



IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

DENNIS P. MURPHY, as Guardian
ad Litem for DILON BARBERO,
a minor,

Plaintiff-Petitioner,

v.

No. S-1-SC-40815

PEDIATRIX CARDIOLOGY OF
NEW MEXICO, P.C. d/b/a PEDIATRIX
CARDIOLOGY ASSOCIATES OF
NEW MEXICO,

Defendant,

and

PRESBYTERIAN HEALTHCARE
SERVICES,

Defendant,

and

NEW MEXICO SUPERINTENDENT
OF INSURANCE,

Intervenor-Respondent.

On Writ of Certiorari to the New Mexico Court of Appeals

BRIEF IN CHIEF

Oral Argument is Requested

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STATEMENT REGARDING TRANSCRIPT CITATIONS

Citations to the hearings held on July 20, 2022, August 7, 2023, and December 6, 2023 are to the unofficial written transcripts, which were filed in the appellate record according to the Court of Appeals’ Order dated June 7, 2024. Any citations to other hearings are to the audio recordings or official logs. All transcript citations substantially follow the form in Rule 23-112 NMRA, Appendix Part X.A.

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, this brief complies with the type-volume limitations set forth in Rule 12-318(F)(3) NMRA, because it is prepared in a proportionally-spaced 14-point typeface with serifs and the body of the brief contains 10,356 words, according to WordPerfect 21, Version 21.0.0.81.

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Russell Toal, Superintendent, Office of Superintendent
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INTRODUCTION

When Dilon Barbero was a toddler, he suffered a catastrophic injury during surgery to repair his congenital heart defect. On the eve of trial, the parties reached a settlement of Dilon’s medical malpractice claims. The district court adopted the recommendations of Dilon’s guardian ad litem and approved the settlement. The district court found that the settlement terms were fair and reasonable and in Dilon’s best interests.

The New Mexico Superintendent of Insurance moved to intervene to contest the settlement. Over one year of litigation in the district court ensued. At the center of the dispute was the question whether the Superintendent must pay Dilon’s future medical expenses as a lump sum, as the parties agreed, or whether those expenses must be paid as incurred, as the Superintendent insists. Ultimately the district court revoked approval of the settlement based on the Superintendent’s position.

The district court described the post-settlement proceedings as a “turf war.” [13 RP 3216] Caught in the crossfire is Dilon, on whose behalf this lawsuit was brought. Dilon is now almost 13 years old. The injury that he suffered caused paraplegia, an uncontrolled bowel and bladder, and

cognitive impairment. The Superintendent's refusal to abide by its statutory obligation to pay a court-approved settlement from the Patient's Compensation Fund ("PCF") has had a profoundly negative impact on Dillon's family's ability to care for his lifelong—and costly—medical needs. Dillon also now faces the burden of going to trial and the risk of the jury reaching a defense verdict.

The Superintendent's refusal to abide by its statutory obligation also adversely impacts Defendant Pediatrix Cardiology (Plaintiff's co-appellant in the direct appeal), which is unfairly being deprived of its rights as a qualified healthcare provider ("QHP"). Although Pediatrix paid surcharges to obtain coverage under the Medical Malpractice Act ("the Act"), it now faces the burden of going to trial and the risk of a punitive damages award.

The Superintendent's interference in settlements violates the plain language of the Act. Her refusal to fund the settlement as provided by the Act also violates the separation of powers doctrine. And it contravenes New Mexico's policy favoring settlements. New Mexico's judicial system is thus yet a third casualty of the Superintendent's unlawful conduct.

The court of appeals affirmed the district court’s revocation of the settlement approval in a published opinion that has a “complex precedential value.” *Murphy v. Pediatric Cardiology of NM*, A-1-CA-41672, ___ P.3d ___, 2025 WL 830422, ¶ 1 n.2 (N.M. App. Mar. 10, 2025) (“Slip op.”). The reasoning (but not the result) of the “majority” opinion was joined by only one (authoring) judge. The separate concurrence in part and dissent in part was authored by the second judge on the panel and joined by the third. The entire panel agreed that the 1992 version of the Act (which was in effect when Dilon was injured) “did not permit lump sum payments of future damages and that the Superintendent had authority to object to the settlement terms.” *Id.* ¶ 26 (Wray, J., concurring in part and dissenting in part).

For the reasons that follow, the court of appeals erroneously affirmed the district court’s revocation of the settlement approval. The Court should reverse and remand for further proceedings.

SUMMARY OF PROCEEDINGS

I. Nature of the case and course of proceedings

After the district court revoked approval of the settlement and

denied Plaintiff's motion to reconsider, it certified its order for interlocutory appeal. [14 RP 3280] In a rare move, Defendant Pediatrix joined in Plaintiff's application for interlocutory appeal, which the court of appeals granted. [14 RP 3284; 15 RP 3510] The district court stayed proceedings. [14 RP 3282] The post-settlement procedural history will be discussed in detail below. *See infra* Statement of Facts Parts II.D-G.

II. Statement of facts

A. Background facts about Dilon's injury

Dilon was born with treatable congenital heart defects. [1 RP 12] At the age of two, he underwent open heart surgery to repair his atrial septal defect.¹ *Id.* This procedure was performed by Dr. Carl Lagerstrom, a pediatric cardiothoracic surgeon. *Id.* Dr. Lagerstrom failed to repair Dilon's other heart defect during the surgery. [5 RP 967-68] Following open heart surgery, Dilon's left superior vena cava still drained to his left atrium, meaning that there was a small hole in the wall of his heart, and his heart was pumping oxygen-poor blood throughout his body. [1 RP 12-13]

¹A hole between the septum dividing the two upper chambers of the heart.

To repair the hole, approximately two months after the surgery, Dilon underwent another surgical procedure with Dr. Jennifer Davenport, a pediatric cardiologist at Pediatrix. [1 RP 13] Dr. Davenport performed a catheterization procedure to place an occlusion device in Dilon's heart vessel in an effort to seal up the hole. *Id.* For this type of procedure to be successful, the device must be large enough; otherwise, it can migrate through the circulatory system to the aorta, creating an embolism and causing a potentially life-threatening condition. *Id.*

Migration of an occlusion device is a known risk of the procedure that Dr. Davenport performed. *Id.* If migration occurs in a patient like Dilon, a pediatric cardiothoracic surgeon would need to perform emergency surgery. *Id.* Dr. Davenport knew that Dr. Lagerstrom, Presbyterian's only pediatric cardiothoracic surgeon at the time, was unavailable, but she nevertheless went forward with the procedure. [1 RP 13, 15]

Dr. Davenport ultimately placed an occlusion device that was too small. [1 RP 14] In less than 10 minutes, the device migrated into Dilon's aorta, creating a nearly complete blockage of the flow of oxygenated blood to Dilon's brain and spinal cord system. [1 RP 14, 117; 10-24-22 CD

2:15:41–2:15:50] For three hours, Dr. Davenport tried unsuccessfully to remove the device. **[1 RP 14]** Efforts were made to page Dr. Lagerstrom.² **[9 RP 2206-07]** Eventually Dr. Lagerstrom was able to perform surgery, but Dilon experienced blockage of his aorta for approximately four hours by the time that the device was removed. **[1 RP 14, 142]**

The oxygen deprivation caused Dilon to suffer significant and permanent injuries, including a brain injury and spinal cord stroke, resulting in paraplegia and bowel and bladder disorders. **[1 RP 14; 5 RP 966; 8-7-23 Tr. 25:7-9]** Dilon also sustained some cognitive damage. **[10-24-22 CD 2:17:44–2:17:51]**

Dilon's family was never notified that a pediatric cardiothoracic surgeon was unavailable to address complications. **[1 RP 13-14]** Had Dilon's family known that there was no surgical backup in the event of migration, they never would have given consent for Dilon to undergo the procedure. Had Dr. Lagerstrom repaired Dilon's left superior vena cava

²Much of the litigation in the early years of the lawsuit was aimed at discovering the facts surrounding Pediatrix's efforts to summon help for Dilon and Dr. Lagerstrom's whereabouts while this was occurring. *See, e.g.*, **1 RP 141, 176; 2 RP 298, 331, 461; 3 RP 615; 6 RP 1296, 1318, 1401, 1438-39.**

during his original surgery, Dilon would not have had to undergo the catheterization procedure.

After the tragic incident, Dilon was transported to the children's hospital in Denver where he remained for 30 days, receiving pediatric rehabilitation. [10-24-22 CD 2:16:14–2:16:30] Dilon currently lives with his parents and older brother in a rural community outside of Moriarty. *Id.* 2:11:59–2:12:22. His father is a truck driver, employed by a local company in Albuquerque. *Id.* 2:12:32. His mother was previously a certified nursing assistant, but since Dilon's injury, she had to quit her job to provide full-time care for him. *Id.* 2:12:56–2:13:24.

B. Procedural history

Dilon's guardian ad litem filed suit against Pediatrix and Presbyterian Healthcare Services, alleging negligence. [1 RP 11, 16-19] Plaintiff sought damages, including an award for Dilon's past and future medical expenses, as well as punitive damages. [1 RP 21]

The district court entered a scheduling order, and trial was originally set for April 2021. [1 RP 102, 105] Discovery and motion practice ensued. The case was "very aggressively litigated by all parties" for three and a

half years. [13 RP 3214] Trial was vacated and reset twice. [6 RP 1283; 10 RP 2461]

Pediatrix moved for summary judgment on Plaintiff's claim for punitive damages. [4 RP 756] Finding genuine issues of material fact for a jury determination, the district court denied the motion. [6 RP 1271]

C. Dilon's need for future medical care

Plaintiff's expert submitted a detailed life care plan that describes the long term anticipated medical expenses for Dilon. [10-24-22 CD 2:16:47–2:17:28] Dilon will likely need future orthopedic surgeries as a result of his paraplegia. [10 RP 2312] He will also likely need ongoing bowel and bladder treatment. *Id.* In addition, he requires daily catheterization. [10 RP 2313] He will require a full-time in-home caretaker. [10-24-22 CD 2:23:11–2:23:41] His condition is “permanent” and “lifelong.” *Id.* 2:16:02. Defense counsel acknowledged that Dilon “has obviously got significant future problems,” of which Pediatrix “is very cognizant.” [7-20-22 Tr. 11:21-22]

D. Settlement negotiated by the parties and approved by the district court

Trial was set for Monday, July 25, 2022. [10 RP 2461] The

Wednesday before trial, the district court held an emergency hearing at which the parties informed that they were close to resolving the case. [7-20-22 Tr. 3:5-8] Defense counsel explained to the district court that although the Superintendent is obligated to pay future medical expenses from the PCF, and “traditionally they have paid lump sums to get that accomplished,” nevertheless, the Superintendent had recently indicated that she would no longer be paying future medical expenses as a lump sum. *Id.* 4:25–5:9. Defense counsel continued: “I really don’t think the dispute is necessarily with [Plaintiff’s counsel] and my client[] anymore. I think it’s my client with the PCF.” *Id.* 8:9-11.

The district court asked for clarification: “has somehow the superintendent or the PCF . . . drawn this line in the sand now, and . . . even though they’ve done [lump sum payments] in the past, are they now going to say . . . so sorry, your client loses out because we decided on July 1st of this year that we’re not going to do that anymore?” *Id.* 9:21–10:1. Defense counsel responded: “Right. That’s essentially it.” *Id.* 10:2.

In November 2022, Plaintiff and Pediatrix filed a joint motion to

approve minor settlement.³ [12 RP 2880] The district court conducted a hearing at which it took testimony from Dilon’s guardian ad litem and heard arguments of counsel. [12 RP 2907] In approving Plaintiff’s settlement with Pediatrix, the district court noted that Dilon’s guardian ad litem investigated and reported that the proposed settlement is fair and in Dilon’s best interests.⁴ [12 RP 2907; 10-24-22 CD 2:26:00–2:26:55]

The guardian ad litem recommended the creation of an irrevocable trust for Dilon’s benefit. [12 RP 2908] The trust was created and arrangements were made for a licensed entity to serve as trustee. [10-24-22 CD 2:20:14–2:21:05]⁵

³Plaintiff likewise reached a settlement with Presbyterian. [12 RP 2829] That settlement was not the subject of proceedings in the court of appeals, and Presbyterian has not been a party to any appellate proceedings in this matter.

⁴The relevant redacted portion of the agreement is found at 13 RP 3223-24.

⁵The hearing addressing the approval of the settlement with Presbyterian took place on October 24, 2022, and the hearing addressing the approval of the settlement with Pediatrix took place on December 9, 2022. This brief cites the October hearing for some of the overarching concepts about the guardian ad litem’s findings and recommendations because, as the district court noted, the groundwork was laid in that first hearing, and the additional funds from the Pediatrix settlement would be added to the trust that was already created for Dilon’s benefit, funded by the settlement with Presbyterian.

Dilon’s parents testified that they understood the pros and cons, and they had not been coerced into settling. [10-24-22 CD 2:29:55–2:31:45; 12-9-22 CD 10:05:53–10:07:15] The district court acknowledged the public policy favoring settlement. [12 RP 2908] The district court also found that the parties possess the knowledge about the “facts, evidence, and circumstances” of the case, thus rendering them able to assess the risks involved in allowing the case to be tried. *Id.*

The district court adopted the recommendation of the guardian ad litem and approved the settlement. [12 RP 2907-08; 12-9-22 CD 10:07:55–10:09:01] The court ordered the establishment of the trust and further ordered that the “settlement shall be payable by lump sums” as provided in the parties’ agreement. [12 RP 2909] The district court vacated the trial. [12 RP 2826]

The parties presented the settlement agreement to Chris DeWald, who was the liability claims manager for Integrion Group, the third-party administrator for the PCF. [12 RP 2924-25; 13 RP 3097, 3215] Mr. DeWald took the position that the PCF would pay Dilon’s future medical

[12-9-22 CD 10:07:22–10:07:37]

expenses as incurred, not as a lump sum. [12 RP 2924] The Superintendent has not paid the settlement. [13 RP 3215]

E. Intervention of the Superintendent

After the district court approved the settlement, the Superintendent filed a notice of intent to intervene, followed by an application to intervene. [12 RP 2913, 2915] The district court granted leave to intervene. [12 RP 2934]

F. Plaintiff's motion to enforce settlement

Within days of the Superintendent's application, Plaintiff filed an expedited motion to enforce the settlement, in which Pediatrix concurred. [12 RP 2926, 2927; 13 RP 3215] The Superintendent filed a response in opposition. [12 RP 2937]

The district court held a hearing in August 2023 to address the Superintendent's request to file a sur-reply to Plaintiff's reply in support of the motion to enforce the settlement. The district court addressed the Superintendent's counsel as follows:

I am kind of somewhat stumped that we now seem to be veering off in this whole other area concerning the settlement in the case and whether it should be enforced. . . . I almost sense that . . . you're asking the Court to make some sort of a

decision that the superintendent of insurance needs to approve settlements. And, you know, that's not why we're here. I think this is losing sight of the fact that this case has been going on since 2019 and the plaintiff, this little boy, needs some closure in his case and it needs to be decided. And now the superintendent is coming in and saying to the Court, "Well, you can't approve this" – "you should not have approved this settlement," even though the Court made a finding at the time that it was a fair settlement to both sides.

[8-7-23 Tr. 11:8–12:1]

The district court further addressed counsel for the Superintendent:

I guess one of the things that, again, I find very bothersome about this is, first of all, I've already made a determination that the settlement in this case is fair and reasonable. And so the PCF is now coming in trying to upset that determination by all of this legal briefing that's going on and . . . now the threat of an appeal, which doesn't appear to be an appeal of the settlement, because the settlement has been fair and reasonable, but it's some sort of an appeal that the PCF wants or the superintendent wants to, I guess, use this case as an example to say we can't have lump-sum settlements.

Id. 22:20–23:7. The district court emphasized that “what the superintendent is trying to do” is “incredibly unfair to the plaintiff[] and the defendant[] in this case, after a settlement was worked out and the Court has approved it.” *Id.* 23:8-12; *see also* 13 RP 3030.

G. The district court’s revocation of approval of the settlement

Several weeks after the August 2023 hearing, the district court entered an order revoking approval of the settlement. [13 RP 3213] The court started by noting that while the parties agreed to the settlement, the superintendent “opposed” it. *Id.* The district court found that it could not “order the Superintendent to violate a provision of the [Act].” [13 RP 3218] The district court noted that it “is mindful that Dilon Barbero, the person who bears no responsibility, is paying the price.” *Id.* The district court withdrew approval of the settlement and revoked the order of approval. [12 RP 2907; 13 RP 3219]

H. Court of appeals opinion⁶

The authoring judge alone concluded that the plain language of Section 41-5-7(D) (1992) prohibits lump sum payments for future medical expenses. [Slip op. ¶¶ 8, 11; *id.* ¶ 26 (concurrence/dissent)] The concurrence agreed with the conclusion that the Act does not explicitly

⁶Because parts of the opinion do not constitute the opinion of the court of appeals, this brief discusses Judge Hanisee’s opinion by referencing “the authoring judge” and Judge Wray’s opinion by referencing “the concurrence.” This section contains a thumbnail of the opinion; additional aspects are discussed below in the argument.

permit lump sum payments of future damages. *Id.* ¶ 26 (concurrency/dissent)] But the concurrence believed that the language of Section 41-5-7(D) (“as expenses are incurred”) does not prohibit a lump sum payment for future medical expenses either. [Slip op. ¶ 27 (concurrency/dissent)] The current Act, like the 1992 version, is “silent about whether lump sum settlement payments of future damages are permitted or prohibited.” [Slip op. ¶ 29 (concurrency/dissent)] The concurrence also agreed that the Superintendent has authority to object to settlement terms in district court. *Id.* ¶¶ 26, 30 (concurrency/dissent).

QUESTIONS PRESENTED FOR REVIEW

1) Does the Superintendent of Insurance have authority under the Medical Malpractice Act to object to—and refuse to pay—a court-approved settlement between a plaintiff and a defendant who is a qualified healthcare provider?

2) Does the 1992 version of the Act permit parties to reach—and courts to approve—a settlement that includes a lump sum for payment of future medical expenses when the amount is limited by time and degree consistent with the Act?

STATEMENT REGARDING PRESERVATION

Plaintiff preserved the issues for appellate review by briefing his motion to enforce the settlement and his motion to reconsider. [12 RP 2926; 13 RP 2998, 3222; 14 RP 3264] Plaintiff also argued his position at the hearing on the motion to enforce. [8-7-23 Tr. 23:18–29:16; *id.* 51:3–52:20] And Plaintiff preserved the issues in the court of appeals. [BIC 18-50; RB 1-22]

STANDARD OF REVIEW

Statutory construction “concerns a pure question of law, subject to de novo review.” *Bd. of Comm’rs of Rio Arriba Cnty. v. Greacen*, 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672.

ARGUMENT

I. The Superintendent of Insurance lacks authority under the Medical Malpractice Act to object to—and refuse to pay—a court-approved settlement between a plaintiff and a defendant who is a qualified healthcare provider.

A. Mechanics of the Medical Malpractice Act.

The Legislature enacted the Medical Malpractice Act to promote the health and welfare of New Mexicans by making professional liability insurance available to healthcare providers. *See Baker v. Hedstrom*, 2013-

NMSC-043, ¶ 16, 309 P.3d 1047 (citing NMSA 1978, § 41-5-2, repealed 2021). The Legislature “create[d] a balanced statutory scheme for the litigation of medical malpractice cases, one that benefited both health care providers and patients.” *Leger v. Gerety*, 2022-NMSC-007, ¶ 14, 503 P.3d 349 (2021).

While the Act makes professional liability insurance available to healthcare providers, access to that insurance is conditioned on a *quid pro quo*. See *Baker*, 2013-NMSC-043, ¶ 17. Specifically, healthcare providers can receive the benefits of the Act only if they become “qualified health care providers” and accept the attendant burdens of doing so. *Id.*

To be “qualified,” a healthcare provider must undertake certain financial responsibilities, including payment of a surcharge into the PCF. NMSA 1978, § 41-5-5 (2021); *id.* 41-5-25(A) (2021). The surcharge is effectively an insurance premium to cover acts of malpractice. See *id.* In exchange, the Act confers certain benefits on a qualified healthcare provider. For example, a QHP’s personal liability is limited to \$250,000.00. NMSA 1978, § 41-5-6(I) (2023); *Leger*, 2022-NMSC-007, ¶ 15 (citing NMSA 1978, § 41-5-6(D) (1992)). And the Act places a cap on damages. NMSA

1978, § 41-5-6(I) (2023); *Leger*, 2022-NMSC-007, ¶ 15.

Pediatrix paid the required surcharges and is, therefore, a QHP. As such, Pediatrix chose defense counsel to represent it, paid for the defense, and made all decisions regarding the case, including whether to settle and the amount of the settlement. As a QHP, Pediatrix was thus entitled to the benefits of the Act, including payment of claims in excess of \$200,000.00 from the PCF.⁷ See *Cummings v. X-Ray Assoc. of NM, P.C.*, 1996-NMSC-035, ¶ 28, 121 N.M. 821, 918 P.2d 1321 (settlement amount that exceeds Act's limitation of recovery is paid from the PCF); *Baker*, 2013-NMSC-043, ¶ 18.

The Superintendent's refusal to honor a QHP's desire to settle a medical malpractice claim denies the healthcare provider the benefit of the insurance that he or she purchased via surcharges, and it denies compensation to an injured patient. This contravenes the purposes of the Act.

⁷NMSA 1978, § 41-5-6(D) (1992).

B. The court of appeals erred in affirming the district court’s revocation of approval of the settlement based on the Superintendent’s intervention.

1. *The plain language of the Act does not give the Superintendent authority to object to a court-approved settlement or refuse to pay it.*

“The text of a statute . . . is the primary, essential source of its meaning.” NMSA 1978, §12-2A-19. And “a statute’s plain language is the most reliable indicator of legislative intent.” *Stennis v. City of Santa Fe*, 2010-NMCA-108, ¶ 10, 149 N.M. 92, 244 P.3d 787. When construing a statute, the Court must ascertain and effectuate legislative intent, i.e. the purpose or object underlying the statute. *See Greacen*, 2000-NMSC-016, ¶ 4. In doing so, the Court “must give a statute its literal reading if the words used are plain and unambiguous, provided such a construction would not lead to an injustice, absurdity or contradiction.” *Id.*

The Act in effect at the time of Dilon’s injury in 2015 provided that “[a]ny amount due from a judgment or settlement in excess of two hundred thousand dollars (\$200,000) shall be paid from the patient’s compensation fund” as provided in Section 41-5-25. NMSA 1978, § 41-5-6(D) (1992). The Superintendent “shall” pay out settlements from the PCF. *Id.* § 41-5-25(G)

(1992). In particular, when the Superintendent receives a certified copy of a court-approved settlement, she “shall” take steps as necessary to pay the settlement. *Id.* § 41-5-25(H)(2) (1992); *and see Am. Physicians Assurance Corp. v. Ham*, No. 1:08-cv-638 PK/ACT, 2010 WL 11493824, at *1 (D.N.M. May 6, 2010) (“nothing in the [Medical Malpractice Act] suggests that the superintendent has the authority to reject a certified copy of a court-approved settlement and not seek payment”); *Adams v. Delahoussaye*, D-412-CV-2017-00041, Order Granting Motion to Enforce Settlement (Apr. 22, 2021) (nothing in the Medical Malpractice Act gives “authority to the Superintendent to object to or veto proposed settlements”).⁸

The court of appeals acknowledged the statutory language about the Superintendent’s “duties that relate to payments from the [PCF] that the Superintendent *must* make.” [Slip op. ¶ 20 (emphasis added); *id.* ¶ 30 (concurrency/dissent) (stating that parties expected Superintendent to pay court-approved settlement as required by the Act)] And the concurrence acknowledged the Superintendent’s fiduciary duties to patients and

⁸The Superintendent appealed this decision, but the appeal was dismissed by stipulation of the parties. *See Adams v. Delahoussaye*, A-1-CA-39771, Order of Dismissal (Jan. 13, 2022).

qualified healthcare providers. *Id.* ¶ 30 (concurrence/dissent). But the court of appeals glossed over these duties, stating that the Act gives the Superintendent “other functions or duties” and that the Superintendent may take actions that the statute does not enumerate. [Slip op. ¶ 20] Under the doctrine of separation of powers, discussed below, the Superintendent is empowered to exercise authority only if it has been granted by the Legislature, or if the authority is necessarily and fairly implied. *See supra* Part I.B.2. “[O]ther functions and duties” aside, the Superintendent “shall” pay settlements from the PCF but failed to do so here. *See* NMSA 1978, §§ 41-5-25(G) & -(H)(2) (1992).

The Superintendent sought amendments to the Act that would have empowered her to exercise the authority that she now seeks. In particular, the Superintendent recommended that the Act be revised to authorize the PCF custodian to evaluate and approve proposed settlements that implicate the PCF. **[13 RP 3054]**⁹ In addition to the recommendation in

⁹Russell Toal, Superintendent, Office of Superintendent of Insurance, “Medical Malpractice Act/Patient’s Compensation Fund Modification Report (Dec. 31, 2020), available at https://www.osi.state.nm.us/wp-content/uploads/2021/01/12-31-2020_MA-Report_FINAL.pdf

the PCF Modification Report, the Superintendent backed Senate Bill 239, introduced during the 2021 legislative session. That bill sought to amend Section 41-5-25(A) of the Act to empower the Superintendent to “evaluate and approve all proposed settlements that include payment from the patient’s compensation fund.” [13 RP 3055-56] Senate Bill 239 also proposed to make court-approved settlements “subject to the evaluation and approval of the superintendent.” [13 RP 3059] By asking the Legislature for permission to exercise that authority, the Superintendent effectively conceded that she presently has no such authority.

The Legislature refused to grant the Superintendent the authority she sought. Indeed, House Bill 75¹⁰ (enacted as the 2021 amended Medical Malpractice Act) did not adopt any of the Superintendent’s proposed amendments. [13 RP 3061-66] In addition to not granting the Superintendent authority to evaluate and approve settlements, in House Bill 75, the Legislature stripped the Superintendent of what little authority it had previously granted—to purchase insurance on behalf of the PCF. *See id.*

¹⁰L. 2021, Ch. 16

Although the ink had barely dried on newly enacted House Bill 75, the Superintendent again made recommendations for amending Section 41-5-25 of the Act. [13 RP 3069; *id.* 3071] As before, the Superintendent recommended that the Act should be amended to authorize the PCF custodian to evaluate and approve any proposed settlement that implicates the PCF. *Id.* The Superintendent's recommendations were once again not enacted into law.

The district court found that the Act “does not contain explicit language requiring the PCF Custodian to evaluate and approve proposed settlements when the PCF is involved, nor does [the Act] prohibit the PCF Custodian's involvement.” [13 RP 3217] The court of appeals agreed with the district court in this respect. [Slip op. ¶ 17] Both lower courts' recognition of, and reliance on, the fact that the Act does not speak to the Superintendent's authority to object to settlement terms is tantamount to saying that the Superintendent may do absolutely anything, as long as the statute does not expressly prohibit it. But the fact that no provision of the Act gives the Superintendent the authority to object to a court-approved settlement or refuse to pay it is dispositive, especially in light of the Act's

use of the term “shall” discussed above.

The Superintendent recognizes that the Act “is silent on the superintendent’s participation” in settlements. [8-7-23 Tr. 47:2-3; *id.* at 47:22-24] The Superintendent’s concession about the absence of such statutory language harms its legal position. *See supra* Part I.B.2 (discussing Superintendent’s violation of separation of powers doctrine).

The district court’s and the Superintendent’s focus on the fact that the Act does not expressly prohibit the Superintendent’s involvement evinces a misunderstanding of the Superintendent’s power. And although the district court found that it is up to the Legislature to decide “[w]hether the Superintendent should participate in negotiations and approve settlements,” the district court actually *did* decide and, by revoking approval of the settlement based on the Superintendent’s opposition to one of the settlement terms, erroneously permitted the Superintendent to wield that power. [13 RP 3217; Slip op. ¶¶ 4-5]

The court of appeals noted that Plaintiff did not object to the Superintendent’s motion to intervene in the district court. [Slip op. ¶ 18] The court of appeals apparently took this to mean that Plaintiff did not

object to the Superintendent's asserted role in objecting to the settlement and refusing to pay it. However, the reason that Plaintiff did not object to the Superintendent's intervention is so that the district court could obtain jurisdiction over the Superintendent and order her to make payment from the PCF. [13 RP 2999] Plaintiff's position has always been that the Superintendent lacks the authority to object to a court-approved settlement and refuse to pay it. *See, e.g., 12 RP 2926* (stating Plaintiff's position after he concurred in application to intervene).

2. *The doctrine of separation of powers precludes the Superintendent from objecting to a court-approved settlement and refusing to pay it.*

According to the New Mexico Constitution, “[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.” N.M. Const. art. III, § 1. Under the doctrine of separation of powers, the legislative branch enacts the law, the executive branch

executes the law, and the judicial branch interprets the law. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768 (citing *State v. Fifth Jud. Dist. Ct.*, 1932-NMSC-023, ¶ 9, 36 N.M. 151, 9 P.2d 691).

As this Court has recognized, Article III, Section 1 “allows some overlap in the exercise of governmental function.” *State ex rel. Sandel v. New Mexico Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 12, 127 N.M. 272, 980 P.2d 55. Thus, although “it is the particular domain of the legislature, as the voice of the people, to make public policy,” the Court nevertheless recognizes that “executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature.” *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 894 P.2d 386. Accordingly, the Court will not hold that policymaking by an administrative agency violates separation of powers unless it “conflict[s] with or infringe[s] upon what is the essence of legislative authority—the making of law.” *Sandel*, 1999-NMSC-019, ¶ 12 (quoting *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 33, 120 N.M. 562, 904 P.2d 11). In the instant case, the Superintendent’s objection to a court-approved settlement and refusal to

pay conflicts with, or infringes upon, the legislative function.

The Office of Superintendent of Insurance was constitutionally created to “regulate insurance companies and others engaged in risk assumption in such manner as provided by law.” N.M. Const. art. XI, § 20. The Superintendent is the custodian of the PCF, tasked by the Legislature with protecting and administering the fund and holding PCF monies in trust. *See* NMSA 1978, §§ 41-5-25(A), -(C) (2021). “The legislature delegated the office of the superintendent as the agency through which health care providers would record their entitlement to the benefits of the Medical Malpractice Act.” *Otero v. Zouhar*, 1985-NMSC-021, ¶ 23, 102 N.M. 482, 697 P.2d 482, *overruled on other grounds*, *Grantland v. Lea Reg’l Hosp., Inc.*, 1990-NMSC-076, 110 N.M. 378, 796 P.2d 599.

The Superintendent is empowered to exercise only the authority that the Legislature has expressly granted or “that may be fairly implied therefrom.” *Leonard v. Payday Prof.*, 2008-NMCA-034, ¶ 11, 143 N.M. 637, 179 P.3d 1245. There is certainly no express grant here, and the authority exercised by the Superintendent, far from being fairly implied by an express grant, is instead a usurpation of authority.

The concurrence noted that “the Superintendent essentially took the position that the court-approved settlement required the disbursement of funds in a manner that is contrary to the [Act] and its purposes.” [Slip op. ¶ 31 (concurrence/dissent)] But the Superintendent does not have constitutional authority to make that decision. The executive branch does not interpret statutes. As such, neither the parties nor the district court were required to follow the Superintendent’s interpretation of the statute.

“An agency cannot amend or enlarge its authority through rules and regulations.” *Matter of Proposed Revocation of Food & Drink Purveyor’s Permit for House of Pancakes*, 1984-NMCA-109, ¶ 13, 102 N.M. 63, 691 P.2d 64. “Nor may an agency, through the device of regulations, modify the statutory provision.” *Id.* The Superintendent has attempted to do just that, ostensibly under the authority of Section 41-5-25. *See* 13.21.1.8(I) NMAC (third-party administrator of PCF has responsibility to negotiate settlements and “obtain approval from the superintendent . . . before entering into an agreement involving PCF funds”).

The court of appeals refused to consider whether the Superintendent’s rulemaking overstepped its statutory authority because,

in that court's view, "the Superintendent's ability to negotiate is not at issue." [Slip op. ¶ 21] This relates back to the court of appeals' position that "Plaintiff did not object" to the Superintendent's participation in settlement negotiations. *Id.* ¶ 18. This evinces a profound misunderstanding of Plaintiff's position throughout these proceedings. The Superintendent's role in objecting to the settlement goes to the very heart of the matter.

A conflict with, or infringement upon, the Legislature's authority to make law "occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own." *Sandel*, 1999-NMSC-019, ¶ 12; *and see Taylor*, 1998-NMSC-015, ¶ 24, 125 N.M. 343, 961 P.2d 768. That is precisely what the Superintendent has done. Rather than executing the law, the Superintendent seeks to change the law by usurping power that the Legislature never delegated. Rule 13.21.1.8(I) NMAC is an ultra vires action of the Superintendent.

In refusing to pay a court-approved settlement, the Superintendent

has also usurped the power of the judiciary. Courts are empowered to approve settlements. The Superintendent is not. To illustrate the point, the district court asked a rhetorical question: “if the PCF [custodian] has that kind of authority [to approve settlements], then what’s the role of the Court?” [8-7-23 Tr. 34:5-7] The district court reiterated that if the Superintendent is in the business of deciding whether settlements are “reasonable and fair and legal,” then courts would not need to be involved at all. *Id.* 34:7-10.

The district court ultimately did not follow through on that line of thinking. In the end, the district court erroneously allowed the Superintendent to exercise authority beyond that which the Legislature has delegated. And the court of appeals erroneously affirmed. This Court should reverse.

3. *Sound public policy prevents the Superintendent from objecting to a court-approved settlement and refusing to pay it.*

New Mexico public policy favors settlements. *See Guest v. Berardinelli*, 2008-NMCA-144, ¶ 28, 145 N.M. 186, 195 P.3d 353. The settlement of a case obviously reduces the costs of litigation. *See Leger*,

2022-NMSC-007, ¶ 43. Settlements also help ease the courts' crowded dockets. *See Est. of Lajeunesse ex rel. Boswell v. Bd. of Regents of Univ. of New Mexico*, 2013-NMCA-004, ¶ 31, 292 P.3d 485 (2012).

Another important incentive for settling a medical malpractice case, in particular, is that a negotiated settlement eliminates the risk that a provider will be personally liable for punitive damages, as punitive damages may not be paid from the PCF. *See* NMSA 1978, § 41-5-7(H) (1992). As noted above, the district court denied Pediatrix's motion for summary judgment on Plaintiff's claim for punitive damages. **[4 RP 756; 6 RP 1271]** Pediatrix was thus cognizant of its exposure. **[7-20-22 Tr. 9:5-7** ("We could try it and my client could get hit with punitives. And my client doesn't want that.")] Indeed, Pediatrix recognized that a punitive damages award in a case such as this, involving catastrophic injury to a child, could run into tens of millions of dollars. **[13 RP 3001 n.4]**

Again at the hearing on the motion to enforce the settlement, defense counsel stated his client's concern "that this case was one that presented significant risk." **[8-7-23 Tr. 18:1-2]** Defense counsel added: "This little boy has, in fact, lost the use of his legs, and he's a precious little boy, and

our client did not want to put itself at risk.” *Id.* 18:2-4. As defense counsel argued, the settlement reached by the parties is reasonable and it “protects our interests, and it helps this little boy who obviously has significant problems.” *Id.* 31:1-3.

The parties and the district court possess the requisite knowledge to make an informed decision about whether a settlement is appropriate. The parties to the instant case are acutely aware of the potential risks and benefits that they face because they litigated the case for years. They know the evidence. They know the strengths and weaknesses of their legal positions. The district court accordingly found that the parties possessed the knowledge about the “facts, evidence, and circumstances” of the case, allowing them to assess the risks involved in going to trial. [12 RP 2908]

Conversely, the Superintendent, as a non-party for the first four years of the litigation, has no legitimate basis upon which to disagree with the parties’ evaluation of the case and their decision to settle for a particular amount. The Superintendent even admitted: “We’re not saying the settlement is not fair or reasonable.” [8-7-23 Tr. 31:23-24] Yet the Superintendent has inappropriately inserted herself into these proceedings

for the sole purpose of contesting the settlement.

In complex lawsuits such as this one, it is hard enough for the parties to come to the table and reach a meeting of the minds. It would be all the more difficult to settle a case if a third party such as the Superintendent is added to the mix and granted authority to disapprove of an agreement between the parties. As defense counsel noted, the number of cases in which his clients are in disputes with the PCF custodian has “really worked in a detrimental way to try to get cases settled.” [8-7-23 Tr. 30:4-7] If parties cannot negotiate settlements without interference from the Superintendent, the burdens and benefits conferred by the Legislature in the Act are rendered meaningless to healthcare providers and patients alike, a result that would directly contravene legislative intent.

Rather than honoring New Mexico’s policy favoring settlements, the court of appeals was dismissive. [Slip op. ¶ 22] The court of appeals, having decided that the Act grants the Superintendent authority to object to a settlement and refuse to pay it, stated that it will not question the wisdom or justness of legislation. *Id.* But it is up to the judiciary to ascertain legislative intent in a manner that does not lead to unjust

results. *See Greacen*, 2000-NMSC-016, ¶ 4 (courts must not construe statute in manner that would lead to injustice).

The quandary that the parties find themselves in has not always been the status quo. Up until several years ago, the Superintendent did not contest settlements and refuse to pay them. As the Superintendent's counsel put it: "it wasn't until recently that these problems started arising." [8-7-23 Tr. 47:19-20] That is because the Superintendent has shifted policy and practice midstream. As defense counsel pointed out, no change in the law occasioned the Superintendent's change in policy, and there has been no explanation as to why this is happening. [7-20-22 Tr. 10:4-6; *id.* 11:13-14] It will surely result in more cases going to trial, in contravention of the policy favoring settlement.

As recently as the spring of 2021, the Superintendent has acknowledged that "[n]othing prevents the parties from engaging in settlement negotiations, and *the parties may choose to settle the malpractice case in any way they see fit*. And nothing requires any party to agree to a settlement. All parties to potential settlement negotiations are represented by competent professionals who can analyze the potential

liability and damages and advise their respective clients accordingly. *Subject to Court approval, the parties can reach a settlement.*”¹¹ [13 RP 3073 (emphasis added); 8-7-23 Tr. 28:8-24] That fairly recent statement of the Superintendent’s understanding of the settlement universe is not in the orbit of the Superintendent’s current interventions and adversarial postures.

Rather than reducing the costs of litigation, the Superintendent’s position has greatly increased those costs. The post-settlement litigation in the instant case took up over one year of the parties’ and district court’s time. *See* 12 RP 2901, Stipulated Order Approving Minor Settlement (Dec. 16, 2022); 14 RP 3280, Order on Plaintiff’s Motion to Reconsider (Jan. 12, 2024). Then it took up another year of the court of appeals’ time. And now a case that should have resolved over three years ago via settlement is

¹¹Although it appears in the record proper, the Court can also take judicial notice of the Superintendent’s Reply in Support of Motion to Dismiss, filed on March 19, 2021 in *Grant v. Lovelace Health Sys., Inc.*, D-202-CV-2020-04664. *See State v. Gutierrez*, 2011-NMSC-024, ¶ 53, 150 N.M. 232, 258 P.3d 1024 (taking judicial notice of record in separate case); Rule 11-201(B) NMRA, (a “court may judicially notice a[n adjudicative] fact that is not subject to reasonable dispute because it (1) is generally known within the court’s territorial jurisdiction, [or] (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”)

pending in this Court.

In revoking approval of the settlement, the district court found that the Superintendent was not able to determine whether the settlement for future medical expenses was “reasonable, excessive[,] or inadequate.” [13 RP 3218] But it is up to the parties and the district court to make that determination, and they did here. [12 RP 2907-08; 10-24-22 CD 2:26:00–2:26:55] There are already sufficient checks on the system without granting the Superintendent the authority to interfere in settlements.

First of all, in a case such as this one involving a minor settlement, the child’s best interests are represented by his guardian ad litem. Rule 1-017(D) NMRA (providing that an infant may sue by a guardian ad litem). In addition, the child’s best interests are also safeguarded by the district court. A trial court has a “special obligation” to see that children are “properly represented, not only by their own representatives, but also by the court itself.” *See Garcia v. Middle Rio Grande Conservancy Dist.*, 1983-NMCA-047, ¶ 30, 99 N.M. 802, 664 P.2d 1000, *overruled on other grounds by Montoya v. AKAL Sec., Inc.*, 1992-NMSC-056, ¶ 12, 114 N.M.

354, 838 P.2d 971. In particular, in passing upon settlements dealing with claims of a minor, a court must determine whether approval of the settlement would be consistent with the child's welfare. *Id.* And as a general matter, courts have a duty to protect the legal rights of children. *See Wasson v. Wasson*, 1978-NMCA-092, ¶¶ 4, 5, 92 N.M. 162, 584 P.2d 713. Thus, the reasonableness and adequacy of a settlement are sufficiently vetted without the involvement of the Superintendent.

The court of appeals misunderstood Plaintiff's argument in this respect. The court of appeals believed that Plaintiff argued that "other parties determine if the settlement was 'reasonable, excessive[,] or inadequate[,]'" so the district court need not do so." [Slip op. ¶ 22] Plaintiff never made that argument. Instead, Plaintiff argued that the reasonableness and adequacy of the settlement were properly determined by the parties, by Dilon's guardian ad litem, and by the district court.

[CoA BIC 31, 34-35]

The district court initially honored New Mexico policy in approving the settlement. **[12 RP 2907-08]** But the district court contravened public policy in revoking approval of the settlement. **[13 RP 3213]** And the court

of appeals erred in affirming.

4. ***The fiscal woes of the Patient’s Compensation Fund do not justify granting the Superintendent the authority to object to a court-approved settlement and refuse to pay it.***

Part of the district court’s rationale for revoking approval of the settlement is that the Superintendent is required to “protect the PCF.” [13 RP 3217] The Superintendent’s duty to protect the PCF can be accomplished by means other than *ultra vires* acts like those that she has undertaken in this case. Rather than being granted the power to refuse to pay a court-approved settlement, the Superintendent should instead be held to its statutorily mandated duties vis-à-vis the PCF.

For starters, the Superintendent is required to collect sufficient surcharges, or premiums, from QHPs. NMSA 1978, § 41-5-25(D) (2021). As this Court has observed, the surcharges assure the solvency of the PCF. *See Cummings*, 1996-NMSC-035, ¶ 28. In determining the proper surcharges to assess and collect, the Superintendent is required to heed the advice of the PCF advisory board. *See* NMSA 1978, § 41-5-25(D) (2021). And the surcharges “shall be based on sound actuarial principles, using data obtained from New Mexico claims and loss experience.” *Id.* In

addition, the Superintendent is required to properly invest PCF funds and hold them in trust. *See id.* § 41-5-25(A).

Unfortunately, there is a long history of the Superintendent doing just the opposite than what the Act mandates. Multiple sources have documented the Superintendent’s failure to heed its statutory responsibilities. According to the PCF advisory board itself, “[t]he Patient’s Compensation Fund has been mismanaged for many years. It has collected inadequate surcharges, performed improper risk assessments, and failed to collect and analyze appropriate risk data.” [13 RP 3031, 3097,¹² 3099; *see also id.* 3031, 3100,¹³ 3101 (“The Fund deficit is attributable to a long history of mismanagement during prior administrations.”)]

By the end of 2020, the PCF was operating with a deficit of \$66.8 million. [13 RP 3098] According to a consulting actuarial firm, nearly \$47 million of the deficit was attributable to the Superintendent’s “failure to

¹²2022 Annual Report of the Patient[s] Compensation Fund Advisory Board to the New Mexico Legislature (Jan. 18, 2022).

¹³Ritchie, MD, William, “Proposed Findings, Conclusions and Recommendations” Before the New Mexico Superintendent of Insurance as Custodian of the Patient’s Compensation Fund, Docket No. 21-0004-PCF (Oct. 26, 2021).

raise surcharges on independent physicians despite actuarial recommendations,” as well as the Superintendent’s “failure to impose adequate surcharges on hospitals.”¹⁴ *Id.* By the end of 2022, the deficit had grown to approximately \$130.9 million, prompting the Legislature to infuse the fund with \$32.5 million in 2023. *See* Annual Report of the Patient[’s] Compensation Fund Advisory Board to the New Mexico Legislature, at (unnumbered) 4 (Jan. 8, 2024).¹⁵

The Superintendent’s refusal to pay the settlement in the instant case is a not-so-veiled attempt to have Plaintiff and Defendant bear the cost of, and remedy the shortfall caused by, her own mismanagement and that of her predecessors. The Court should not grant the Superintendent the power to refuse to pay court-approved settlements as a means of

¹⁴The deficit was also attributable to so-called “batch claims” against two doctors who had engaged in schemes that harmed a total of 85 patients. **[13 RP 3098]** And the PCF deficit as of 2022 is attributable to the same two reasons discussed, in addition to inflation. *See* PCF Rate Hearing Transcript, 19:19–21:10 (Sept. 22, 2022) (discussing three primary reasons for PCF deficit), available at https://pcf.osi.state.nm.us/wp-content/uploads/2022/09/Hearing_PDFTran.pdf

¹⁵Available at <https://pcf.osi.state.nm.us/wp-content/uploads/2024/01/PCF-Advisory-Board-Report-to-Legislature-2024-Final-with-Exhibits.pdf>

stabilizing the PCF. [13 RP 3030-31] The Legislature did not confer this power on the Superintendent, and doing so would not only contravene the language of the Act and the separation of powers doctrine, but it would violate public policy, as discussed above.

5. *The district court's findings about the parties' settlement negotiations are erroneous.*

The district court found that the parties “resolve[d] the case amongst themselves” and “ignore[d] the Superintendent’s responsibilities.” [13 RP 3218] The district court also found that the parties led it to believe that the Superintendent had approved the settlement. [13 RP 3214, 3219] The court of appeals decided that it “need not address” Plaintiff’s challenge to these findings. [Slip op. ¶ 23] The district court’s findings are not supported by the record or the law.

The parties are entitled to resolve lawsuits amongst themselves without interference from the Superintendent, and the law does not require approval of the Superintendent before they can reach a settlement. *See supra* Argument Part I.B. Furthermore, the Superintendent’s responsibilities include paying court-approved settlements. *See* NMSA 1978, § 41-5-25(H) (1992); *id.* § 41-5-25(H) (2021). Nor did the parties lead

the district court to believe that the Superintendent approved of the terms of their agreement. The parties were forthcoming that the Superintendent would not agree to pay future medical expenses as a lump sum. At the hearing on the motion to enforce, defense counsel stated that throughout the process of settlement talks, “we’ve kept the PCF informed and asked them, repeatedly asked them, demanded that they protect the interests of my client and help the boy by approving the settlement. And they’ve steadfastly refused.” **[8-7-23 Tr. 18:14-18]**

The record reflects that Integrion knew that settlement talks were ongoing beginning with a mediation held in October 2021. **[12 RP 2938, 2948-49]** The Superintendent’s counsel declared that Integrion was notified of, and participated in, mediations in December 2020 and October 2021. **[13 RP 3115]** Integrion also knew that talks continued into the spring and summer of 2022 and admitted that it “participated in negotiations through October 2022.” **[13 RP 3131-3137; *id.* at 3195]** The Superintendent likewise admitted that Integrion knew about the July 2022 mediation and that a settlement demand was presented to Integrion the day after the mediation, receipt of which was confirmed by Integrion.

[13 RP 3194-95; 12 RP 2924]

* * *

In sum, neither the text nor the context of the Medical Malpractice Act contemplates that the Superintendent may refuse to pay a court-approved settlement. The Court should reverse.

II. **The 1992 version of the Medical Malpractice Act permits parties to reach—and courts to approve—a settlement that includes a lump sum for payment of future medical expenses when the amount is limited by time and degree consistent with the Act.**

The 1992 version of the Act provides that, “[p]ayment for medical care and related benefits shall be made as expenses are incurred.” NMSA 1978, § 41-5-7(D) (1992). The Superintendent’s position is that the Act requires that the parties’ settlement for future medical expenses must be paid as incurred, and because the settlement includes a lump sum payment for future medical expenses, the settlement is “in violation” of the Act, relieving the Superintendent of the obligation to pay. [12 RP 2915]

The authoring judge stated that “our Supreme Court has alluded to agreeing with this construction,” i.e. that the plain language of the Act prohibits lump sum payments for future medical expenses. [Slip op. ¶ 11

(citing *Baker*, 2013-NMSC-043, ¶ 18)] But in *Baker*, this Court did not come close to construing Section 41-5-7(D) or deciding whether future medical expenses may be paid as a lump sum. Instead, the Court was merely summarizing the phrase “as expenses are incurred,” without considering whether those words prohibit a lump sum payment. Notably, the concurrence disagreed with the authoring judge and the Superintendent’s position, concluding that Section 41-5-7(D) does not prohibit a lump sum payment for future medical expenses. [Slip op. ¶ 27 (concurrence/dissent)]

The Superintendent’s interpretation of the Act is implausible for at least three reasons. It violates the canons of statutory construction. It ignores the Superintendent’s longstanding practice of making lump sum payments from the PCF for future medical expenses. And the statutory language on which the Superintendent relies did not survive the Legislature’s amendment of the Act. Each of these three reasons for rejecting the Superintendent’s (and the authoring judge’s) interpretation will be examined in turn.

First, a statute is to be construed, if possible, to “give effect to its

entire text.” NMSA 1978, § 12-2A-18(A)(2). A “statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole.” *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022; *Baker*, 2013-NMSC-043, ¶ 26 (stating the “fundamental rule of statutory construction . . . that all provisions of a statute . . . must be read together to ascertain the legislative intent”). The Superintendent’s interpretation ignores additional text from Section 41-5-7: “This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.” NMSA 1978, § 41-5-7(F) (1992). A plain reading of Section 41-5-7(F) indicates that the provision that requires future medicals to be paid as incurred does not prevent a patient and QHP from entering into a settlement agreement that includes a lump sum payment for future medical expenses if they are limited by time and degree.

According to the court of appeals, both sections “can be read in harmony even if lump sum future medical payments are prohibited.” [Slip op. ¶ 12] This conclusion is erroneous. The Superintendent’s interpretation

of the Act renders Section 41-5-7(F) meaningless surplusage. Section 41-5-7(F) effectively negates the requirement that future medical expenses must be paid as incurred if there is a settlement. Otherwise Section 41-5-7(F) has no role to play in the statutory scheme.

The Superintendent does not have authority under the Act to refuse to pay a settlement with a negotiated amount for future medical expenses when the settlement meets certain conditions imposed by the Act, particularly where the settlement is approved by the district court. In the instant case, the parties carefully crafted a settlement agreement with limitations on the time and degree of payment for future medical expenses. The parties included a temporal limitation by agreeing that Dilon's future medical care and related benefits would extend until he reaches age 64.5. **[13 RP 3223-24]** The parties further limited the degree of future medical expenses by agreeing to an amount less than the present value of Dilon's life care plan, as calculated by Plaintiff's expert economist, Dr. Allen Parkman. **[13 RP 3103-04]**

The Superintendent has attempted to justify her intervention by arguing that she must act to protect PCF funds. **[12 RP 2917, 2919, 2937]**

But the reality is that a pay-as-you-go arrangement actually increases costs to the PCF. As Dr. Parkman explained, paying future medical expenses as incurred costs the PCF more in administrative expenses over time. **[13 RP 3104]**

Paying as incurred also means that the PCF does not get the benefit of the discounted present value of the cost of Dilon's life care plan, which the settlement reflects. *Id.* In cases involving future medical expenses, juries are instructed to reduce any such award to present value. *See* UJI 13-1822 NMRA. The Superintendent's refusal to pay the settlement is thus not fiscally sound because less money would be expended from the PCF if paid now than if Dilon's future medical expenses are paid as incurred, as Dr. Parkman opined. **[13 RP 3104]** It makes good fiscal sense for the Superintendent to pay the settlement as a lump sum, and her refusal to do so not only conflicts with her fiduciary responsibilities, but it contradicts her own arguments about those responsibilities.

The Superintendent admitted that "the amount that is paid for future medical expenses annually is small in comparison to the amount that's paid out for past medical expenses and nonmedical damages." **[8-7-**

23 Tr. 43:9-12; see also 13 RP 3032 (future medical expenses comprise a small fraction of the total figure for claims on the PCF)] This is yet another demonstration that the Superintendent's position is untenable.

Second, the Superintendent has a longstanding practice of making lump sum payments from the PCF for future medical expenses. In fact, the Superintendent admitted that she has paid future medical expenses as a lump sum in the past.¹⁶ **[8-7-23 Tr. 36:5-6]** And record evidence bears out this admission. When Plaintiff made IPRA requests for information about PCF payments, it became apparent that multi-million dollar lump sum settlement payments are regularly paid from the PCF. **[13 RP 3007-08; id. 3075-96]**

Furthermore, in the district court, the Superintendent argued that even if she has authorized lump sum payments for future medical expenses in the past, this does not mean that she must always agree to such payments, and she still has the authority to evaluate each case on its merits and decide whether to approve of a lump sum payment for future

¹⁶In spite of this admission, the district court declined to decide whether the Superintendent has previously made lump sum payments for future medical expenses. **[13 RP 3217-3218]**

medical expenses. **[14 RP 3254]** This is a damning argument. On the one hand, the Superintendent steadfastly maintains that a lump sum payment for future medical expenses would violate the Act. **[12 RP 2915, 2942; 14 RP 3251; 8-7-23 Tr. 38:19-22]** The district court accepted that argument and undid the settlement on that basis. **[13 RP 3218]** Yet on the other hand, the Superintendent claims that she can authorize lump sum payments for future medical expenses on a case-by-case basis. **[14 RP 3254]**

The fact that the Superintendent routinely paid future medical expenses as a lump sum from the PCF in the past, and the fact that the Superintendent believes that she can do so now on a case-by-case basis (even in cases governed by the 1992 version of the Act), shows that lump sum payments do not violate the Act.

It is noteworthy that the Superintendent recommended that Section 41-5-25 should be amended to include a provision that the PCF custodian shall not pay future medical expenses as a lump sum. **[13 RP 3069; *id.* 3071]** As with the Superintendent's other recommendations, the Legislature has not seen fit to adopt it. But the very fact that the

Superintendent made this recommendation shows that she understands that future medical expenses may be paid as a lump sum consistent with the Act. Thus, the district court’s concern about its lack of “authority to order the Superintendent to violate a provision of the [Act]” is for naught.

[13 RP 3218]

Citing *State v. Vest*, 2021-NMSC-020, ¶ 34, 488 P.3d 626, the authoring judge refused to consider the Superintendent’s endorsement of an amendment that would have added the “as expenses are incurred” language back into the statute. [Slip op. ¶ 13] Under *Vest*, courts are to look at the “language of the statute as passed and the history of the statute insofar as any amendments may have been made.” 2021-NMSC-020, ¶ 34. The Legislature clearly amended the statute to remove the “as expenses are incurred” language. The Superintendent’s endorsement of an amendment to add that language back into the statute sheds light on the duplicity of the Superintendent’s position in the instant case. Under both versions of the statute, the Superintendent has claimed the authority to—and in fact has—paid future medical expenses as a lump sum.

Third, as discussed, the language on which the Superintendent

relies—“[p]ayment for medical care and related benefits shall be made as expenses are incurred”—does not appear in the version of the Act that is currently in effect. *Compare* NMSA 1978, § 41-5-7 (2021) *with* § 41-5-7(D) (1992). While the Legislature amended the statute to delete the requirement that payment for those particular expenses shall be made as incurred, it nevertheless left intact the following language: “This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.” NMSA 1978, § 41-5-7(D) (2021); NMSA 1978, § 41-5-7(F) (1992). Deleting the “as expenses are incurred” provision while leaving intact the provision about settlement is a strong indication that the language about paying medical expenses “as . . . incurred” had detrimental effects unintended by the Legislature. This case is a prime example of such a detrimental effect. The Legislature thus remedied this unintentional consequence by amending the Act to delete the very provision on which the Superintendent hangs her hat. While the authoring judge brushed this off, it is nevertheless relevant when considering the “history and background”

of the statute in order to ascertain legislative intent. *Vest*, 2021-NMSC-020, ¶ 34.

In addition to the linguistic problems with the Superintendent's and the authoring judge's interpretation of Section 41-5-7(D), there are several practical problems. *First*, if Dilon's future medical expenses must be paid as incurred, then those expenses would need to be continuously negotiated with Integrion, the PCF's third-party administrator. Integrion, which is "similar to other insurance companies," has "claims handler[s]" or "claims adjuster[s]" who would have the authority to examine the necessity of each medical service and associated bill. [8-7-23 Tr. 49:24-25] This could lead to endless disputes and even devolve into costly satellite litigation about whether a charge is reasonable and related to Dilon's injury. [13 RP 3033] Under the terms of the settlement, the lump sum for Dilon's future medical expenses would be safeguarded in a trust, and the trustee would be a gatekeeper, making sure that trust funds are used to take care of Dilon's future medical needs.

Second, there are no guarantees of the PCF's future solvency. The Superintendent's well-documented pattern and practice of failing to collect

adequate surcharges and failing to raise surcharges despite sound actuarial recommendations, discussed above, places Dilon at risk that his future medical expenses will not be paid. **[13 RP 3014]** Dilon’s guardian ad litem reached a settlement so that Dilon would not have to bear that risk.

The Superintendent has argued that if the PCF becomes insolvent, there is “a possibility” that Plaintiff can sue the state for deprivation of his property interest without due process of law. **[8-7-23 Tr. 43:20–44:3]** That “possibility” is scant comfort to a family caring for a child with significant lifelong medical needs, who has spent years seeking redress for Dilon’s injuries, only now to be told, following a settlement agreed to by both sides on the eve of trial, that the terms are not acceptable to a state agency and will not be honored.

The authoring judge was wrong to ignore these practical concerns occasioned by a categorical denial of lump sum payments for future medical expenses. [Slip op. ¶ 15] Far from being “policy considerations . . . within the purview of the Legislature,” they are reasons why the court of appeals’ construction of the statute impermissibly “lead[s] to an injustice,

absurdity or contradiction.” *See Greacen*, 2000-NMSC-016, ¶ 4.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the court of appeals’ opinion and the district court’s order revoking approval of the settlement and remand for further proceedings.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 12-319(B)(1) NMRA, Appellant states that oral argument would be helpful to a resolution of the issues because this case presents a far-reaching issue of constitutional magnitude.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January 2026, I electronically filed a true and complete copy of the foregoing document with the Clerk of Court, using the Odyssey File and Serve System, which caused a copy to be served on counsel of record and any other service contacts.

/s/ Caren I. Friedman