COURT OF APPEALS FOR THE STATE OF WASHINGTON

Division I

WASHINGTON STATE COALITION FOR THE HOMELESS; ANITA ELLIOTT, and her minor child, JUSTIN; *et al*; and other persons similarly situated; Respondents, Cross-Appellants, vs. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al; Appellants.	Supreme Court No. 62879-3 Division I No. 36377-8-I

REPLY BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

March 20, 1996

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I. INTRODUCTION

DSHS does not dispute the summary judgment evidence on the foster care issue: It takes or retains substantial numbers of children unnecessarily when the caseworker or the dependency judge determine that less costly shelter or housing assistance to the family would prevent or shorten placements. DSHS systematically fails to equip caseworkers to provide such assistance in these cases.[1] Because of this, caseworkers and the courts cannot exercise their professional judgment. It also does not dispute the resulting serious harm to the children and families.

Instead, DSHS disputes legal restraints on its practices. By its view, laws enacted to overcome agency indifference to these problems have no effect. Despite the resulting deprivation of the most sacred private liberties under our state and federal constitutions, DSHS disputes that due process even applies. DSHS denies that courts have oversight authority, although DSHS enlists them to take and keep these children.

DSHS is incorrect. The Court should affirm the trial court's ruling except in three respects: (1) It should reinstate the claims under

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[1] DSHS asserts, without any citation to evidence, that "[c]hildren in a family with housing problems will have a much greater chance of receiving Home Based Services or housing assistance through the Family Preservation Act." DSHS reply brief at 19, ftnt. 14. The evidence is exactly the opposite. *E.g.*, CP 602-603, 646, 657, 1311, 1325. Homelessness defeats other services, especially those that are "home-based" and that require a residence to receive or benefit from the service.

the federal Adoption Assistance and Child Welfare Act (AACWA); (2) It should declare the constitutional requirement that the state, when exercising foster care powers, use the least restrictive methods necessary and exercise professional judgment; (3) The Court should extend relief to all affected families in the class and should require DSHS to devise and implement a plan to correct its systematic failures.

II. THE COURT SHOULD REINSTATE THE FEDERAL STATUTORY CLAIMS FOR FOSTER CARE RELIEF.

In 1994 Congress overturned pertinent parts of *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360 (1992). 42 U.S.C. § 1320a-2.[2] While the "reasonable efforts" provision is still not enforceable, the rest of the AACWA is enforceable to the extent it was prior to *Suter*.[3]

Those cases, and more recent ones, enforce the AACWA under

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[2] *See* Brief of Respondents and Cross-Appellants, pages 42 - 44.

[3] In light of this amendment, this court finds (and the parties agree) that the narrow holding of Suter remains intact, and the plaintiffs claims under 42 U.S.C. § 671(a)(15) must be dismissed because the "reasonable efforts" language in that section is too "vague and amorphous." But the court must "rewind the clock" and look to cases prior to Suter to determine the enforceability of other provisions under the Adoption Assistance Act. More broadly, the amendment overrules the general theory in Suter that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan. Instead, the previous tests of Wilder and Pennhurst apply to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries.

Jeanine B. by Blondis, 877 F.Supp. 1268, 1283 (E.D. Wis. 1995).

the three factors analysis for 42 U.S.C. § 1983 claims. *Jeanine B. By Blondis v. Thompson*, 877 F.Supp. 1268, 1281-1282 (E.D. Wis. 1995):

> Factors to examine include: (1) whether "the provision in question was intended to benefit the putative plaintiff[s]"; (2) whether the provision reveals a congressional preference or a binding obligation; and (3) whether the plaintiff asserts an interest which is so "vague and amorphous" that it is "beyond the competence of the judiciary to enforce."[4]

DSHS misapplies these factors by misstating the plaintiffs' claim.

(1) Congress Intended the AACWA to Benefit the Plaintiffs

Congress intended the AACWA to benefit families who need help to prevent or shorten a placement. This intent is "clear and undisputed." *Jeanine B.*, 877 F.Supp. at 1283; *Artist M. v. Johnson*, 917 F.2d 980, 987 (7th Cir. 1990), *rev. on other grounds*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992)(Intent "cannot be seriously disputed.") DSHS does not dispute this factor.

(2) The AACWA Imposes Binding Obligations

DSHS seeks to deflect the AACWA mandate by misstating it.

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[4] *Citing Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). "When making this determination, the court is aware that '[t]he crucial consideration is what Congress intended.' The defendants bear the burden of demonstrating that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right. *Wright*, 479 U.S. at 423-24, 107 S.Ct. at 770-71 This conclusion is not easily drawn." *Aristotle P. v. Johnson*, 721 F.Supp. 1002, 1011 (N.D. Ill. 1989).

DSHS notes that the Act does not specify shelter or housing assistance. Therefore, it asserts, DSHS cannot be made to provide such assistance. This is the same response it offers to the state foster care statutes. At its most benign, DSHS would thus contrive an exception to these laws so that, of all unspecified services, it cannot be made to provide shelter or housing assistance. At its extreme, DSHS means that it need not provide any service since none are specified.[5] Neither view is correct.

The law does not specify services for a good reason. Caseworkers and dependency judges need the discretion to tailor service decisions to a family's individual needs. Instead, the AACWA requires a case plan and a court review to make these assessments "assuring" the necessary services for each family.[6] DSHS must equip caseworkers to

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[5] This is the position that DSHS took in *In re the Welfare of J.H.*, 75 Wn.App. 887, 880 P.2d 1030, *rev. denied*, 126 Wn.2d 1024 (1995).

[6] The state "shall" have an approved plan that " . . . provides for the development of a case plan (as defined in section 675(1) of this title) for each child. . . and provides for a case review system which meets the requirements described in section 675(5)(B) of this title with respect to each such child." 42 U.S.C. § 671(a)(emphasis added). A "case plan" must include:

> [a] plan for **assuring** that the child receives proper care, and that **services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child,** . . . .

Id. at § 675(1)(B)(emphasis added). The "case review system" requires a court or other adjudicative procedure for "assuring that -

(continued...)

provide shelter assistance only when DSHS's own mandated case plans or court reviews require it "to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child,. . . . " 42 U.S.C. § 675(1)(B).

DSHS's arguments and case citations, therefore, rebut a claim that plaintiffs do not make. The plaintiffs do not propose a "federal right to housing assistance." DSHS reply brief at 32. They do not assert that "housing assistance is mandated by the case plan and case review section of the AACWA." *Id.* 42-43. Unlike the relief denied in cases that DSHS cites, the plaintiffs do not challenge either DSHS's own case plans or the individual dependency court adjudications.[7] The plaintiffs

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[6](...continued)

> "(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, . . .
>
> (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court of by administrative review . . . in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care . . .

Id. at 675(5).

[7] DSHS reply brief at 42. In *Scrivner v. Andrews*, 816 F.2d 261 (6th Cir. 1987), the court rejected a damage claim from a family who sought more visitation with a child than the case plan or the dependency review found to be appropriate. In *B.H. v. Johnson*, 715 F.Supp. 1387 (N.D. Ill. 1989), the court declined to order (continued...)

do not seek to undo, review or prejudge any individual case. Unlike relief granted in other cases, plaintiffs do not ask this court to make individual assessments for class members outside the case plan or case review process. The plaintiffs only seek to implement assessments that DSHS and the dependency courts already are required to make.

The provisions of the AACWA requiring these case plans and reviews are unmistakably mandatory. Courts have expressly recognized claims to enforce them.[8] Courts have even required measures necessary

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[7](...continued)
specific services that the agency or the dependency courts did not require. The decision did find the case plan requirement itself to be enforceable. In *Aristotle v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989), the plaintiffs' challenged the state's case plans and case reviews. Relief would have required the court to define for the class the meaning of "least restrictive setting" and "reasonable efforts" to reunify. It would have also required the court to define a term -- "meaningful sibling visitation -- that is not in the statute. In *Del A. v. Roemer*, 777 F.Supp. 1297 (E.D. La. 1991), the court rejected the plaintiffs' challenge to the state's alleged failure to have the required case plans or case reviews. "There is no objective benchmark against which compliance with this provi-sion can be measured. Whether a child has a plan satisfying this provision is as individual as each child." *Id.* at 1309. (The *Del. A.* ruling was advisory. The court had previously found, contrary to every other court, that the AACWA was not enforceable because, under the first factor of the analysis, it was not intended to benefit the children. *Id.* at 2305-1306.)

In contrast to these cases, the plaintiffs in this case do not ask the court to review or specify the contents, criteria, or procedure of DSHS's case planning or case review. The plaintiffs want only that DSHS fulfill their terms when they call for shelter or housing assistance.

[8] The provisions sought to be enforced here are located in the Sections setting forth in mandatory language the features a state plan must possess before funding will be provided. [citing § 671(a)(16) among other sections]. When the right asserted is tied explicitly to the funding provision, the Supreme Court has found the requisite congressional intent.

(continued...)

to implement a case plan or case review system.[9]

In doing so, they reject DSHS's suggestion that the AACWA requires only that the U.S. Department of Health and Human Services (HHS) approve the state's plan. DSHS reply brief at 30.[10]

These courts also reject DSHS's analysis of *Wilder* and *Pennhurst*. **First**, the AACWA is stronger than the Medicaid statute that the *Wilder* Court found to confer a cause of action. That Medicaid law relied on the state's own discretion and the "satisfaction" of HHS:

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[8](...continued)

Artist M. v. Johnson, supra, 917 F.2d at 987; *L.J. v. Massinga,* 838 F.2d 118, 123 (4th Cir.1988); *Lynch v. Dukakis,* 719 F.2d 504, 509-12 (1st Cir.1983); *Joseph A. by Wolfe v. New Mexico Department of Human Services,* 575 F.Supp. 346, 353 (D.N.M. 1983) *vacated on other grounds,* 69 F.3rd 1081 (10th Cir. 1995); *B.H. v. Johnson, supra,* 715 F.Supp. at 1403-04; *Spielman v. Hildebrand,* 873 F.2d 1377, 1386 (10th Cir.1989); *Jeanine B., supra. See also* cases at Plaintiffs' opening brief, footnote 76.

[9] *E.g., Lynch v. Dukakis, supra,* 719 F.2d at 512-13 (To "ensure prospective compliance" with the case plan and review requirements, the couirt limited the case-load of each social worker to twenty-four cases and required the Department of Social Services to assign each case to a social worker within twenty-four hours of its receipt.)

[10] The court in *Jeanine B.* noted that Congress expressly rejected this suggestion:

> As for the second factor, Congress imposed a binding obligation by explicitly tying the creation of certain features of a state plan to federal funding. The scheme and the language of § 671(a) are mandatory, and the theory of Suter --that when Congress sets out plan requirements the only enforceable right is to the plan itself, and not to its implementation--has been rejected by Congress itself--the body whose intentions must be interpreted. The second prong of Wilder is met.

Jeanine B., 877 F.Supp. at 1283-1284.

> a State plan for medical assistance must -- provide for payment [for services] provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) which the State finds, and makes assurances satisfactory to the Secretary are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities . . .

Wilder v. Virginia Hospital Ass'n, 496 U.S. at 502-503. If this language is enforceable, then so are the stronger terms of AACWA.

Second, *Pennhurst* declined to enforce The Developmentally Disabled Assistance and Bill of Rights Act of 1975 because, unlike the AACWA, its mandate was "not tied explicitly to funding provision." 917 F.2d at 987. Also, the amount of federal money ($ 1.6 million) was "woefully inadequate" in proportion to the state's purported obligations. 451 U.S. at 24, 101 S.Ct. 1531. *Wilder* distinguished the Medicaid statute on these grounds because the Medicaid money was more proportional to the state's obligations. *Wilder, supra,* 496 U.S. 498, 511, footnote 10. Significantly, the AACWA uses the same funding formula as Medicaid.[11] This money, which is not capped,

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[11] The federal government pays from 50% to 83% of the state's costs for foster care services, depending on a formula used in the federal Medicaid program. In addition, the federal government will pay 75% of the training costs for employees and foster parents, plus 50% of other costs. 42 U.S.C. § 674, as amended by P.L. 101-239, section 8006(a); 42 U.S.C.§ 1396d(b); 42 C.F.R. § 433.10(b).

amounts to tens of millions of dollars in any year.[12]

Congress offered this money on the condition that states change their practices.[13] Washington State understood this well enough. The

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[12] Federal funds in the amount of $ 263,843,000 constitute 46.5% of DSHS's total budget of $ 566,332,000 for Children and Family Services Programs in FY 1995 - 1997. ESHB 1410, Sec. 202 (1995 2d Special Session). In FY 1993-1995, the AACWA accounted for about 19% or $ 55,332,542 of the federal dollars that DSHS received for Children and Family Services. *See* Trial Exh. 1, page 89.

[13] Many children, and their parents, do not receive proper post-separation services which could lead to reunification of the family. Existing accountability and due process procedures are extremely vague, and widely ignored, which directly contributes to the maintenance of thousands of children in indeterminate and inappropriate, and costly foster care.

123 Cong. Rec. 24214 (July 20, 1977)(Extension of Remarks by Rep. George Miller.)

> Every study of the existing foster-care system has found a dismal absence of services provided to the family -- services which would prevent the removal and long-term placement of children in foster care.

123 Cong. Rec. S12807 (July 26, 1977, No. 127)(Remarks of Sen. Cranston, co-sponsor).

> Federal funding practices actually encourage this breakup of the American family by providing unlimited funds for maintenance payments, but strictly limiting the amount available for preventive and reunification services or for adoption subsidy payments.

123 Cong. Rec. S12807 (July 26, 1977, No. 127)(Remarks of Sen. Cranston, co sponsor).

> If human concerns addressed by this bill are not enough to move us, certainly savings in tax dollars which are expected due to the shift away from expensive foster care to preventive services and adoption, should move us in this day of budget restraints.

Opening Statement of Sen. Dole, Hearing Before the Subcommittee on Public Assistance of the Committee on Finance on H.R. 3434, page 55 (September 24, 1979); 125 Cong. Rec. H122134 (Remarks of Rep. Brodhead)("It is substantially cheaper to

(continued...)

legislature incorporated into state law the same preventive and reunification duties, case plans and court reviews. Chaps. 13.34, 74.13, 74.14A. RCW. *See* Plaintiff's opening brief at 34 - 41, 47 - 51. The legislative history of these changes shows not only the intent to require DSHS to provide such services but the understanding that it is a condition of AACWA funding.[14] DSHS acknowledges this mandate when it noted

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[13](...continued)
provide necessary services to children in their own homes . . . than to provide the full cost of support of those children in foster homes . . . We know that when the family is kept together, it is a better environment for the children, and it is, of course, cheaper for the Federal Government."); *See also,* S.Rep. No. 96-336, reprinted in 1980 U.S. Code Cong. & Admin. News 1448, 1450 (96th Cong., 2d Sess.); *See also* 125 Cong. Rec. S22682 (August 3, 1979).

[14] In enacting Chap. 74.14A RCW the legislature stated the problem the way Congress did:

> The current DSHS priorities for children and families and the existing organizational structure of the department present two major problems for social and health services for children and families. The first problem is that by placing the highest priority on such services as out-of-home placements, institutionalization, and hospitalization, rather than on services which delay or reduce the need for these services child or family problems which could be addressed early on are left to deteriorate until the problem becomes chronic and severe. This pattern can result in escalating requests for additional costly out-of-home and institutional placements because community-based early intervention programs do not exist in sufficient number. . . .

Final Legislative Bill Report, SHB 433, Laws of 1983, Chap. 192. The following year, the legislature acknowledged the AACWA mandate for services:

> The Department of Social and Health Services receives approximately $ 5.0 million annually in federal funds for foster care maintenance and administrative costs. Under Public Law 96-272 [AACWA] the department is required to make reasonable efforts to keep a child at

(continued...)

HHS's statutory authority to withhold the money from noncomplying states. DSHS reply brief at 30.[15] DSHS's manual notes that the state's receipt of federal money requires AACWA compliance.[16]

DSHS would defeat Congress's intent. DSHS concedes that "case plans and the case review" are dependent on "the unique facts of

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[14](...continued)
home and to return a child home from a foster care placement. This provision was effective in October 1, 1983. No child can be certified eligible for Title IV-E (federal funds) unless a specific determination is made by the court that the department has made such an effort. Thus, failure to enact this legislation could jeopardize the $ 5.0 million in annual federal funds."

Fiscal Note No. 84-168 for HB 1526 cf SB 4637 (January 25, 1984)(re Laws of 1984, Chap. 188, sections 2 - 4, adding "reasonable efforts" duty to Chap. 13.34 RCW.)

[15] HHS's administrative remedy shows that the statute is mandatory. Such administrative remedies, however, do not preclude the availability of enforcement through a private cause of action. An administrative sanction can preclude private enforcement of a federal statute under 42 U.S.C. § 1983 only if the state defendant bears the heavy burden of showing that Congress intended it to foreclose all other remedies. *Jeanine B., supra,* 877 F.Supp. at 1283. Courts did not reached this conclusion about AACWA before the 1994 amendments to the Social Security Act. *Id., Artist M. v. Johnson, supra* 917 F.2d at 986. *Aristotle P. v. Johnson,* 721 F.Supp. 1002, 1011 (N.D.Ill. 1989)("As an initial matter, "generalized powers" such as the ability to cut off federal funds, "are insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Wright*, 479 U.S. at 428, 107 S.Ct. at 773.) Preclusion is even less likely now that Congress, by that amendment, expressly indicated its expectation of private enforcement. *See also, Withrow v. Concannon*, 942 F.2d 1385, 1387 (9th Cir. 1991)(HHS's finding of the state's "substantial compliance" necessary to avoid administrative remedies does not preclude a judicial finding of violations in a private lawsuit under 42 U.S.C. § 1983.)

[16] Public law 96-272 [AACWA] provides funds to states for services to children if the state maintains compliance with several requirements for permanency planning, case plans, and case review procedures.

Chapter 23 -- Permanency Planning, Section 23.02. S.J. Exh. T., page 3.

each case and the social work judgments that flow from those facts." DSHS reply brief at 39, 41. Presumably, it admits that it must have a case plan for each child, and that it must show up at the appropriate times for a judicial review. Yet, it disputes a duty to implement its own case plan or the court's judgment. DSHS would thus degrade foster care laws to paperwork and process without meaning for statutory goals of prevention, reunification or permanency planning, which themselves would be reduced to child welfare platitudes of no consequence.

As a result, children are spending unnecessary time in foster care because their families lack a place to live, contrary to the judgments of DSHS's own caseworkers and dependency courts. This is not merely tragic. This not only breaches rudimentary standards of child welfare practice. It violates federal and state law.

(3) The courts are competent to interpret the AACWA.

DSHS also uses its misstatement of the plaintiffs' requested relief to assert that courts are not competent to adjudicate the claim. Noting that service assessments must be made "on the unique facts of each case", DSHS believes that the plaintiffs' claim is too vague without "objective benchmarks." DSHS reply brief at 39. Three points are pertinent. **First**, the plaintiffs have always contended that service needs

must be assessed case-by-case. **Second**, individual assessments are well within the capabilities of a court, as DSHS implicitly acknowledges. Dependency judges make these judgments all the time. Giving specific application to generalized legal requirements is the routine business of the judiciary.

Third, the real question is whether the court should use this lawsuit to administer individual relief. This is the purpose of lawsuits, including class litigation, even when individual assessments may be difficult.[17] It is common in foster care litigation.[18] The plaintiffs do not propose it. They seek only to require DSHS to equip caseworkers to implement the judgments the dependency system already makes.

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[17] E.g., *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 371, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977)("The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practice. After the victims have been identified, the court must, as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination. This process of recreating the past will necessarily involve a degree of approximation and imprecision."); *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D.Colo, 1986)(Court certified a class of purchasers of an allegedly defective Cadillac where relief would depend on the varying types of purported misrepresentation and degrees of reliance.) *See also,* NEWBERG ON CLASS ACTIONS, § 10 (3rd Ed. 1992).

[18] *E.g., L.J. v. Massinga*, 699 F.Supp. 508, 510 (D.Md. 1988)(The court required the defendant to conduct independent reviews of individual foster homes, to visit each child on a specified schedule, and provide for adequate staff), *aff'd*, 838 F.2d 118 (4th Cir. 1988); *Baby Neal for and By Kanter v. Casey*, 43 F.3rd 48, 64 (3rd. Cir. 1994) (The court granted class certification despite the potential need to order relief for individual class members); *Norman v. Johnson*, 739 F.Supp. 1182 (N.D. Ill. 1990).

III. DUE PROCESS REQUIRES DSHS, WHEN PROTECTING A CHILD, TO USE THE LEAST RESTRICTIVE MEANS AND TO EXERCISE PROFESSIONAL JUDGMENT

DSHS claims the dangerous power to intrude into fundamental liberties without rudimentary due process limits on the manner and extent of its intrusion. It appears to concede a family's rights arising from the bond between a parent and a child. DSHS reply brief at 23. It does not dispute that this right is fundamental or that the state's intrusion triggers the strictest judicial scrutiny. Yet, it acknowledges no duty to proportion its intrusion to its purpose. It admits no obligation to exercise professional judgment. Both are due process requirements.

DSHS, again, misstates the plaintiffs' claim. They do not ask DSHS "to ensure a given type of family life" or "to guarantee family unity at state expense." DSHS reply brief at 23 - 25. Instead, they seek due process regulation of forcible state intrusion.[19] For this reason, DSHS mistakes the relevance of cases that do not require the government to assist where it has declined to intrude or that uphold conditions

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[19] The question is not whether the state will act. It has done so on its own initiative. Nor is it whether the state will pay money. By its use of foster care, it pays more than housing assistance is likely to cost. Nor is the question whether the housing assistance as an alternative to foster care would protect the children. The plaintiffs' seek it only when the caseworker or the dependency courts find that it will.

that the government places upon the receipt of voluntary services.[20] Due process does not apply when DSHS does not intervene.[21] When DSHS does intrude, due process applies emphatically.

Due process requires not only that the state have an adequate reason for an intrusion but also that its extent and manner be related to the purpose. This is a bedrock of due process protection against governmental excesses. It is especially applicable when the state's reasons are compelling:[22]

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[20] DSHS reply brief at 24-26. In *Black v. Beame*, 419 F.Supp. 599 (S.D.N.Y. 1976), *aff'd* 550 F.2d 815 (2nd Cir. 1977) the court found no constitutional deprivation where a parent **voluntarily** placed its children into foster care. The court in *Aristotle v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989) distinguished *Black v. Beame* on these grounds to find children in foster care have a constitutional right to reasonable visitation with siblings: "More importantly, the children in Black were voluntarily placed into foster care by their mother." *Id.* at 1009. In *Rust v. Sullivan*, 500 U.S. 173, 202 111 S.Ct. 1759, 1777, 114 L.Ed.2d 233 (1991), the Court reviewed the government's refusal to fund abortion counseling that "leaves a pregnant woman with the same choices as if the government has chosen not to fund family planning services at all." In *Lindsay v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), the plaintiffs were tenants of a **private** landlord challenging their eviction. In *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d (1970) the court rejected challenges to state limits on the amount of voluntary welfare benefits. In *Bedford v. Sugarman*, 112 Wn. 500, 772 P.2d 486 (1989), the Court upheld conditions the state placed upon the receipt of voluntary income assistance to alcoholics and drug addicts.

[21] In fact, the courts have accepted the states' argument against any constitutional duty to children who are not subject to state control. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

[22] "[I]n the prosecution of a favorite scheme, the best of men, satisfied with the rectitude of their intentions, are subject to forget the bounds of moderation; . . . ." E. Gibbon, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE, vol. I, Chap. XII (1776)(ed. J.B. Bury 1909, p 362).

> At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972)(limiting state power to commit a mentally disabled person.)[23]

Courts articulate this due process requirement for foster care cases in two ways. **First**, the state must use the "least restrictive alternative" available to protect the child. This formulation has long been part of due process analysis. *E.g. Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shelter v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). A less stringent version is even part of intermediate level scrutiny.[24] DSHS notes only that these cases have "nothing to do with family integrity." DSHS reply brief at 26. Their

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[23] *Accord, Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)(state must provide proper care and placements necessary to "comport fully with the purpose of respondent's commitment."); *Woe v. Cuomo*, 729 F.2d 96, 104-07 (2d Cir. 1984)(holding that the *Jackson v. Indiana* principle means that "[i]f the justification for commitment rests, even in part, upon the need for care and treatment . . . then a State which commits must also treat"); *Lynch v. Baxley*, 744 F.2d 1452, 1460-62 (11th Cir. 1984).

[24] *E.g., Turner Broadcasting System v. Federal Communications Commission*, ___ U.S.___, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)(The Court, in applying intermediate scrutiny to content-neutral restrictions that impose an incidental burden on free speech, explained that such restrictions will be sustained if the burden on free speech "is no greater than is essential to the furtherance of [the government's] interest." This test requires "narrow tailoring" to ensure that the means chosen "do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" 114 S.Ct. at 2469. The full "least restrictive alternatives" requirement of "strict scrutiny" is even more stringent. *Id.*

general holding, however, applies directly to all fundamental rights: government may infringe only with the least restrictive means. Courts apply this principle to foster care.[25] If there is a reason to distinguish the familial integrity at stake in foster care, it would be to afford it greater protection commensurate with its greater sanctity and the heightened judicial scrutiny it receives. The Supreme Court, indeed, has applied this protection to familial rights, such as contraception.[26]

The Court *In re Sumey*, 94 Wn.2d 757, 621 P.2d 108 (1980) regarded the codification of the least restrictive requirement in the state's alternative residential placement (ARP) system as a necessary safeguard that saved that system from invalidation as an unjustifiable intrusion into the integrity of the family.[27] If the state's use of less

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[25] See Plaintiffs's opening brief, page 46. *See also, Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883 (10th Cir. 1992).

[26] *See, Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)(State may not intrude by means "which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

[27] In upholding the constitutionality of the ARP procedure under Chap. 13.32 RCW (the predecessor statute to Chap. 13.32A RCW), the *Sumey* court stated:

> The RCW 13.32 procedure furthers these goals [of preserving family unity] by requiring the employment of all feasible measures such as counseling and rehabilitative social services prior to removing the child from the home, and requiring the continuation of efforts to unite the family after the child has been removed from the home.
>
> * * *
>
> In every case in which RCW 13.32 residential placement is ordered,

(continued...)

restrictive alternatives is a precondition for the intrusion that resulted from an ARP, it is surely a precondition to the greater intrusion that results from foster care.

Second, courts have articulated an alternative due process requirement to protect liberties affected by the state's non-criminal confinements. In these cases, the state is obliged to exercise "professional judgment." *See* Plaintiffs' opening brief, page 46.[28] DSHS's reply brief did not respond to this requirement.

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[27](...continued)
the trial court must specifically find, as did the court in this case, that the currently existing family conflict is so extreme that it cannot be remedied by less restrictive alternatives such as counseling or crisis intervention services. RCW 13.32.040.

Id. at 761 and 764.

[28] *See also, Norfleet v. Arkansas Department of Human Services*, 989 F.2d 289, 291-93 (8th Cir. 1993); *Yvonne L. ex rel. Lewis v. New Mexico Department of Human Services*, 959 F.2d 883, 890-93 (10th Cir. 1992); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475-77 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987)(en banc), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City of Dep't of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *LaShawn A. ex rel. Moore v. Dixon*, 762 F.Supp. 959, 992-93 (D.D.C. 1991), *aff'd on other grounds*, 990 F.2d 1319 (D.C. Cir. 1993); *Aristotle P. v. Johnson*, 721 F.Supp. 1002, 1008-10 (N.D. Ill. 1989). Acknowledging that children in foster care can be harmed in a variety of ways, federal courts have recognized the right to protection of harm in a variety of forms, including a right to safe and appropriate placements, *Yvonne L.*, 959 F.2d at 890-94, a right to case plans and services, *LaShawn A.*, 762 F.Supp. 993, a right to appropriate medical care, *Norfleet*, 989 F.2d at 291-93, and a right to visitation with siblings, *Aristotle P.*, 721 F.Supp. at 1002. *See Also, Gibson v. Merced County Department of Human Resources*, 799 F.2d 582, 589-90 (9th Cir.1986).

IV. THE COURT'S FOSTER CARE RELIEF WAS TOO LIMITED.

The Court should modify the trial court's relief on the foster care issues. It unduly restricts the discretion that caseworkers and dependency courts need. It excludes members of the plaintiff class. It does not address DSHS's systematic failures.[29]

(1) The "Primary Factor" Formulation Limits Discretion

The court declared that dependency judges may require DSHS to assist when homelessness is "the primary factor" in a child's placement. The plaintiffs cited the problems that this formulation will create. Plaintiffs' opening brief at 47 - 48. DSHS's reply illustrates them.

First, the trial court's formulation limits the discretion that caseworkers and the dependency court require to assess what services will work to prevent or shorten a placement. The dependency statutes confer this necessary discretion. The Court should not restrict it.

Second, a formulation that asks if a need is "primary" invites disputes not about facts or what services will work but instead about how they can be characterized. DSHS illustrates this by its mischarac-

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[29] DSHS does not directly address these issues. Instead, it repeats its opposition to any relief at all. DSHS reply brief, page 54 - 58.

terization of the named plaintiffs.[30] The caseworker and the dependency court had to delay the return of the S. children for 14 months **solely** because Mrs. S. lacked housing for them. Yet, DSHS incredibly disputes that her need for housing was a "primary" factor.

Third, there is confusion about what "primary" means. DSHS

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[30] In the S. case, the children required placement initially taken because their father raped one of them and because Mrs. S., who was also abused, did not or could not protect them. The plaintiffs have no complaint about the initial place-ment. The problems arose later when the father was in prison and the caseworker and the dependency judge were ready to return the children to Mrs. S. According to the dependency court order and the caseworker, the only remaining obstacle was Mrs. S.'s lack of housing:

> Since October 4, 1990, the last significant obstacle to returning the children to Ms. [S.'s] is her inability to obtain adequate housing for herself and the children. Under the court's order of October 4, 1990, the children would have been returned to her once her stable housing is verified. When she obtains this housing for herself and the children she will be permitted to recover her children. . . . Specifically, I have been ready for a significant time now to recommend the children's return to Mrs. [S.] The court order of October 4, 1990 expressly allows their return upon the verification that she has housing for them.

CP 1280 - 1283. In December 1991, fourteen months after the court and the caseworker were ready to return the children when she found housing, Mrs. S. procured an apartment. DSHS returned her children on December 22, 1991. CP 428, 1471.

In the C. family case, the mother's drug addiction was certainly a significant factor in the children's need for placement. As the Guardian Ad litem testified, however, her homelessness was also an important factor. CP 1264, 1284, 696.

DSHS does not mention these undisputed facts. Instead, it improperly cites to its own trial court pleadings which in turn cite to documents that are not part of the appellate record. DSHS's reply brief at 16. It also erroneously states that its facts of the named plaintiff "were unrebutted by the plaintiffs." *Id.* The plaintiffs presented evidence on each individual claim and cited it in opposition to the defendants' summary judgment motion on the individual claims. CP 787. Even so, the facts are not in significant dispute, only the characterization.

would appear to restrict it to a factor that is the sole and only problem that the family ever had. Failing this extreme interpretation, DSHS would then limit it to factors that at the time solely explain the need for placement. The word does not require such a limited definition. Courts have fashioned formulations that list multiple "primary factors."[31] At the least, the Court should clarify that homelessness can be a "primary" factor if assistance to address it would prevent or shorten a child's placement, whether or not the family has additional problems.

(2) Relief Must Address DSHS's Systematic Failures

The Court should not limit relief to a declaration of the dependency judge's authority. Such relief does not benefit plaintiff families who are not yet before a court.

Relief must also address DSHS's systematic failures to equip its caseworkers. Individual dependency judges are not able to address these systematic failures. They lack the time and resources to relitigate them

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[31] *E.g., Steele v. Queen C. Broadcast Co.*, 54 Wn.2d 402, 411, 341 P.2d 499 (1959)(listing seven "primary factors" governing the issuance of an injunction against torts. "No one factor is controlling."); *Doty v. Anderson*, 17 Wn.App. 464, 467, 563 P.2d 1307 (1977)(Listing seven "important factors" governing the invalidity of a will); *Allard v. First Interstate Bank*, 112 Wn.2d 145, 149, 768 P.2d 998, 773 P.2d 420 (1989)(Listing three "primary factors" to determine the amount of an attorney's fees award. One of the factors was RPC 1.5(a) which lists an additional eight factors.); *In re Johnson*, 92 Wn.2d 349, 350, 597 P.2d 113 (1979)(Listing two "primary factors" of ill health and alcoholism contributing to an attorney's to disbarment.); *Martin v. Pickering*, 85 Wn.2d 241, 245, 533 P.2d 380 (1975)(Listing "two primary factors and two secondary factors" governing the vacating of a default judgment.)

in every case. Additionally, if their powers are limited, as DSHS asserts, to those described in *In re Welfare of J.H.*, than they will lack the authority.[32] More importantly, dependency judges have a child to think about. Their decisions about a child should not be embroiled in questions about DSHS's systematic efforts or failures.

This case allows the Court to remedy the systematic problem. That is the purpose of affirmative litigation. The Court made this very point in *Orwick v. Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984). The plaintiffs in *Orwick* alleged "system-wide violations" from the use of faulty radar evidence in traffic cases in municipal courts. The City, like DSHS in this case, sought dismissal asserting that individual court proceedings had exclusive jurisdiction. The Court ruled that the class action conferred jurisdiction to grant relief for the systematic problem:

> We hold that superior courts have original jurisdiction over claims for equitable relief from alleged **system-wide** violations of mandatory statutory requirements . . . .

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[32] The court's ability to recall the caseworker or the Secretary into court, as *In re Welfare of J.H., supra,* proposes, will unlikely prove helpful or very informative. The courts are busy. In King County Superior Court, for example, contested hearings have been difficult to schedule because of backlog. The court is trying to reduce court time by strict limits on live testimony and argument in contested matters. KCLJuCR 3.9(c). These difficulties will worsen if courts lose their customary powers to order services in favor of an ability merely to schedule yet more hearings to hear yet more explanations from a caseworker why she is not equipped to provide the services that will resolve a case at less cost.

103 Wn.2d at 251 (emphasis added).[33] Class litigation commonly adjudicates claims analogous to the plaintiffs.[34]

To remedy DSHS's systematic failures, the plaintiffs seek an order requiring DSHS to present to the trial court an adequate plan for equipping caseworkers. This relief would be similar to the plan the court required under the RCW 74.13.031(1) claims. DSHS would have the same discretion and flexibility to determine the plan's details.

Without a plan, DSHS will continue to send caseworkers to serve plaintiff children without resources. It will continue to ask dependency judges to assume responsibility for them without providing any assistance that the judges will continue to find necessary to prevent or shorten placements. Caseworkers will be left, as they are now, explaining to dependency judges that DSHS has not equipped them. And dependency judges will continue to be left with the tragic choice of

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[33] The court affirmed the dismissal of the claims for injunctive relief, however, because of mootness since "[t]his case is not before the court as a class action . . . ." 103 Wn.2d at 254. The court did reverse the dismissal of the damage claims which were not moot.

[34] *E.g., Hansen v. Department of Social Services,* 238 Cal. Rptr. 232, 234 (Cal. App. 2 Dist. 1987)(Preliminary relief requiring emergency shelter and other child welfare services to a class of families who are homeless or who are imminently threatened with homelessness); *Lynch v. Dukakis, supra* (Judgment requiring the state to provide an array of services to foster children and their natural and foster parents.); *Artist M. v. Johnson, supra* (Preliminary injunction requiring state to provide services to a class of children under the state's dependency court supervision); *McCain v. Koch,* 117 A.D. 198, 502 N.Y.S.2d 720 (1986)(Declaratory and injunctive relief requiring assistance to a class of homeless persons.)

leaving a child at risk with an unassisted family, or placing or keeping a child in unnecessary placement that a modest amount of housing assistance could have averted.

V. DSHS'S CONTRADICTORY POSITIONS WOULD PRECLUDE MEANINGFUL JUDICIAL REVIEW.

DSHS makes inconsistent assertions about the court's authority. Taken together, they would free DSHS of judicial review under the AACWA, state law or the constitution.

DSHS disputes any duty to assist homeless families under RCW 74.13.031(1). It admits only the duty to assist those homeless children who, like others, may require dependency services.[35] Yet, in the foster care part of this case, DSHS disavows any enforceable responsibility. DSHS first disputes this court's authority to address the matter. Instead, it urges the court to leave service decisions to individual dependency courts. However, DSHS then disputes the authority of judges in those individual proceedings to require DSHS to provide services.[36] In this way, DSHS will have succeeded in avoiding all judicial review.

The Court should examine DSHS's assertions. They would preclude judicial oversight of an agency in its use of the most formid-

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[35] *E.g.*, DSHS's opening brief at 19, 22, 24; DSHS reply brief at 1, 13.

[36] This is the position DSHS took in *In re the Welfare of J.H., supra.*

able powers that the state can exercise against the most sacred of private liberties. In a government of laws with an independent judiciary, judicial review is essential to avert abuse and enforce the law. This review is especially appropriate in the foster care system where courts play an integral role, at DSHS's request, and become complicit in the tragedies that result from DSHS's systematic failures.

VI. CONCLUSION

The Court should reinstate the AACWA and the constitutional claims. It should modify the trial court's relief to make it meaningful for all class members. The Court should affirm the other rulings.

March 20, 1996

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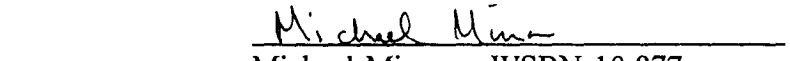

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