

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

NO. D-202-CV-2015-07535

GABRIELLE VALDEZ, as Personal
Representative of the Wrongful
Death Estate of OMAREE VARELA,
Deceased, and JILL MARRON, as
Guardian ad litem for N.V., a minor,

Plaintiffs,

vs.

JOE ROYBAL, in his personal capacity
acting under color of state law;
BENNIE PLACENCIO, in his personal
Capacity acting under color of state
law; JOHN DOES 1-5, in their personal
capacity acting under color of state
law and THE NEW MEXICO CHILDREN, YOUTH
AND FAMILIES DEPARTMENT,

Defendants.

**COMPLAINT FOR CIVIL RIGHTS VIOLATIONS AND
VIOLATIONS OF THE NEW MEXICO TORT CLAIMS ACT**

Plaintiff Gabrielle Valdez, as Personal Representative of the Estate of Omaree Varela,
and Jill Marron, as guardian ad litem for N.V., a minor, for their causes of action against
Defendants, states as follows:

1. This action arises under the provisions of the First and Fourteenth
Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983 and the New
Mexico Tort Claims Act.

The Parties

2. Gabrielle Valdez is a resident of Albuquerque, Bernalillo County, New Mexico. She is the duly appointed personal representative of the Wrongful Death Estate of Omaree Varela, deceased.

3. Jill Marron is a resident of Albuquerque, Bernalillo County, New Mexico. She is the duly appointed guardian ad litem for N.V., a minor child.

4. At all times material to this lawsuit, Defendant Joe Roybal was a resident of New Mexico (county unknown), and was employed as a social worker by the Children, Youth and Families Department of the State of New Mexico ("CYFD"). He was responsible, in whole or in part, for investigating the allegations of physical abuse and physical neglect suffered by Omaree and his siblings. He also was responsible, in whole or in part, for preparing the September 16, 2009 memorandum declaring that CYFD was investigating Synthia Varela, recommending that Omaree and his sister remain under the care of Essie Sotelo, and stating that Synthia should not take the children into her care.

5. At all times material to this lawsuit, Defendant Bennie Placencio was a resident of New Mexico (county unknown), and was employed as a social worker by CYFD. He was responsible, in whole or in part, for investigating the allegations of physical abuse and physical neglect suffered by Omaree and his siblings. He also was responsible, in whole or in part, for threatening Essie Sotelo with criminal prosecution for interstate kidnapping if she did not bring Omaree and his sister to New Mexico and for arranging their placement with Steve Casaus and Synthia Varela.

6. At all times material to this lawsuit, Defendants John Does 1-5 were residents of New Mexico (county unknown), and were employed as social workers by CYFD. Upon

information and belief, they were responsible, in whole or in part, for investigating the allegations of physical abuse and physical neglect suffered by Omaree and his siblings. Upon information and belief, they also were responsible, in whole or in part, for threatening Essie Sotelo with criminal prosecution for interstate kidnapping if she did not bring Omaree and his sister to New Mexico, for arranging their placement with Steve Casaus and Synthia Varela and for monitoring that placement.

7. At all times material to this lawsuit, Defendants Joe Roybal, Bennie Placencio and John Does 1-5 acted within the course and scope of their duties as public employees, were state actors, and acted under color of state law.

8. Defendant CYFD is a department of New Mexico state government which provides an array of prevention, intervention, and rehabilitative services to New Mexico children and their families. The Protective Services Division of CYFD is mandated by the New Mexico Children's Code to receive and investigate reports of children in need of protection from abuse and/or neglect by their parents, guardians or custodians, and to take action to protect those children whose safety cannot be assured in the home.

VENUE

9. Venue is proper in this judicial district pursuant to NMSA 1978 §§ 41-4-18(B) and 38-3-1(A) and (G).

GENERAL ALLEGATIONS

Omaree's Early Life

10. Omaree Varela was exposed in utero to crack cocaine and was born prematurely in February 2004 with significant medical challenges.

11. Omaree's mother, Synthia Varela, was in prison for drug trafficking at the time she gave birth. Synthia Varela was a drug addict who admitted to using crack cocaine during her pregnancy with Omaree. She also had a lengthy list of arrests on charges that included shoplifting, disorderly conduct, concealing identity, failure to appear in court, contempt of court, failure to comply with the conditions of her probation, aiding illegal activity, prostitution on multiple occasions, and drug possession, distribution and trafficking (also on multiple occasions). Omaree's biological father (Christopher Clewis) also was incarcerated at the time Omaree was born.

12. Not long after Omaree's birth, Synthia Varela gave power of attorney for Omaree to two female relatives while she finished her prison sentence. Within one month, there were allegations of physical neglect (inadequate food) and medical neglect (no weight gain since birth) against these care givers. CYFD substantiated the allegations, but later dismissed the case after Omaree was placed in the hospital for weight gain and the two female relatives were referred for parent building skills. Although Omaree was never taken into the State's legal custody during this period, CYFD placed him with a foster parent for approximately 30 days. After that, CYFD returned Omaree to the care of the same female relatives to whom Synthia Varela had entrusted Omaree and against who CYFD substantiated allegations of physical and medical neglect.

13. Synthia Varela married Steve Casaus in November 2004. Like Synthia, Steve Casaus had a criminal record for drug possession. He also had been charged repeatedly with drug trafficking, assault, domestic violence, auto theft, and multiple parole violations.

14. For the first two years of his life, Omaree tolerated a number of primary caregivers. Synthia Varela signed another power of attorney for Omaree to a family friend

(Essie Sotelo) in June 2006, but it is not clear how long Essie Sotelo may have cared for him at that time.

CYFD's Multiple Investigations of Allegations of Physical Abuse and Neglect of Omaree by Synthia Varela

15. By the time Omaree was only five years old, there were several indications that Synthia Varela could not adequately care for Omaree. These included the following:

A. In October 2006, CYFD investigated allegations of physical neglect against Synthia Varela regarding her care of Omaree. Although CYFD found the allegations to be unsubstantiated, as a result of this investigation, Synthia Varela signed yet another power of attorney for Omaree, this one to Omaree's maternal aunt and uncle.

B. CYFD investigated another allegation of physical neglect against Synthia Varela in February 2008 based on her continued drug use and lack of supervision of Omaree. CYFD closed this file when the social worker could not locate the family.

C. In November 2008, Synthia Varela had a daughter (N.V.) with a different father. N.V. is a minor child. To protect her privacy, she is designated in this Complaint by her initials. Soon after that, Steve Casaus was incarcerated with the New Mexico Department of Corrections for 1,397 days for repeated violations of a probation agreement.

D. PB&J Family Services (an organization that assists at-risk children) noted in January 2009 that "Synthia feels overwhelmed with Omaree when he will not listen to her."

E. In April 2009, an Albuquerque Public Schools Independent Education Program ("IEP") evaluation found that Omaree had "significant delays." The report

found that he had made no progress on his goals since the last IEP report because of his frequent absences from school (he attended class only 28 of 69 days).

F. In June 2009, CYFD again investigated allegations of physical neglect and physical abuse of Omaree and allegations of physical neglect with respect to N.V. against Synthia Varela, all in relation to Synthia's continued drug use. Again, CYFD found the allegations to be unsubstantiated. Defendant Joe Roybal performed this investigation. He determined that it was sufficient that the family was receiving in-home services through PB&J, and he took no other action.

G. Sometime during the summer of 2009, Synthia Varela prepared a written statement that she wanted Essie Sotelo to care for her children.

H. PB&J noted in July 2009 that Synthia had her children staying with "friends of friends" and that she would not return phone calls.

I. In mid-September 2009, Defendant Joe Roybal again investigated allegations of physical neglect of Omaree and N.V. by Synthia Varela relating to her use of crack cocaine. Defendant Joe Roybal could not locate Synthia, but Essie Sotelo produced Synthia's earlier written statement and explained that she (Ms. Sotelo) had been caring for the children since late August because Synthia was using drugs and had not been home. Accepting this explanation, Defendant Joe Roybal again found that the abuse allegations were unsubstantiated, and again recommended that the family continue to use PB&J. Defendant Joe Roybal also urged Essie Sotelo to secure a formal power of attorney while caring for the children.

J. Four days later, Defendant Joe Roybal determined that the allegations that Synthia Varela was neglecting Omaree and his sister N.V. were unsubstantiated. No

further action was taken, even though Defendant Joe Roybal stated that he was unable to contact Synthia.

K. At approximately this same time, Synthia Varela asked Essie Sotelo to return the children to their mother. Essie Sotelo relayed this information to Defendant Joe Roybal, and expressed her fear, based upon her years of observation, that Synthia Varela was not capable of caring for her children.

The September 16, 2009 CYFD Memorandum

16. Essie Sotelo was not able to obtain a power of attorney from Synthia Varela to formalize her role as caretaker for Omaree and N.V. Instead, Ms. Sotelo obtained legal status as the children's caretaker from CYFD. After receiving the call from Essie Sotelo, Defendant Joe Roybal prepared a memorandum on CYFD letterhead, dated September 16, 2009 which stated:

Re: Synthia Varela (DOB 6/08/75), Omaree Varela DOB 2/03/04), and [N.V.] (DOB [omitted])

To Whom It May Concern:

The Children, Youth and Families Department is currently investigating an open case regarding Synthia Varela and the above-named children. Essie Sotelo (*DOB omitted*) is the current caretaker for Omaree and [N.V.]. It is the Department's recommendation that the children should remain in Essie Sotelo's care pending the current investigation. Synthia Varela or Marnyle Barnes ([N.V.]'s biological father) should not take the children into their care until interviews and assessments of their caretaking ability can be completed. Synthia or Marnyle should not take Omaree Varela out of school pending the Department's findings of the current investigation.

If there are any questions regarding this matter, my contact information is listed below.

17. This memo was written by a CYFD Social Worker acting in the course and scope of his employment and was intended to communicate that the State of New Mexico had assumed the authority to place Omaree and N.V. with Ms. Sotelo. Further, the document was intended to

prevent the removal of the children from Ms. Sotelo's care pending a determination of Synthia Varela's fitness to parent her biological children.

18. The September 16, 2009 memorandum was placed in CYFD's files. It also was forwarded to the Albuquerque Public Schools to alert school authorities of CYFD's involvement in determining the appropriate and safe placement for the children.

19. Given that this memo was written by a CYFD Social Worker, appears on CYFD letterhead and was distributed by CYFD to third parties (like the Albuquerque Public Schools), CYFD approved, ratified, authorized, and otherwise facilitated the preparation and dissemination of the memorandum.

20. There is nothing in the CYFD file showing that Synthia Varela was aware of, or agreed to, this memorandum declaring Essie Sotelo to be the sole caretaker of her children at this time. Defendant Joe Roybal's unilateral decision to remove Omaree and his sister from their biological parent and place them under the sole custody and control of Essie Sotelo was not done as a voluntary placement outside of the home, as authorized by the New Mexico Children's Code. To the contrary, the memo was a declaration of the government's assertion of control over the custody and placement of the children despite knowing that the children's biological mother wanted the children reunited with her.

21. Defendant Joe Roybal was not a law enforcement officer, and his unilateral decision to remove Omaree and his sister from their biological parent and place them under the sole custody and control of Essie Sotelo was not done as a form protective custody without a court order, as authorized by the New Mexico Children's Code.

22. Essie Sotelo was not a licensed foster parent, was not a guardian appointed by a court, and was not authorized to care for Omaree and N.V. by a parental power of attorney.

Her sole authority to exercise control and dominion over Omaree and his sister derived from the September 2009 memorandum prepared by Defendant Joe Roybal as a CYFD Social Worker.

23. The CYFD file contains no record of what factors either CYFD or Defendant Joe Roybal used in making the decision to place Omaree and his younger sister in the exclusive custody and care of Essie Sotelo. Instead, it appears that – as of September 2009 – her sole authority to exercise control and dominion over Omaree and his sister derived from the “To Whom It May Concern” memorandum prepared by Defendant Joe Roybal acting as a CYFD social worker.

Events Following the September 16, 2009 CYFD Memorandum

24. After receiving this memo from CYFD, the APS elementary school that Omaree attended revised his emergency contact sheet. In bold, black letters at the bottom of the page, the school wrote, “9/16/09 In Case of Emergency Do Not Call Mom!”

25. After Defendant Joe Roybal prepared this memo in September 2009, Essie Sotelo retained custody of Omaree and N.V. During the next 18 months:

A. Essie Sotelo kept regular contact with Joe Roybal and informed him that she had moved back and forth between New Mexico and Arizona on at least two occasions with the children. Despite the fact that these communications were made with a CYFD social worker and directly affected the care of a child placed by CYFD with a non-relative who was not a licensed foster parent during the course of an-going investigation into the children and their biological mother, there is no record of any of these communications in the CYFD files regarding Omaree.

B. Essie Sotelo showed the September 2009 CYFD memo provided to her by Defendant Joe Roybal to one or more health care providers in both New Mexico and

Arizona in order to secure medical care for Omaree and N.V. and to establish that she was the children's guardian.

C. Essie Sotelo showed the September 2009 CYFD memo provided to her by Defendant Joe Roybal to officials at the elementary school in which she enrolled Omaree in Arizona, and based on that memo, the school accepted Essie Sotelo as Omaree's guardian and emergency contact.

D. Essie Sotelo used the September 2009 memo provided to her by Defendant Joe Roybal with the Social Security Administration to establish that she was Omaree's guardian and to ensure that Omaree's federal benefits were sent to him in care of her at her address.

E. In December 2009, despite the absence of any record to document the scope of its inquiry, CYFD again closed its investigation into whether Synthia Varela posed a risk of harm to Omaree or N.V. Defendant Joe Roybal merely stated that the allegations against Synthia Valera were unsubstantiated. CYFD failed to inform Essie Sotelo of this finding and took no actions to rescind the September 2009 memo. Instead, CYFD chose to allow the children to remain out of state in the placement it previously had selected – Essie Sotelo's home – where the children had been safe and were thriving.

F. After Defendant Joe Roybal signed the Notice of Results of Investigation in December 2009 (with a copy to his supervisor), there is no record in the CYFD files relating to Omaree or N.V. that Defendant Joe Roybal or any CYFD supervisor took any steps either to reunify Synthia Varela with Omaree and his younger sister, or to arrange for any family preservation or support services to assist Synthia Varela with the skills

needed to help the biological family remain intact and to assure that she was able to care for Omaree and his sister at home.

26. Several other key events occurred over the next 18 months.

A. Synthia Varela twice was incarcerated in the Bernalillo County Metropolitan Detention Center. One incarceration was for 48 hours, and the other appears to have been for 10 days.

B. After having served roughly 24 months of his sentence, Steve Casaus returned to Synthia Varela's home sometime after December 2010. He did not live in the home when Defendant Joe Roybal removed Omaree and N.V. from the home and placed them with Essie Sotelo in September 2009, and he had been absent from the home for at least nine months before that date.

C. In February 2011, Synthia Varela gave birth to her third child, E.V., by a third father. E.V. is a minor child. To protect his privacy, he is designated in this Complaint by his initials. Although Synthia originally reported that she did not use drugs during her pregnancy, E.V. tested positive for cocaine at birth. Synthia Varela then confessed to using cocaine while she was pregnant with E.V. The hospital records indicate that CYFD was informed of this finding, as confirmed by CFYD's records.

D. By this time, it appears that Defendant Joe Roybal no longer was assigned to this file. Defendant Bennie Placencio performed the investigation regarding the allegations of physical neglect of E.V. by Synthia Varela (drug exposed child/adult drug abuse). Despite the positive laboratory results, Defendant Bennie Placencio concluded that the allegations were "unsubstantiated." Instead, Defendant Bennie Placencio allowed the hospital staff to send the infant home on oxygen with Synthia Varela and

Steve Casaus, referred the family to PB&J for family services, secured housing, furniture, and baby clothes from various agencies, and arranged for Synthia Varela to obtain parenting skills and substance abuse counseling.

E. Synthia Varela changed residence at least one time. This was at least the fifth time she physically had moved since Omaree was born.

27. All in all, between 2004 and February 2011, CYFD received at least seven allegations of abuse involving Synthia Varela, Omaree or Synthia's other children. According to CYFD records, during several of these investigations Synthia Varela reported that she took medication for epilepsy, diabetes and ADHD, and that she had a brain tumor for which she used oxygen. There is no indication that CYFD sought medical documentation from Synthia Varela or her doctors to substantiate these claims, to learn the degree of their severity, or to evaluate what effect these conditions may have had on her parenting skills.

Omaree's Forced Move to New Mexico

28. Sometime within the 30 days after she gave birth to E.V., Synthia Varela contacted CYFD and demanded the return of Omaree and N.V.

29. Rather than give in to Synthia Varela's demand for the return of her children, the Children's Code specifically authorized CYFD to prevent this placement by filing a petition alleging abuse and neglect and seeking temporary custody of the children. Neither CYFD, nor any individual Defendant, did so. Had CYFD ignored the demand and done nothing at all, Synthia Varela would have been forced to go to Children's Court to seek return of Omaree and N. V., thereby entitling Omaree and his sister to the procedures and protections afforded by the Children's Code.

30. Instead, CYFD and its employees facilitated and assisted Synthia Varela to regain custody of Omaree and N.V. despite years of documentation that she was unfit to parent these children and the lack of any record that she had completed any kind parenting skills training or substance abuse counseling.

31. In March 2011, Defendant Bennie Placencio or Defendants John Does 1-5 called Essie Sotelo, identified himself as a CYFD caseworker and ordered her immediately to transport Omaree and N.V. to Defendant CYFD in New Mexico. The CYFD case worker threatened and promised that if Ms. Sotelo did not immediately comply with this directive, she would be charged with interstate kidnapping. Essie's daughter received a similar call at her home in Albuquerque that threatened her mother with prosecution for interstate kidnapping if the children were not immediately brought to New Mexico. Essie Sotelo received the call on a Friday, and was ordered to bring Omaree and N.V. to New Mexico within 72 hours.

32. Despite the fact that these communications were made by a CYFD social worker and directly affected the care of children placed by CYFD with a non-relative who was not a licensed foster parent, there is no record of any of these communications in the CYFD files regarding Omaree. There also is no record of any communication about this transition between Defendant Bennie Placencio and any of his supervisors or the CYFD legal staff.

33. Fearful of the threat of criminal prosecution, Essie Sotelo followed the directions she was given. She left Arizona and delivered Omaree and N.V. to a CYFD office in Albuquerque on a Monday in March 2011. Defendant Bennie Placencio or John Does 1-5 immediately handed Omaree and N.V. over to Steve Casaus and Synthia Varela. The children immediately left the CYFD office with Steve Casaus and Synthia Varela – adults the children had not seen for at least the past 18 months.

34. In the CYFD files regarding Omaree, there is no record of any investigation or assessment performed in March 2011 of the living conditions that Synthia Varela and Steve Casaus could provide for Omaree and N.V. There also is no notation, documentation, or record reflecting any analysis of the basis for CYFD's decision to demand that Omaree and N.V. be transported to New Mexico and to place them with Steve Casaus and Synthia Varela, or of any of the factors used by CYFD to determine whether this exchange was in the best interest of Omaree and his sister. There also is no record that any safety assessment regarding Synthia Varela, Steve Casaus or the home in which Omaree and his sister were being forcibly placed.

35. In the CYFD files regarding Omaree, there is no record that Defendant Bennie Placencio or John Does 1-5 had any knowledge or awareness whatsoever that, in the 18 months since Joe Roybal prepared the September 2009 memo, the relevant family constellation significantly had changed: Synthia Varela was now living with her previously absent, ex-convict, husband and had a new infant son who had tested positive for cocaine at birth.

36. Before placing Omaree and N.V. with Synthia Varela and Steve Casaus, there is no record in the CYFD files relating to Omaree that Defendant Bennie Placencio or John Does 1-5 ordered or arranged for any family preservation or family support services to provide Synthia Varela and Steve Casaus with the skills needed to help the biological family remain intact and assure that they would be able to care for Omaree, N.V. and E.V. at home.

37. The only record that is within the CYFD file is a February 23, 2011 memorandum on CYFD letterhead addressed to the Social Security Administration and signed by Defendant Bennie Placencio. In that memo, Defendant Bennie Placencio identifies himself as a CYFD investigator working with Synthia Varela. He then states that "this letter is to inform you that she has legal and physical custody of Omaree Varela -DOB 02/03/04 and [N.V.]." This

statement was untrue: as of late February 2011, Omaree and his sister were in Arizona under the exclusive care of Essie Sotelo. Moreover, Essie Sotelo had used Defendant Joe Roybal's September 2009 memo with the Social Security Administration to establish that she was Omaree's guardian and to ensure that Omaree's federal benefits were sent to him in care of her at her address. The only reason for Defendant Bennie Placencio's memo was to counteract CYFD's earlier memorandum placing custody of the children with Essie Sotelo.

38. But for the directive given by CYFD personnel and the threat of criminal prosecution for interstate kidnapping, Essie Sotelo would not have brought Omaree and his sister to New Mexico, and Omaree and his sister would not have been placed in the home occupied by Synthia Varela, Steve Casaus and E.V.

Synthia Varela's Erratic Behavior

39. On at least two occasions, CYFD instructed Synthia Varela to secure behavioral assistance for Omaree at a non-profit agency that provides social and mental health services in the Albuquerque area. Synthia never complied, and Omaree was never seen or admitted at the agency.

40. However, on two separate occasions, Synthia Varela underwent voluntary intake interviews with the agency. On April 1, 2011 – less than one month after Defendant Benny Placencio placed Omaree and his sister with her – Synthia reported the following to the intake therapist:

- A. She was married.
- B. She previously had been diagnosed with bi-polar disorder and PTSD.
- C. “Most days it is difficult to motivate herself to get out of bed to care for her children and daily activities.”

D. She “reported that she does not feel that she can stabilize her moods without medications/adjustment to the ones she has at this time.”

41. Synthia never followed up with any of the treatments and therapies recommended by the agency. CYFD never monitored or observed whether Synthia Varela was accessing any of the recommended parenting support networks.

42. In mid-October 2013, two months before Omaree was killed, Synthia Varela returned to the agency for another interview. At that time, she told the intake therapist the following:

A. Under marital status, she checked “never married.”

B. She had been admitted to two psychiatric facilities (including when she was 33 years old in 2008).

C. She suffered a traumatic brain injury in 1997 as a result of a sexual assault, and also “has diabetes, seizure disorder and an aneurism in her brain.”

D. She has “significant medical problems that are impacting her daily functioning, her pain level and possibly her life expectancy.”

E. Under “Impulse Control,” she reported “with anger, hard to control impulse.”

43. Once again, Synthia never complied with the therapist’s directive for intensive treatment. And once again, CYFD failed to follow-up, monitor or inquire whether Synthia Varela was obtaining the assistance necessary to enable her safely to parent her children.

44. According to CYFD records, during several investigations Synthia Varela reported that she was bipolar, that she took medication for epilepsy, diabetes and ADHD, and that she had a brain tumor for which she used oxygen. There is no indication that Defendants

Joe Roybal, Bennie Placencio or any CYFD supervisor ever asked for medical documentation from Synthia Varela or her doctors to substantiate these claims, to learn the degree of their severity, or to evaluate the effect these numerous conditions may have had on her parenting skills.

Omaree and N.V's Life Following Their Forced Placement in New Mexico

45. The months between their forced placement with Synthia Varela and Steve Casaus in March 2011 until Omaree's death in December 2013 were violent ones for Omaree and his sister.

46. In October 2012, CYFD substantiated allegations that Omaree was being physically abused – bruise on right temple; marks on leg – by an “unknown person.” Omaree told several stories of how he had been hurt, claiming at various times during the investigation that i) Synthia Varela hit him with a telephone for not paying attention; ii) N.V. hit him with a toy phone; iii) he hit himself while playing with a toy phone; and iv) Synthia Varela hit him with a belt. Synthia reported that Omaree had been playing outside and fell.

47. The Child Abuse Response Team at University of New Mexico Hospital confirmed Omaree's injury and found that it was consistent with being struck with a belt. The physician who performed the examination also found that “this injury is very worrisome for abusive injury.” She went on to write:

Given the multiple risk factors revealed in the history including a prior history of abuse in the child, behavior and mental health problems in the child and mother, and prior disruption of the family unit, it is my impression that Omaree continues to be at risk for abuse without preventive services in place in his home environment.

48. On paper, CYFD seemed to agree with this assessment. After performing a Child Safety Assessment on both Synthia Varela and Steve Casaus, CYFD determined that the

children were “unsafe.” As defined by CYFD, this meant that “[o]ne or more safety threats placing the children in immediate or impending danger of serious harm were identified. There are not sufficient protective capacities to offset, mitigate and/or control the threat of immediate or impending danger of serious harm.”

49. Despite making this appraisal, CYFD listed the risk level as only “moderate,” and recommended that Synthia Varela continue working with the support services already in place.

50. Two months later, CYFD noted unsubstantiated allegations of physical abuse (discipline) of Omaree by Synthia based on an incident where Synthia Varela allegedly punched Omaree in the stomach with a closed fist in a local store.

51. N.V. likewise was exposed to physical abuse, emotional abuse and neglect by Synthia Varela and Steve Casaus.

52. In June 2013, Albuquerque police responded to a 911 call regarding possible abuse at the home of Synthia Varela and Steve Casaus. The tape of the call contains several minutes of profanity, screaming and verbal abuse focused on Omaree by an adult man and woman, seemingly arising from food that he spilled on the ground. N.V. was present in the home during the verbally abusive tirade.

Omaree’s Death

53. On December 27, 2013, Omaree was found dead at home. He was nine years old.

54. The autopsy report listed the cause of Omaree’s death as blunt trauma and the manner of death as homicide. According to the report:

There were contusions (bruises) of the chest, arms, legs and tongue; abrasions (skin scrapes) of the face; a healing laceration (skin tear) of the scalp (left parietal

scalp); and hemorrhage (bleeding) into the muscles between the ribs (intercostal hemorrhage), into the soft tissues of the back, into the diaphragm (muscle that separates the chest and abdominal organs), into an abdominal wall muscle (right internal oblique muscle), into the abdominal cavity (hemoperitoneum), into the soft tissues around the pancreas and left kidney; and on the outer surface (serosa) of the bowel. On the chest were discreet [sic] injuries consistent with thermal injuries (burns).

55. Both Synthia Varela and Steve Casaus were indicted for Omaree's death.

Synthia Varela

A. In the criminal complaint filed against Synthia Varela, the Albuquerque Police reported that, after initially claiming that Omaree fell off of a bouncing toy horse, Synthia confessed that "she began by kicking [Omaree] in the stomach causing him to fall to the ground. While falling, [Omaree] struck his head on a dresser then struck his head on the ground. Once [Omaree] was on the ground, Synthia began kicking him. She kicked him at least two times, near his stomach."

B. Synthia Varela has been charged with felony child abuse resulting in death.

C. In May 2015, the criminal court found that Synthia Varela "is presently not competent to stand trial in this cause and that she is dangerous." Based on this finding, the court entered an order committing Synthia Varela to the Las Vegas Medical Center for treatment to attain competency to stand trial.

Steve Casaus

D. Steve Casaus told inconsistent versions of his involvement in Omaree's death and his presence at the time he was killed.

i. He initially told police officers that he had been at a friend's house working on a car when Synthia Varela called him to say that Omaree had fallen

off a bouncing toy and hurt himself. He then returned home and tried to revive Omaree. Under this version, Casaus had been home for approximately 30 minutes before 911 was called. Casaus' explanation for this delay was that he did not know where the phones were to make the call.

ii. Upon further police questioning, Casaus changed his story. In this version, Casaus was present at home shooting heroin in the bathroom when he heard shouting between Synthia Varela and Omaree. When he emerged from the bathroom, he found Omaree lying on the floor, began efforts to revive him, and told Synthia Varela to call 911.

E. In the original criminal complaint filed against him, Steve Casaus "revealed he overheard Synthia striking [Omaree] repeatedly. Synthia told Steve she only hit [Omaree] as she normally does, but she may have hit him too hard, 'this time.'"

F. Steve Casaus originally was charged with, among other things, felony child abuse, tampering with evidence and bribery or intimidation of a witness (Omaree's younger sister, N.V.).

G. As a result of further investigation, Steve Casaus was reindicted on additional charges. The new indictment charged that Casaus permitted Omaree "to be tortured, cruelly confined or cruelly punished" which resulted in Omaree's death, and that Casaus participated in the violent acts which led to Omaree's death.

H. Steve Casaus was tried on nine separate counts in September 2015. Forensic evidence presented at trial indicated that Steve Casaus may have delayed calling 911 by roughly three hours as Omaree was dying.

I. After a week-long trial, Steve Casaus was found guilty of child abuse with reckless disregard resulting in death. He also was found guilty of lesser charges, including tampering with evidence and intimidation of a witness.

CYFD's Investigation into Omaree's Death

56. CYFD prepared a Child Protective Services Investigation Summary on the same day Omaree died. It substantiated the allegations of physical abuse (death) and physical neglect (medical neglect) regarding Omaree against Synthia Varela. CYFD also substantiated the allegations of physical neglect (lack of supervision, drug abuse and burns) as to Omaree against Steve Casaus.

57. In the same report, CYFD also turned its attention to N.V. and E.V. Based on "sufficient credible, reasonable, believable information," CYFD concluded that:

A. The behavior of any member of the household is violent and/or out of control;

B. There was reasonable cause to suspect that a member of the household caused serious physical harm or has made a plausible threat to the children;

C. Caregiver's impairment due to drug or alcohol use seriously affects his/her ability to supervise, protect or care for the children, placing the children in present or impending danger of serious harm; and

D. Behavior of any member of the household is symptomatic of mental or physical illness or disability, and this condition is uncontrolled and places the children in present or impending danger of serious harm.

58. In addition, the CYFD investigator found the following with regard to both Synthia Varela and Steve Casaus:

- A. They did not demonstrate a protective role and responsibilities;
- B. They did not express empathy and sensitivity for the children;
- C. They were not emotionally able to intervene and protect;
- D. They did not set aside their needs in favor of the children;
- E. They did not demonstrate tolerance;
- F. They did not demonstrate sufficient impulse and emotional control; and
- G. They did not have a strong emotional bond and positive attachment with the children.

59. Only 14 months earlier, in substantiating the October 2012 allegations of physical abuse sustained by Omaree, CYFD determined that Synthia Varela and Steve Casaus exhibited empathy, sensitivity, tolerance, impulse and emotional control, that they set aside their needs in favor of the children and that they had a strong emotional bond and positive attachment with the children. CYFD gave no explanation as to how or why the Department came to these entirely conflicting evaluations of the same people within such a short period of time.

60. Following Omaree's death, CYFD assumed custody of both N.V. and E.V. They now are in foster care with relatives who have expressed the desire to adopt them.

61. Following CYFD's removal of N.V. and E.V. from the home of Synthia Varela and Steve Casaus in December 2013, N.V. reported abuse perpetrated against her by both Synthia Varela and Steve Casaus. N.V. reported she was:

- A. hit with a belt buckle by Synthia Varela;
- B. punched in the forehead by Steve Casaus;
- C. locked in a dark bedroom and in a closet; and
- D. choked by Synthia Varela.

62. The Child Abuse Response Team (“CART”) performed an evaluation of N.V. following Omaree’s death. The CART evaluation’s findings were consistent with N.V.’s reports of abuse in the home of Synthia Varela and Steve Causes – including a scar resembling a cigarette burn, numerous healed linear scars, and abrasions.

63. N.V. also reported that the night Omaree was killed, she witnessed Synthia Varela and Steve Casaus drag his body across the room. Synthia Varela and Steve Casaus forced N.V. to sit on the bed with Omaree after he was already dead and until the police arrived.

Governor Martinez’ Response to Omaree’s Death

64. In response to Omaree’s death, Governor Susana Martinez has had four separate public responses.

A. In early January 2014, the Governor said that CYFD did nothing wrong and blamed Omaree’s parents for his death. “That mother is the sole person who is responsible for the death of that child,” she said. But even though CYFD had been understaffed for many years, the Governor chose not to spend the money the legislature appropriated, returning over \$12.5 million in unspent resources to the State’s general fund for the years 2012 and 2013 – the very years relevant to the facts of this case.

B. Subsequently, while continuing to defend CYFD, the Governor blamed the Albuquerque Police Department for failing to report the June 2013 allegations of verbal and possible physical abuse to CYFD so that the Department could act.

C. In mid-January 2014, the Governor ordered a full-scale investigation into Omaree’s life and death. At that time, Jared Rounsville, the Director of Child Protective Services for CYFD noted, “When any child dies, you know, we have all failed that child.”

D. Finally, in April 2014, Governor Martinez announced a series of reforms for the State's child-welfare system, saying that "every agency can improve. Every agency can learn."

COUNT I
CIVIL RIGHTS CLAIMS AGAINST
JOE ROYBAL, BENNIE PLACENCIO AND JOHN DOES 1-5
FAILURE TO EXERCISE PROFESSIONAL JUDGMENT

65. Plaintiff realleges and incorporates by reference all the above paragraphs and all subparagraphs as if they were fully set forth herein.

66. As of September 16, 2009 when Defendant Joe Roybal prepared the CYFD memorandum stating both that Essie Sotelo was the sole caretaker for Omaree and his sister and, conversely, that Synthia Varela could not take her biological children into her care, the State of New Mexico assumed custody of Omaree.

67. Based solely on his authority as a CYFD Social Worker, Defendant Joe Roybal made the unilateral decision to remove five-year old Omaree and infant N.V. from the home of their biological parent and affirmatively place them under the exclusive care and control of a non-relative. This placement was immediate and for an unlimited and unspecified period of time. Given their young age, Omaree and N.V. were wholly dependent for their food, shelter, clothing, personal care, education, medical care, safety and welfare on the care-giver selected for them by the State of New Mexico.

68. This kind of open-ended custody determination normally can be made only in a manner consistent with, and governed by, the requirements of the New Mexico Children's Code.

69. Had Defendant Joe Roybal adhered to the requirements of the Children's Code and sought to remove Omaree and his sister from Synthia Varela based on allegations of abuse

and neglect, then Omaree and N.V. would have been entitled to the following mandatory protections and safeguards:

A. the filing in Children's Court of a timely petition alleging neglect or abuse or seeking custody and temporary placement of Omaree and N.V. in an approved location, NMSA 1978 §§ 32A-4-1 through -34 (Abuse and Neglect Act);

B. the appointment of an attorney to represent the children's legal rights, NMSA 1978 § 32A-4-10(B);

C. the appointment of a Guardian ad Litem charged with the duty of zealously representing the children's best interests, NMSA 1978 § 32A-4-10(C);

D. the development of a proposed treatment plan that would have set forth steps to ensure that Omaree and N.V.'s physical, medical, psychological and educational needs were met, and that their best interests were served, NMSA 1978 § 32A-4-21(B)(10);

E. the appointment of a Court Appointed Special Advocate ("CASA") who would have assisted the court in determining the best interests of Omaree and N.V. by investigating the facts of the situation, submitting reports to the parties, and monitoring compliance with the treatment plan, Rule 10-164(A) NMRA;

F. written notice of the factual grounds supporting any change in the children's placement, including placement in the home of Synthia Varela and Steve Casaus, with copies sent to Omaree and N.V.'s Guardian ad Litem, attorney, CASA, and the court prior to the placement change going into effect, and the right to contest the proposed change, NMSA 1978 § 32A-4-14(A);

G. an adjudicatory hearing to determine the children's disposition, and the submission of a predispositional report that would have provided the court with

information regarding such things as the specific reasons for placing Omaree and N.V., a statement of how the proposed placement was consistent with their best interests and special needs, a statement of the children's wishes, and a description of Omaree and N.V.'s medical and educational background, NMSA 1978 § 32A-4-21; and

H. the right to be heard at such a hearing, NMSA 1978 § 32A-4-10.

70. Despite Defendant Joe Roybal's failure to comply with the demands of the Children's Code, his actions – including the removal of Omaree and N.V. from Synthia Varela's home, placement of the children with Essie Sotelo, and preparation and distribution of a CYFD memorandum that admonished third parties such as the school system not to interfere with the placement – had the purpose and effect of taking Omaree and N.V. into the State's custody because the State assumed the sole and exclusive right to determine where and with whom the children would live, along with the right and duty to protect Omaree and N.V., and to ensure that they were provided with food, shelter, personal care, education and ordinary and emergency medical care by the person Defendant Joe Roybal selected to be the caregiver for Omaree and N.V.

71. By unilaterally removing Omaree and N.V. from their biological home and placing them with a non-relative without any known training or licensure, Defendant Joe Roybal intentionally and knowingly bypassed established professional and legal procedure, and substantially departed from accepted professional judgment, practice, or standards in such a way as to abdicate reliance on professional judgment in making this inappropriate placement decision.

72. In a similar manner, based solely on his authority as a CYFD Social Worker, Defendants Bennie Placencio or John Does 1-5 made the unilateral decision to remove Omaree

and N.V. from Essie Sotelo's care, require them to move to New Mexico, and place them in the exclusive care and control of Steve Casaus and Synthia Varela, whom CYFD had investigated on multiple occasions for allegations of physical abuse and physical neglect and whom CYFD knew were incapable of safely parenting the children. This placement was immediate and for an unlimited and unspecified period of time. Given their young age, Omaree and N.V. once again became entirely dependent for their food, shelter, clothing, personal care, education, medical care, safety and welfare on the caregivers selected for them by the State of New Mexico.

73. A change in a child's placement – including a return to a child's biological parent – normally can be accomplished only in a manner consistent with, and governed by, the requirements of the New Mexico Children's Code. NMSA 1978 § 32A-4-14(A).

74. Had Defendant Bennie Placencio or John Does 1-5 adhered to the requirements of the Children's Code and sought to remove Omaree and his sister from Essie Sotelo's care and place them with Steve Casaus and Synthia Varela, Omaree and N.V. would have been entitled to the mandatory protections and safeguards set forth above.

75. By unilaterally removing Omaree and N.V. from Essie Sotelo's care, forcing them to move to New Mexico, and placing them with Steve Casaus and Synthia Varela, whom CYFD had investigated on multiple occasions for allegations of physical abuse and physical neglect and whom CYFD knew were incapable of safely parenting the children, Defendant Bennie Placencio or John Does 1-5 intentionally and knowingly bypassed established professional and legal procedure, and substantially departed from accepted professional judgment, practice, or standards in such a way as to abdicate reliance on professional judgment in making this inappropriate placement decision.

76. By demanding that Essie Sotelo bring Omaree and N.V. from Arizona to New Mexico within 72 hours, Defendant Bennie Placencio acted in undue haste and with unnecessary impatience. The impropriety of this heavy-handed, malevolent approach is made all the more evident by CYFD's improper threat of felony criminal prosecution against Essie Sotelo, the very woman to whom 18 months earlier, the Department had entrusted to care for Omaree and his sister. Unknown to Essie Sotelo, but clearly understood by Defendant Bennie Placencio, was his inability to cause the arrest or prosecution of Ms. Sotelo for anything. Defendant Placencio was not a law enforcement officer; he nevertheless intentionally communicated to Essie Sotelo that he had the power, authority and ability to cause her to be arrested, prosecuted and incarcerated.

77. In December 2009, CYFD appears to have concluded the investigation into Synthia Varela to which Defendant Joe Roybal referred in his September 2009 memo by finding that the allegations were unsubstantiated. However, there is nothing in the record to show that CYFD informed Essie Sotelo of this finding or that it took any actions to rescind the September 2009 memo.

78. Moreover, in the 15 months after Defendant Joe Roybal signed the Notice of Results of Investigation in December 2009, there is no record that Defendants Joe Roybal, Bennie Placencio or any CYFD supervisor took any steps either to reunify Synthia Varela with Omaree and his younger sister, or to arrange for any family preservation or support services to assist Synthia Varela with the skills needed to help the biological family remain intact and to assure that she was able to care for Omaree and his sister at home.

79. In the CYFD files regarding Omaree and N.V., there is no record that Defendant Bennie Placencio had any knowledge or awareness that, in the 18 months since Defendant Joe Roybal prepared the September 2009 memo, the relevant family constellation

significantly had changed. Had Defendant Bennie Placencio acted in a prudent manner, and had he used the requisite degree of care in the exercise of his state authority, or had he made even the slightest of inquiries regarding the family with which he placing Omaree and N.V., he would have learned the following facts that demonstrated that the home in which the children were being forcibly placed was substantially different from and potentially more dangerous than both the home from which they were being taken and the home from which they had been removed in September 2009:

A. From Omaree's birth in 2004 until he was removed and put under the care of Essie Sotelo in September 2009, CYFD received and investigated at least seven allegations of abuse involving Synthia Varela, Omaree or Synthia's other children.

B. After the children were removed from her care, Synthia Varela twice was incarcerated in the Bernalillo County Metropolitan Detention Center.

C. Steve Casaus returned to Synthia Varela's home sometime after December 2010 after serving roughly two years of his sentence for multiple parole violations. He had not been living in the home when Defendant Joe Roybal removed Omaree and N.V. in September 2009 or at any time during the nine months before that date.

D. In February 2011, Synthia Varela gave birth to her third child, E.V., by a third father. E.V. tested positive for cocaine at birth. This fact prompted yet another CYFD investigation.

E. Synthia Varela changed residences at least once, which was at least the fifth time she physically had moved since Omaree had been born.

80. There is no documentation of the basis for CYFD's demand that Essie Sotelo bring Omaree and his sister to New Mexico or its decision to place them with Steve Casaus and

Synthia Varela. There is no record of any of the factors used by CYFD to determine whether this exchange was in the best interest of Omaree and his sister, particularly in light of the multiple past allegations of physical abuse and physical neglect. There also is no record that Defendant Bennie Placencio, any of his supervisors or any other CYFD personnel performed any kind of child safety assessment regarding Cynthia Varela, Steve Casaus or the home in which Omaree and his sister were being forcibly placed. The absence of any one of these records is evidence of a pronounced lack of professional judgment. That all of these indicia of any kind of investigation are missing demonstrates a reckless and conscious disregard of an obvious risk of serious harm.

81. By unilaterally removing Omaree and N.V. from Essie Sotelo's care without making any inquiry into the propriety of this new placement, Defendant Bennie Placencio or John Does 1-5 intentionally and knowingly bypassed established professional and legal procedures, and substantially departed from accepted professional judgment, practice, or standards in such a way as to abdicate reliance on professional judgment in making this inappropriate placement decision.

82. While in the custody of the State of New Mexico through its departments, officers, employees, and agents, including, but not limited to, Defendants Joe Roybal, Bennie Placencio, and John Does 1-5, Omaree and N.V. had a fundamental right, protected by the Fourteenth Amendment to the United States Constitution, not to be placed in, or subjected to, an injurious and unsafe environment in which they were vulnerable to physical and/or emotional abuse.

83. As custodian of Omaree, CYFD and its employees, including, but not limited to, Defendants Joe Roybal, Bennie Placencio, and John Does 1-5, owed Omaree and N.V. a duty to

protect them from physical and emotional abuse. CYFD and its employees also owed Omaree and N.V. a duty to exercise professional judgment in attempting to place them in a safe environment free from physical and emotional abuse.

84. Defendants Joe Roybal, Bennie Placencio, and John Does 1-5 were employees of the State of New Mexico and CYFD who engaged in a series of actions and judgments that resulted in the State assuming custody of Omaree and N.V. and making inappropriate placement decisions, including the forcible placement in the home of Steve Casaus and Synthia Varela, which was substantially different from and potentially more dangerous than the home from which they were being removed, as well as the home from which they had been removed 18 months earlier. Defendants Joe Roybal, Bennie Placencio, and John Does 1-5 bypassed established professional and legal procedure and departed from accepted professional practice and standards in making these inappropriate placement decisions.

85. The two-paragraph “To Whom It May Concern” memorandum was nothing more than a sham device used to circumvent and avoid completing a professionally appropriate and legally required home study before placing Omaree and N.V. in the sole care and custody of Essie Sotelo or placing them in the home of Steve Casaus and Synthia Varela.

86. Placing the children with Essie Sotelo in violation of their fundamental rights and the New Mexico Children’s Code saved the State of New Mexico money. Placement of children in foster care in the manner required by the Children’s Code is expensive. Such placement requires financial outlays for properly selected and trained foster parents, social workers, supervisors, therapists, treatment professionals, guardians ad litem and lawyers, all of who together work in the child abuse and neglect arena. The State avoided all of these costs through

its use of the simple expedient of Joe Roybal's September 2009 memo which awarded sham "custody" of Omaree and N.V. to Essie Sotelo.

87. By orchestrating, directing, authorizing and approving the placement of Omaree and N.V. with Essie Sotelo and then the placement in the home of Steve Casaus and Synthia Varela, Defendants Joe Roybal, Bennie Placencio, and John Does 1-5 substantially departed from accepted professional judgment, practice, or standards in such a way as to abdicate reliance on professional judgment, and knowingly or recklessly subjected Omaree and N.V. to a grave and immediate danger that was known or obvious to Defendants.

88. The conduct of these Defendants was knowing, unlawful, deliberate, indifferent, malicious, reckless, wanton, and conscience-shocking.

89. As a direct and proximate result of these Defendants' conduct as set forth above, Omaree and N.V. suffered horrifying physical abuse, traumatic emotional abuse, severe mental anguish, and ultimately Omaree lost his life as a direct result of the deprivation of their constitutional rights.

COUNT II
CIVIL RIGHTS CLAIMS AGAINST
JOE ROYBAL, BENNIE PLACENCIO AND JOHN DOES 1-5
CREATING AND INCREASING DANGER AND SPECIAL RELATIONSHIP

90. Plaintiff realleges and incorporates by reference all of the above paragraphs and all subparagraphs as if they were fully set forth herein.

91. While in the custody of the State of New Mexico through its departments, officers, employees, and agents, including, but not limited to, Defendants Joe Roybal, Bennie Placencio, and John Does 1-5, Omaree and N.V. had a fundamental right, protected by the Fourteenth Amendment to the United States Constitution, not to be placed in, or subjected to, an

injurious and unsafe environment in which they were vulnerable to physical and/or emotional abuse.

92. Omaree and N.V. had a fundamental right, protected by the Fourteenth Amendment to the United States Constitution, to be safeguarded from physical and emotional abuse and neglect and not to be placed in danger created by state officials.

93. Defendants Joe Roybal, Bennie Placencio, and John Does 1-5 had a duty, enforceable under the Fourteenth Amendment to the United States Constitution, to ensure the safe and proper disposition of children within their custody and control, to avoid placing any such children in situations of greater danger than those from which Defendants removed the children in the first place, and to refrain from enhancing the special dangers to which the children were already subject.

94. Omaree and N.V. had been in an unsafe and dangerous environment while under the care of Synthia Varela, a situation well-known and documented by CYFD by virtue of the numerous and repeated allegations of physical abuse and physical neglect involving Synthia Varela.

95. By removing Omaree and his sister from the care of Synthia Varela, and asserting custody and control over them in a manner not authorized or sanctioned by the New Mexico Children's Code and without ensuring that these placements and caretakers were appropriate, Defendant CYFD, acting through Defendants Joe Roybal, Bennie Placencio, and John Does 1-5, assumed an affirmative duty – arising out of the special relationship among Defendants, the State of New Mexico, and children in the State's custody – to protect and supervise Omaree and N.V. in any environment to which Defendants consigned them. Defendants violated this duty

knowingly, recklessly, or with deliberate indifference toward, and callous disregard for, Omaree and N.V.'s rights.

96. By establishing Essie Sotelo as the sole caretaker for Omaree and N.V. through nothing more than use of the September 2009 "To Whom It May Concern" memorandum, CYFD, acting through social worker Defendant Joe Roybal, affirmatively assumed a special relationship with, and exercised control over, Omaree and N.V. in a manner that deprived the children of the numerous protections and procedures set forth in the Children's Code to which they otherwise would have been entitled.

97. By improperly threatening Essie Sotelo with felony criminal prosecution and demanding that she bring Omaree and N.V. to New Mexico and then forcibly placing them with Steve Casaus and Synthia Varela without taking any steps to determine and ensure that this change in placement was in the best interest of the children, CYFD, acting through its social workers Defendants Bennie Placencio or John Does 1-5, affirmatively exercised their authority as public employees and assumed a special relationship with, and exercised control over, Omaree and N.V. in a manner that deprived the children of the numerous protections and procedures set forth in Children's Code to which they otherwise would have been entitled.

98. CYFD, acting through its social workers Defendants Joe Roybal, Bennie Placencio, and John Does 1-5, affirmatively created the danger or increased Omaree and N.V.'s vulnerability to the danger in any number of ways.

A. By assuming custody over Omaree and N.V. in a unilateral and unreviewable manner that willfully ignored the requirements of the New Mexico Children's Code, Defendants put Omaree and N.V. in harm's way by interfering with and

removing the protective services which otherwise would have been available and depriving Omaree and N.V. of state aid and resources.

B. By improperly threatening Essie Sotelo with felony criminal prosecution and demanding that she bring Omaree and N.V. to New Mexico, Defendants affirmatively placed Omaree and N.V. in the custody of Steve Casaus and Synthia Varela without the numerous protections afforded by the Children's Code. This state action amounted to an unequivocal threat of force and show of authority with the clear intention of exercising domination and control over the custody of Omaree and N.V. Omaree and N.V. would not have been placed in the home of Steve Casaus and Synthia Varela and exposed to the obvious risks of serious harm present there but for the affirmative actions taken by CYFD and its social workers.

C. In the September 2009 "To Whom It May Concern" memorandum, CYFD and Defendant Joe Roybal unequivocally stated a clear intention to perform an investigation explicitly targeted toward Synthia Varela and Omaree and his sister. This avowal was not a mere assurance of protection through a generic policy; it was an unambiguous promise directed to Omaree, N.V., and to third parties who otherwise would have undertaken to protect them. Defendants' affirmative conduct in compelling Omaree and N.V.'s transfer to New Mexico and forcible placement in the home of Steve Casaus and Synthia Varela without having performed the promised investigation in a competent manner that complied with accepted professional judgment, practice, or standards placed Omaree and N.V. at risk as the specific victims of a clearly identified transgressor.

D. In coercing Essie Sotelo to transport Omaree and N.V. to New Mexico and forcibly placing them in the home of Steve Casaus and Synthia Varela, Defendants affirmatively sent Omaree and N.V. to an environment that was substantially different from and potentially more dangerous than both the home from which they were being removed and the home from which they had been taken 18 months earlier.

i. At the time Omaree and N.V. were taken in September 2009, Synthia Varela's home consisted of herself, Omaree and his younger sister. Defendants were well aware that Synthia could barely manage in this environment, and that Omaree and N.V. had been victims of numerous allegations of physical abuse and neglect.

ii. The family constellation in the home in which Defendants forcibly placed Omaree and N.V. substantially changed after September 2009. By March 2011, the home contained Synthia Varela, Omaree, N.V., E.V. (an infant who was born testing positive for cocaine because of Synthia's use of drugs during her pregnancy) and Synthia's husband (who only recently had been released from prison and who had barely lived with the three children – none of whom he had fathered). The existence of each of these changed circumstances increased Omaree and N.V.'s vulnerability to harm.

iii. The physical residence was different in that Synthia Varela changed residences yet again, which was at least the fifth time she physically had moved since Omaree was born.

99. Defendant Bennie Placencio affirmatively acted to force Essie Sotelo to bring Omaree and N.V. to New Mexico and then deliberately chose to place Omaree and N.V. in the

care of Steven Casaus and Synthia Varela without making any effort to learn of these significant – and potentially more dangerous – changes that had occurred since Defendant Joe Roybal placed Omaree and his sister in the care of Essie Sotelo in September 2009.

100. Omaree and N.V. – the two children compelled by CYFD to be placed in the home of Steve Casaus and Synthia Varela – were members of a limited and specifically identifiable group.

101. Defendants' conduct, described above, put Omaree and N.V. at substantial risk of serious, immediate and proximate harm, the risk of which was obvious or known to CYFD based on its numerous earlier investigations of physical abuse and neglect allegations and the clearly more dangerous environment in which they demanded Omaree and N.V. be placed.

102. Defendants acted knowingly, recklessly, or with deliberate indifference toward, and conscious disregard of, that substantial risk of harm.

103. When viewed in total, Defendants' conduct, as set forth above, was knowing, unlawful, deliberate, indifferent, malicious, reckless, wanton, and conscience-shocking.

104. As a direct and proximate result of these Defendants' conduct as set forth above, Omaree and N.V. suffered horrifying physical abuse, traumatic emotional abuse, severe mental anguish, and ultimately Omaree lost his life as a direct result of the deprivation of their constitutional rights.

COUNT III
CIVIL RIGHTS CLAIMS AGAINST
JOE ROYBAL, BENNIE PLACENCIO AND JOHN DOES 1-5
DENIAL OF ACCESS TO COURTS

105. Plaintiff realleges and incorporates by reference all of the above paragraphs and all subparagraphs as if they were fully set forth herein.

106. As of September 16, 2009 when Defendant Joe Roybal prepared the CYFD memorandum stating both that Essie Sotelo was the sole caretaker for Omaree and N.V. and, conversely, that Synthia Varela could not take her biological children into her care, the State of New Mexico assumed custody of Omaree and N.V.

107. Based solely on his authority as a CYFD Social Worker, Defendant Joe Roybal made the unilateral decision to remove Omaree and N.V. from the home of their biological parent and affirmatively place them under the exclusive care and control of a non-relative. This placement was immediate and for an unlimited and unspecified period of time.

108. This kind of open-ended custody determination normally can be made only in a manner consistent with, and governed by, the requirements of the New Mexico Children's Code. The stated purpose of this comprehensive statutory scheme is "to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced."

109. Had Defendant Joe Roybal adhered to the requirements of the Children's Code and sought to remove Omaree and his sister from Synthia Varela based on allegations of abuse and neglect, then the children would have been entitled to the following mandatory protections and safeguards established by New Mexico law through its Children's Code:

A. the filing in Children's Court of a timely petition alleging neglect or abuse or seeking custody and temporary placement of Omaree and N.V. in an approved location;

B. the appointment of an attorney to represent their legal rights in proceedings conducted in Children's Court;

C. the appointment of a Guardian ad Litem charged with the duty of zealously representing the best interests of Omaree and N.V. in proceedings conducted in Children's Court and other judicial proceedings;

D. the development of a proposed treatment plan that would have set forth steps to ensure that Omaree and N.V.'s physical, medical, psychological and educational needs were met, and that their best interests were served;

E. the appointment of a CASA who would have assisted the court in determining the best interests of Omaree and N.V. by investigating the facts of the situation, submitting reports to the parties, and monitoring compliance with the treatment plan;

F. written notice of the factual grounds supporting any change in Omaree and N.V.'s placement, including a return to Synthia's home, with copies sent to the children's Guardian ad Litem, attorney, CASA, and the court prior to the placement change going into effect, and the right to contest the proposed change;

G. an adjudicatory hearing to determine disposition of the children's placement and treatment, and the submission of a predispositional report that would have provided the court with information regarding such things as the specific reasons for placing Omaree and N.V., a statement of how the proposed placement was consistent with their best interests and special needs, a statement of the children's wishes, and a description of Omaree and N.V.'s medical and educational background; and

H. the right to be heard in Children's Court at such a hearing.

110. Defendant Joe Roybal's failure to comply with the demands of the Children's Code including, but not limited to, the removal of Omaree and N.V. from Synthia Varela's

home, placement of Omaree and N.V. with Essie Sotelo, and preparation and distribution of a CYFD memorandum that admonished third parties such as the school system not to interfere with the placement, impeded and prevented the children from accessing the court system and securing the protections and safeguards to which they were entitled under the Children's Code.

111. In a similar manner, the failure of Defendants Bennie Placencio or John Does 1-5 to comply with the demands of the Children's Code including, but not limited to, the unilateral decision to remove Omaree and N.V. from Essie Sotelo's care and place them in the exclusive care and control of Steve Casaus and Synthia Varela, whom CYFD had investigated on multiple occasions for allegations of physical abuse and physical neglect, impeded and prevented Omaree and N.V. from accessing the court system and utilizing the legal remedies established by the Children's Code.

112. At all times materials to this lawsuit, Omaree and N.V. had a fundamental right, protected by the First and Fourteenth Amendments to the United States Constitution, to petition and have access to the courts and to utilize the legal remedies and procedures established by the State of New Mexico for the purpose of assuring their health and safety.

113. The official actions taken by Defendants Joe Roybal, Bennie Placencio or John Does 1-5 frustrated and prevented Omaree, N.V., or any person authorized to act on their behalves, from petitioning or otherwise accessing the Children's Court, and from assuring that their placement, including their placement with their biological parent, and any custody determination, was accomplished in a manner consistent with, and governed by, the requirements of the New Mexico Children's Code. Because of the official actions of these Defendants, as set forth above, no action was filed in the Children's Court on behalf of Omaree or N.V.

114. The conduct of these Defendants was knowing, unlawful, deliberate, indifferent, malicious, reckless, wanton, and conscience-shocking.

115. As a direct and proximate result of these Defendants' conduct as set forth above, Omaree and N.V. suffered horrifying physical abuse, traumatic emotional abuse, severe mental anguish, and ultimately Omaree lost his life as a direct result of the deprivation of their constitutional rights.

COUNT IV
VIOLATION OF TORT CLAIMS ACT BY CYFD

116. Plaintiff realleges and incorporates by reference all of the above paragraphs and all subparagraphs as if they were fully set forth herein.

117. Defendant CYFD is a New Mexico state agency, which, as mandated by the New Mexico Children's Code, receives and investigates reports of children in need of protection from abuse and/or neglect by their parents, guardians or custodians, and is required to take appropriate action to assure the health and safety of those children and to act in their best interests.

118. At all times material to the allegations set forth in this Complaint, Defendants Joe Roybal, Bennie Placencio and John Does 1-5 acted within the scope of their duties as social workers or other employees for the State of New Mexico.

119. As of the time Defendant Joe Roybal prepared and distributed the September 2009 "To Whom It May Concern" memo, Defendant CYFD exercised control over, and orchestrated, directed, authorized and approved, the placement and custody of five-year old Omaree with Essie Sotelo.

120. Defendant CYFD's unilateral and complete control over the placement and custody of Omaree and N.V. continued when Defendant Bennie Placencio or John Does 1-5

made the unilateral decision to remove the children from Essie Sotelo's care and forcibly place them in the home of Synthia Varela and Steve Casaus as the property and structure in which Omaree and N.V. would reside.

121. Because the home was exclusively selected by Defendant CYFD as part of Defendant CYFD's unilateral control over the placement and custody of the children who Defendant CYFD already had determined to be in need of protection from abuse and/or neglect, Defendant CYFD operated and/or maintained the building.

122. Defendant CYFD had a duty to exercise reasonable and ordinary care in the operation and maintenance of the Synthia Varela/Steve Casaus residence.

123. Such duties included, but were not limited to, those established by pertinent statutes and regulations governing the manner in which a child's health and safety were to be safeguarded and protected by Defendant CYFD. These statutes and procedures include the New Mexico Children's Code, the Abuse and Neglect Act, and the administrative regulations issued by Defendant CYFD and its Protective Services Division, all of which were integral and important for the safe operation of the residence in which CYFD placed Omaree and N.V.

124. These statutes and procedures evidence Defendant CYFD's duty to act with reasonable and ordinary care both in assuring Omaree and N.V.'s health and safety and in preventing their placement in a home that was unsafe or dangerous, or that posed an unreasonable risk of harm to its residents.

125. Defendant CYFD breached its duties to Omaree and N.V.

126. Failing to seek custody of Omaree and N.V. in a manner consistent with, and governed by, the requirements of the New Mexico Children's Code was a breach of such duties.

127. Acceding to Synthia Varela's demand for her children to be brought to New Mexico without investigating whether placing Omaree and N.V. with her and Steve Casaus was in their best interests and without making the requisite safety assessment of the home before placing Omaree and N.V. in her care was a breach of such duties.

128. Failing to take reasonable steps to ensure that the home to which it was requiring Omaree and N.V. to move was safe, was not dangerous, did not have a defective condition, and was free from unreasonable risk of harm to its residents was a breach of such duties.

129. Changing Omaree and N.V.'s placement by moving them to the home of Steve Casaus and Synthia Varela without preparing and sending written notice of the factual grounds supporting the change in placement prior to the placement change was a breach of such duties.

130. Failing to provide sufficient documentation of the reasons for the change in Omaree and N.V.'s placement and the investigation of the adequacy of the placement with Steve Casaus and Synthia Varela in a manner that would allow multiple persons with responsibilities for Omaree N.V.'s welfare access to their status and case histories was a breach of such duties.

131. As a direct and proximate result of these Defendants' conduct as set forth above, Omaree and N.V. suffered horrifying physical abuse, traumatic emotional abuse, severe mental anguish, and ultimately Omaree lost his life as a direct result of CYFD's negligence.

132. The immunity from liability of Defendant CYFD has been waived to the full extent provided by the New Mexico Tort Claims Act.

133. Proper and timely written notice of this claim was provided as required by law.

WHEREFORE, Plaintiffs request that the Court enter a judgment in their favor and against Defendants for the following:

1. Compensatory damages in an amount to be determined at trial;
2. Punitive damages in an amount sufficient to punish Defendants for their intentional and reckless violations of Omaree and N.V.'s constitutional rights and to deter such violations in the future; and
3. Reasonable attorneys' fees and costs of suit under 42 U.S.C. § 1988.

Respectfully submitted,

MARTINEZ, HART & THOMPSON, P.C.

Electronically filed

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