the ACLU-NM inquiries/accusations. As of June 17, 2011, the mediation between CYFD and ACLU-NM had been rescheduled for July 14, 2011.

VII. FINDINGS

There were no findings.

VIII. RECOMMENDATIONS

Recommendation 1:

CYFD should inform the ACLU-NM that ACLU-NM attorney fees and costs should be monitored and controlled by the ACLU-NM to prevent such costs from exceeding agreed upon amounts, and that no rolled-forward attorney fees and costs will be paid by CYFD.

Recommendation 2:

CYFD should monitor whether the TAC is complying with the requirement to provide written information, prior to the required TAC meetings, to the ACLU-NM and CYFD regarding CYFD's progress and compliance.

IX. REFERRALS

This examination raised a legal question of whether it is appropriate for a New Mexico state agency to enter into settlement agreements that include provisions comparable to certain provisions contained in the Amended Agreement that CYFD executed with the ACLU-NM. It should be noted that CYFD sought approval from the New Mexico Attorney General's Office (AGO) prior to entering the settlement agreement with the ACLU. CYFD could not produce documentation evidencing the AGO's approval of the Agreement; however, based on the OSA's interview with CYFD's Assistant General Counsel, it appears CYFD received approval of the Agreement from the AGO. Nevertheless, the OSA will submit this question to the AGO for further consideration.

The OSA will also refer this question to the Governor given that this settlement agreement involved an executive agency under the control of the Governor. Additionally, the Governor's review of this examination report and associated legal questions may assist the Governor in any future consideration of these types of settlement agreements.

X. EXIT CONFERENCE

An exit conference was held on Tuesday, June 28, 2011 at the CYFD office in the PERA building in Santa Fe, New Mexico.

Attending for CYFD were:

Yolanda Berumen-Deines, Secretary
Edna-Reyes-Wilson, Deputy Secretary
Bob Tafoya, Chief of Staff
Julienne Smrcka, Director Community Outreach & Development

Michelle George, Associate Deputy Director
John Sweeney, Deputy Director – Juvenile Justice
Scott Cameron, Assistant General Counsel
Enrique C. Knell, Communications Director

Attending for the Office of the State Auditor were:

Carla Martinez – Deputy State Auditor
Evan Blackstone- Chief of Staff
Kathy Neidigk – Audit Manager
Dennis DeVary – Audit Manager