

COPY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WASHINGTON STATE COALITION FOR)
THE HOMELESS,)
et al.,)

Plaintiffs,)

vs.)

DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
et al.,)

Defendants.)

No. 91-2-15889-4

PLAINTIFFS' MEMORANDUM OPPOSING
DEFENDANTS' SUMMARY JUDGMENT MOTION

October 8, 1993

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1 I. STATE CHILD WELFARE LAWS OBLIGE DSHS TO ASSIST MEMBERS OF
2 THE PLAINTIFF CLASS

3 DSHS seeks summary judgment by repeating assertions that
4 the court rejected when it denied the defendants' motion for
5 judgment on the pleadings: first, that the term "homeless
6 children" in Chap. 74.13 RCW does not include those children who
7 are homeless with their families; second, that DSHS has the
8 unreviewable discretion to determine what the state's child
9 welfare laws mean; and, third, that, under the foster care laws,
10 DSHS cannot be obligated to provide any particular type of
11 assistance in individual dependency cases regardless of its
12 necessity to prevent or shorten a particular placement.

13 If these assertions were correct, DSHS would have prevailed
14 on its motion for judgment on the pleadings two years ago. If
15 correct, these assertions would degrade the state's child wel-
16 fare laws to inconsequential platitudes and would disable the
17 courts as a meaningful review authority. These assertions,
18 however, are incorrect. The plaintiffs will review them
19 briefly, with some citations to their previous briefing. The
20 remaining questions for the court, addressed in the plaintiffs'
21 summary judgment motion, concern not whether DSHS has duties to
22 assist the plaintiffs but whether it has fulfilled them.¹

23 ¹ These questions, addressed in the plaintiffs' motion for partial summary judgment, are posed
24 in the court's Order on Defendants' Motion for Judgment on the Pleadings. They ask whether a trial
is necessary to determine, in the Order's words, the following:

25 A. The defendants' alleged failure to comply with their duty under RCW
26 74.13.031(1) to develop, administer, supervise, and monitor a coordinated and
comprehensive plan that establishes, aids, and strengthens services for the
protection and care of homeless children. Plaintiffs are not seeking adjudication
of their individual claims for specific services based on this alleged failure of
defendants' statutory duty.

27 B. The defendants' alleged failure to comply with their duties to provide child
28 welfare services to homeless children under RCW 74.13.031, RCW 74.13.020 and RCW
74.14A, including those families whose children are in foster care in whole or in

1 A. "Homeless" means homeless.

2 DSHS proposes that the word "homeless" in Chap. 74.13 RCW,
3 instead of its ordinary meaning denoting a lack of housing,
4 refers only to children who are abused and neglected.² The
5 court has no reason to accept this redefinition of a plain and
6 unambiguous word. "Homeless" means homeless. To redefine it
7 would violate its plain meaning, the governing rules of statu-
8 tory construction, and the legislative history of the statute.

9 1. *The court must give the word its plain meaning*
10 *despite DSHS's contrary interpretation.*

11 The first rule of construction requires courts to give
12 words their plain meaning.³ This rule has such priority that
13 courts do not consult legislative history or give particular
14 weight to agency interpretation in the face of an unambiguous
15 word. *Id.*⁴ In such cases, courts consult the dictionary. *Id.*

16 part because the family lacks adequate housing".

17 C. The defendants' alleged failure to comply with their duty under RCW
18 13.34.060(8)(a), RCW 13.34.130(1)(b), and RCW 13.34.130(5) to make reasonable
19 efforts to prevent or eliminate the need for foster care placement of children that
20 arise in whole or in part because the family lacks adequate housing.

21 D. The defendants' alleged violation of the due process guarantees of Article
22 I, Section 3 of the Constitution of the State of Washington and the 14th Amendment
23 to the United States Constitution.

24 E. Plaintiffs' claims under 42 U.S.C. Sec. 1983 for injunctive and declaratory
25 relief.

26 F. Plaintiffs' claims for damages under state law.

27 Order on Defendants' Motion for Judgment on the Pleadings, § 7 (August 21, 1992).

28 ² Defendants' Memorandum in Support of Motion for Summary Judgment, page 19 - 25 (Hereafter
called Defs.' Memo). DSHS made a similar argument in support of its dismissal motion in 1991 when
it asserted that the word meant "children who are without families":

 Even the term "homeless children" arguably does not include children without
shelter, but rather, only those children who are without families.

Defendants' Reply Memorandum in Support of Motion for Judgment on the Pleadings, page 35, 35 - 36.

³ The plaintiffs have reviewed this rule at Plaintiffs' Motion for Partial Summary Judgment,
page 15.

⁴ See also, *State Employees v. Personnel Board*, 54 Wash. App. 305, 309, 773 P.2d 421 (Div.
II 1989) ("Interpretation of a statute is a matter of law subject to independent appellate review.
... Where the language of a statute is plain and unequivocal, courts must construe it according
to its true intent, notwithstanding a contrary construction by an administrative agency.")

1 According to a 1967 edition of Webster's, the plain and
2 only meaning of "homeless" is "having no home or permanent place
3 of residence." Webster's Third International Dictionary 1083
4 (1967). The Court has long used the word for this meaning when
5 referring to families and others.⁵ DSHS's own regulations use
6 the term "homeless" to include families without housing.⁶ In
7 English speech and literature, the word has long meant what it
8 means today.⁷

10 ⁵ See German-American State Bank v. Godman, 83 Wash. 231, 240, 145 P. 221 (1915) ("If the words
11 employed in the will should be held to impress a trust upon exempt property, the widow and minor
12 children, when the estate was small, might in many cases be left homeless and penniless.") (emphasis
13 added); Weaver v. Montana Stables, 46 Wash. 65, 67, 89 P. 154 (1907) ("As one witness stated, the
14 'neighborhood was a peculiar one; there were Japs and Chinese and Africans living in the immediate
vicinity, all mixed together,' exposing the barn to the trespasses of the homeless and dissolute
class who desired a temporary lodging.") (emphasis added); Dodak v. Lewis, 187 Wash. 138, 59 P.2d
1121 (1936) ("During the month of March, 1935, the defendant Lewis, by an instrument in writing,
leased to Washington Emergency Relief Administration the second floor of a building in Aberdeen,
to be used by lessee in connection with its 'transient and homeless men's division.'") (emphasis
added).

15 ⁶ DSHS defines a "homeless individual" for purposes of administering the food stamp program:
16 "Homeless individual" means a person lacking a fixed and regular nighttime residence
17 or a person whose primary nighttime residence is a: (a) Supervised shelter designed
to provide temporary accommodations; (b) Halfway house or similar institution
providing temporary residence for persons needing institutionalization; (c)
Temporary accommodation in the residence of another person; or (d) Place not
designed for, or ordinarily used as, a regular sleeping accommodation for humans.

18 WAC 388-49-020(36).

19 ⁷ E.g.:

20 And homeless near a thousand homes I stood,
And near a thousand tables pined and wanted food.

21 William Wordsworth, GUILT AND SORROW, stanza xli (1794) (emphasis added).

22 "Keep ancient lands your storied pomp!" cries she,
With silent lips, "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the Golden door!"

23 Emma Lazarus, THE NEW COLOSSUS (1883) (emphasis added).

24 . . . America, the refuge of the homeless, the hunted, the oppressed, throws wide
her hospitable doors to all that suffer and can put up \$ 50 admission, except the
Chinese; . . .

25 Mark Twain, from remarks introducing Winston Churchill at a reception in New York City on December
12, 1900, reprinted in MARK TWAIN'S WEAPONS OF SATIRE: ANTI-IMPERIALIST WRITINGS ON THE PHILIPPINE-
AMERICAN WAR, page 10 (Syracuse University Press 1992) (emphasis added).

26 Poverty here, she found, was worse than anything she has seen in the United States.
Whole families slept in the streets of Mexico City and Vera Cruz, homeless and
penniless, the sick with the well.

27 Noble Iris, NELLIE BLY: FIRST WOMEN REPORTER page 34 (Julian Messner, Inc. 1956).

2. *DSHS's meaning of "homeless" would make other statutory terms redundant.*

DSHS's redefinition of "homeless" to mean those children who are "abused and neglected" or "without families" would duplicate other words with these same meanings in the same child welfare statutes and make it or them superfluous. *E.g.:*

The department shall . . .

(1) Develop, administer, supervise, and monitor a coordinated and comprehensive plan . . . for the protection and care of homeless, runaway, dependent, or neglected children.

RCW 74.13.031(1)(emphasis added). DSHS must also "[i]nvestigate complaints of neglect, abuse, or abandonment of children . . . "

RCW 74.13.031(3). RCW 74.13.020 defines "child welfare services" as those services necessary for the protection and care of "homeless, dependent or neglected children." The legislature defines "dependent" children separately in Chap. 13.34 RCW; this definition includes children who are "abandoned" "abused" or "neglected". RCW 13.34.030(emphasis added).

These references show two things: first, that the word homeless, appearing alongside these other words, has its own independent meaning. Otherwise, either it or the other terms would be superfluous. Second, when the legislature wants to refer to abused and neglected children or children without families, it uses those words to describe them. When it refers to children without a place to live, it uses the term "homeless".

3. *Legislative History Cannot Be Used to Support the Department's Definition of "Homeless."*

DSHS asserts that legislative history of a 1935 federal statute supports its definition of "homeless" in state law.

1 Defs.' Memo. pages 22 - 25. Since the term is plain, the court
2 should not consider legislative history. Legislative history of
3 a federal law passed in 1935 is particularly extraneous to the
4 meaning of a 1965 state law. Even so, the legislative history
5 of either state or federal law does not support DSHS's view.

6 a. Legislative history should not be considered
7 at all in this case.

8 If a law is clear and unambiguous, the "court may not
9 consider legislative history or related statutes for construc-
10 tion of the statute".⁸ In Jacquins v. DSHS, 69 Wash. App. 21,
11 30, 847 P.2d 513 (Div. I 1993), for example, the court refused
12 even to consider the federal AFDC statute, much less its legis-
13 lative history, in construing Washington's AFDC law for reasons
14 that apply equally to the present case:

15 DSHS' interpretation of the statute suffers from the
16 dualism of looking at the plain language, but trying
17 to make that language "plainer" by construing it with
federal statutes and regulations. We are not con-
cerned with interpreting federal statutes; we are
concerned with a state statute,

18 b. The legislative history of a 1935 federal
19 law is particularly irrelevant to the
interpretation of a 1965 state law.

20 Even for ambiguous laws, the court should not consult
21 legislative history of a predecessor federal statute passed
22 thirty years previously without evidence that the state legisla-
23 ture adopted that history.⁹ Legislatures, when adopting

24
25 ⁸ State Employees v. Personnel Board, 54 Wash. App. 305, 311, 773 P.2d 421 (1989) (judicial
26 and agency interpretations of comparable federal and state statutes could not be used to interpret
Washington military leave statute). See also Cherry v. Municipality of Metro Seattle, 116 Wn.2d
794, 799, 808 P.2d 746 (1991); Multicare Medical Center v. DSHS, 114 Wn. 2d 572, 582, 790 P.2d 124
(1990).

27 ⁹ DSHS cites to an excerpt from the Bill Report of the federal Social Security Act of
28 1935. Defs.' Memo., page 23.

1 identical federal language, may be presumed to know and perhaps
2 to adopt the construction courts have given to that language.
3 Everett Concrete v. Labor and Industries, 109 Wn.2d 819, 823,
4 748 P.2d 1112 (1988); State v. Carroll, 81 Wn.2d 95, 109, 500
5 P.2d 115 (1972). Court decisions are easy to identify and
6 locate, and courts may fairly presume that a legislature knows
7 about them. In contrast, there is no authority or reason to
8 presume that legislators would know of, care about or adopt the
9 legislative history of another jurisdiction's law.¹⁰ Such a
10 presumption would also compound the difficulty of discerning
11 legislative history.¹¹

12 Reliance on the legislative history of the 1935 Social
13 Security Act is particularly inappropriate because there is no
14 direct link between this Act and the present state law passed in
15 1965. In 1937, the state legislature passed child welfare
16 legislation referring to "homeless children" using language
17 similar to that found in the 1935 federal statute. RCW 74.12.
18 130 was the amended version of the 1937 legislation. There is
19 no state legislative history for this 1937 law. In 1965, the
20 legislature repealed RCW 74.12.130 as part of significant
21 changes in the state's child welfare laws. As part of those
22 changes, the legislature passed the provisions which are

23
24 ¹⁰ In Everett Concrete v. Labor and Industries, *supra* at 823, for example, which DSHS cites,
25 the court referred not to the legislative history but to cases interpreting the federal statute.

26 ¹¹ Discerning meaningful legislative history of a statute in question is hard enough.
27 Even when available, it must be used "with discretion". Baker v. Snohomish County Planning, 68
28 Wash. App. 581, 588, 841 P.2d 1321 (Div. I 1992), rev. denied, 121 Wn.2d 1027 (1993). Yet DSHS's
proposal would have the court discern not only the legislative history of the statute at issue, but
the history of predecessor statutes as well. Having done this, the court must then determine which
part of that past history the Washington legislature had consulted and adopted. This is not worth
the trouble for an ambiguous law; it is clearly not worthwhile for a plain one.

1 currently codified at RCW 74.13.020 and .031, and for the first
2 time imposed a duty on DSHS to "develop, administer, and super-
3 vise a plan" for the protection and care of homeless children.

4 There is no evidence that the 1965 or even the 1937 state
5 legislatures were aware of the 1935 Bill Report for the federal
6 Social Security Act. The 1965 law did not even mention the
7 previous state or federal statutes. It would distort the
8 statutory construction rules to regard the federal Bill Report
9 as part of the legislative history for the state's laws.

10 c. If legislative history is considered, it
11 shows that the legislature intended
"homeless" to mean without shelter.

12 The available legislative history for Chap. 74.13 RCW
13 indicates that "homeless children" includes those with families.
14 The 1965 bill file for H.B. 296, which enacted RCW 74.13.020(2),
15 contained a memorandum to the governor.¹² It states:

16 Department is given the duty of strengthening programs
17 to assist **homeless** or neglected children, to investi-
18 gate complaints of abuse, neglect and abandonment, and
to offer assistance to parents, etc. in solving these
problems.

19 Memorandum from Walt Howe to Governor Evans, dated March 13,
20 1965 (emphasis added). This memo contradicts the Department's
21 assertion that "homeless" was intended to refer to children
22 without families since it directs the Department to provide
23 assistance to parents as one way of solving homelessness.

24
25
26 ¹² As initially passed, RCW 74.13.020 contained a section almost identical to the
27 current RCW 74.13.031(1), which was repealed and reenacted in 1967 as Section .031. Legislative
28 history can include, not only the House and Senate Journals, but other documentation sufficiently
probative of the legislature's intent. Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 104,
829 P.2d 746 (1992), recon. denied 119 Wn.2d 91 (1992), cert. den. 113 S.Ct. 1044 (1993).

1 d. If the 1935 Social Security Act is relevant,
2 it supports the plain meaning of "homeless".

3 DSHS bases its argument on a brief excerpt from the Social
4 Security Act's 38-page Bill Report. The section of the Report
5 that pertains to child welfare services, however, does not
6 discuss the term "homeless" or define it. Its primary concern
7 was the need for assistance in rural areas.¹³

8 More helpful than this inconclusive passage in the Bill
9 Report is the historical context of the Social Security Act and
10 its derivative state statutes.¹⁴ The Bill Report shows that
11 the Social Security Act's main purpose was to ease the hardships
12 of the Great Depression, including those suffered by children:

13 Titles IV and V of the bill deal with another impor-
14 tant aspect of economic security, that of security for
15 children. Children are, perhaps the most tragic
16 victims of the depression. . . . And with so many
17 children now growing up under the abnormal conditions
18 involved in relief and the many hardships created

19 ¹³ The section containing the excerpt that DSHS cites reads as follows:

20 In Title V, Federal aid is also made available for the development of local child-
21 care services. These services are concerned with the 300,000 dependent and
22 neglected children, the 200,000 children who annually come as delinquents before the
23 courts, and the 70,000 illegitimate children born each year. These groups are in
24 many respects the most unfortunate of all children, as their lives have already been
25 impaired. To repair these damaged lives as far as possible, and to keep these
26 children from becoming a permanent burden to society, child-care services have been
27 established in most urban centers, but in less populous areas they are exceedingly
28 limited or nonexistent. As with other welfare services, there has been an actual
retrogression in these child-care services during the depression, although the need
has greatly increased. To stimulate the development of such services in rural
areas, where they are now almost totally nonexistent, a small appropriation is
proposed in this bill, to be allotted to the States for payment of part of the
expense of county and local child-welfare services. H.Rept. 615, 84-1, p. 12.

Elsewhere, the Bill Report describes child welfare services as follows:

Section 521: This section, which constitutes part 3 of this title, authorizes the
sum of \$1,500,000 to be appropriated for each fiscal year, to enable the United
States, through the Children's Bureau, to cooperate with State public-welfare
agencies in the work of establishing and extending public welfare services for the
protection and care of dependent, homeless, and neglected children, and children in
danger of becoming delinquent. The services with which the Children's Bureau is
thus authorized to cooperate are limited to those carried on in rural areas.

29 ¹⁴ Courts may consider a statute's historical context in order to understand the
30 problem that the legislature intended to solve. Washington State Nurses Assoc. v. Bd. of Medical
Examiners, 93 Wn.2d 117, 121, 605 P.2d 1269 (1980).

1 through the depression, it is imperative that every-
2 thing possible be done to offset the demoralizing and
3 deteriorating effects of the great disaster that has
4 befallen this country. (H. Rept. 615, 74-1, p. 10.)

5 The homelessness of families was among the hardships of the
6 Great Depression.¹⁵ This historical context is pertinent
7 because the state legislators that passed the state law in 1937
8 knew it first hand; and those that passed the 1965 law came of
9 age in it. Presumptions of what they knew concerning homeless
10 families would include this experience.

11 ¹⁵ Affidavit of Kay Young McChesney, Ph.D. The distress of families also informed the
12 adjudication of the Washington Supreme Court in a way that would not be inappropriate in this case.
13 In Rummens v. Evans, 168 Wash. 527, 13 P.2d 26 (1932) the court affirmed the dismissal of a
14 challenge to King County's decision to incur debt to respond to the need of 17,000 indigent
15 families for food, shelter and supplies:

16 The care of the state for its dependent classes is considered by all enlightened
17 people as a measure of its civilization, and the care of the poor is generally
18 recognized as among the unquestioned objects of public duty [a quotation from
19 secondary sources]. . . .

20 It being most certainly a governmental function and duty, the duty is no less, but
21 rather the greater, when there are 17,000 families, and in excess of 50,000 poor
22 persons, needing public aid.

23 Id. at 534. Citing prior cases upholding the counties' authority to appropriate funds for
24 emergency needs of the sheriff, the Court noted the more evident emergency in this case:

25 The same situation exists in this case, but is much more appalling and exigent. If
26 husbands and fathers of 17,000 families are unable to find food to satisfy the
27 hunger of their families and other bare necessities, although in the midst of
28 plenty, many will be driven to get what they can where they may find it by any means
available, or driven to desperate self-destruction. They will not quietly and
tamely submit to starvation. The burdens of the taxpayers of the state are
grievous, as we well know, and have reached a point which is well-nigh unendurable,
but not so grievous as to be hungry, cold and naked, without fault, and seeing
helpless women and children in the same state and unable to relieve them.

Id. at 535. To the extent that statutes limited the ability of the County to incur the debt for
the relief of the poor, they must defer to the imperative of other authority requiring that the
government respond:

Under our statutes and decisions, therefore it being a positive governmental
function and duty of the county to care for the poor, the statute emphasized by
appellants does not govern.

Id. at 537. The Court rejected the plaintiffs' request that the County procure the necessary funds
from savings that might be derived from greater efficiency in public administration of government:

Upon the plainest dictates of humanity, such a condition must be relieved
immediately, or in many hundreds of cases it may be too late or useless. Months
would necessarily be required to make such savings effective. While the funds could
be accumulated, as suggested by appellants, thousands of men, women and children,
might die or be driven to crime, to relieve their necessities, or to reprisal and
disorder.

The judgment is right, and is affirmed.

Id. at 538.

1 4. *The Legislature did not acquiesce in DSHS's*
2 *Interpretation.*

3 DSHS claims that its interpretation is entitled to
4 deference because the legislature has not repudiated it while
5 amending other provisions of Chap. 74.13 RCW.¹⁶ DSHS cites
6 White v. State, 49 Wn.2d 716, 725, 306 P.2d 230 (1957), app.
7 dis. 355 U.S. 10 (1957) for this proposition. Several problems
8 are noteworthy.

9 First, as White v. State states, an inference of legis-
10 lative acquiescence, and any special regard for an agency's
11 interpretation, is proper only when the law is ambiguous. *Id.*

12 Second, even when the law is unclear, the acquiescence
13 depends on a showing that the legislature actually considered
14 the contested interpretation. In White v. State, the agency had
15 promulgated the contested policy in a "formal rule" and
16 collected taxes pursuant to it. *Id.* at 719. In this case, the
17 court cannot even speculate over the legislature's view of
18 DSHS's present interpretation because DSHS has not issued it in
19 any formal way. Instead, the contested interpretation arises in
20 litigation as a denial of responsibility.

21 Third, the legislature, while it amended other statutes in
22 Chap. 74.13 RCW, did not amend RCW 74.13.031(1) or RCW 74.13.
23 020 in any significant way since imposing the duty in 1965.

24 Finally, legislative acquiescence, even for those courts
25 that have a taste for it, is thin soup to sustain a statutory
26 interpretation, much less a redefinition of a plain statute. In

27 16 Def's.' Memo., page 21.
28

1 State Employees v. Personnel Board, 54 Wash. App. 305, 310, 313,
2 773 P.2d 421 (Div. II 1989), the agency had also promulgated the
3 challenged rule; the legislature even failed to pass a bill that
4 would have revoked it. The court still refused to "ascribe to a
5 bare reliance on legislative acquiescence" without legislative
6 history indicating that the legislature was aware of the issue.
7 54 Wash. App. at 310. This history is not available here.

8 5. *DSHS's proposed exclusion of families from Chap.*
9 *74.13 RCW repudiates the family focus of*
Washington child welfare law.

10 Excluding children from Chap. 74.13 RCW because they are
11 with their families offends the overriding goal of Washington's
12 child welfare laws to treat children as part of their families
13 whenever possible and to encourage the family's integrity. The
14 plaintiffs have reviewed the Washington statutes and court cases
15 that comprise this mandate. Plaintiffs' Memorandum Opposing
16 Defendants' Motion for Judgment on the Pleadings, page 13.¹⁷
17 As a result, DSHS must serve children through their families.

18 Even if Chap. 74.13 RCW was ambiguous, the court should
19 adopt that interpretation that best furthers this statutory
20 emphasis on the family. This emphasis supports the inclusion
21 within that law of those children who are with their families.

22 17

For example:

23 It shall be the policy of the state of Washington to: (1) Recognize the family as
24 the most important social and economic unit of society and support the central role
parents play in child rearing.

RCW 74.13.085.

25 The legislature finds that a primary goal of public involvement in the lives of
26 children has been to strengthen the family unit. . . .

27 The legislature further finds that the most successful programs for reaching and
working with at-risk families and children treat individuals' problems in the
context of the family. . . .

28 RCW 70.190.005 (creating the Family Policy Council).

1 The court should not infer their exclusion that would be repug-
2 nant to the larger body of Washington's child welfare law.¹⁸

3 6. *The federal agency's approval of DSHS's plan*
4 *submitted under federal law does not support*
5 *DSHS's interpretation.*

6 DSHS asserts that it fulfills the requirements of state law
7 because a federal agency has approved its plan submitted under
8 federal law for the purpose of receiving federal funding.¹⁹
9 This does not matter. The court dismissed the plaintiffs'
10 federal statutory claims because the U. S. Supreme ruled that
11 federal law did not grant children or parents a private right of
12 action for violations.²⁰ In contrast, the court found that the
13 plaintiffs have a private right of action for DSHS's failure to
14 fulfill its independent duties under state law.

15 State law duties are distinct from the requirements that
16 the federal law imposes for the continued receipt of federal
17 funding. In Jacquins v. DSHS, 69 Wash. App. 21, 847 P.2d 513
18 (Div. III 1993), for example, the court found that DSHS violated
19 state AFDC statutes even though DSHS was in full compliance with
20 analogous federal AFDC law and continued to receive federal AFDC
21 reimbursement. In rejecting DSHS's reliance on its good
22 standing under the federal law, the court stated the very point

23 ¹⁸ The court in Hansen v. Department of Social Services, 238 Calif. Rptr. 232 (Calif.
24 App. 1987) cited just such a repugnance to state child welfare goals when it rejected an
interpretation of California's laws that would have limited assistance only to those children
removed from their families to the exclusion of intact families.

25 ¹⁹ Defs.' Memo., pages 20 - 21, 25. DSHS also mentions the Comprehensive Housing
26 Affordability Study (CHAS) drafted by the Washington Department of Community Development (DCD).
27 Id. at page 34. The CHAS is required by the federal National Affordable Housing Act of 1990, 42
U.S.C. § 12705(a). Stipulation for the Admission of Exhibits for Summary Judgment, Exhibit N. It
is a precondition for the state's receipt of federal housing and community development funds. 42
U.S.C. § 12705(a) et seq; Exhibit N, page i.

28 ²⁰ Suter v. Artist M., 112 S. Ct. 1360, 118 L.Ed.2d 1 (1992).

1 applicable in this case: "We are not concerned with interpreting
2 federal statutes; we are concerned with a state statute, . . ."
3 *Id.* at 30. (emphasis added).

4 The distinction between DSHS's state duty and its obliga-
5 tions under federal law is plain from the sequence of amendments
6 to Chap. 74.13 RCW from its 1937 predecessor. These changes
7 enhanced DSHS's duty from a mere codicil to federal efforts to
8 its present role as an independent provider of services:

9 In 1937, the predecessor to RCW 74.13.031(1) merely gave
10 the Department of Social Security (DSHS's predecessor) the
11 "power to cooperate" with the federal government and "to receive
12 and expend all funds" provided by the federal, state or local
13 governments.²¹ In 1965, the legislature repealed this law in
14 favor of its present duty to provide services:

15 The department shall have the duty to provide child
16 welfare services as defined in section 3, and shall:

17 (1) Develop, administer, and supervise a plan that
18 establishes, extends aid to, and strengthens services
19 for the protection and care of homeless, dependent or
20 neglected children or children in danger of becoming
21 delinquent.

22 Laws of 1965, Chapter 30, § 4.²² In 1979, this section took
23 its present form when the legislature strengthened DSHS's duties
24 further by changing "extends aid to" to "aids" and added

25 21

26 The department of social security, through and by means of the
27 division of children, shall have the power to **cooperate with the**
28 **Federal government**, its agencies or instrumentalities in developing,
administering and supervising a plan for establishing, extending aid
and strengthening services for the protection and care of homeless,
dependent, and children in danger of becoming delinquent and to
receive and expend all funds made available through the department
of social security by the Federal government, the state or its
political subdivisions for such purposes.

Laws of 1937, Chapter 114, § 6 (emphasis added).

22 22

23 As originally codified, this was put in RCW 74.13.020. In 1967, this same language
24 was moved to a new section, RCW 74.13.031. Laws of 1967, Chapter 172, § 17.

1 "runaway" children in place of those "in danger of becoming
2 delinquent". Laws of 1979, Chap. 155, § 77.²³ These changes
3 show that, since 1965, DSHS's duties are independent of any
4 obligation it incurs under federal law.

5 The federal government's approval of DSHS's federally
6 required plan not only does not protect DSHS from challenges
7 under state law, but also does not even determine its compliance
8 with the federal statute. The standard of compliance for
9 getting federal funds is much more lax than the standard
10 governing the obligation to individuals.²⁴ And it is the
11 courts, not federal agencies, that determine whether the state
12 has met that standard. Washington courts, in fact, commonly
13 find DSHS to be in violation of federal statutes despite the
14 fact that it continues to receive federal money pursuant to a
15 federally approved plan.²⁵ If federal approval of a federally
16 required state plan is not relevant to determination of federal

17 ²³ The legislature made other changes to this section in 1975 and 1977 that did not
18 affect the language pertinent to homeless children.

19 ²⁴ The court in Withrow v. Concannon, 942 F.2d 1385 (9th Cir. 1991) made this very
20 point. In that case, welfare recipients had challenged the state's failure to meet federal time
limits for resolving welfare claims. Although the state's performance had satisfied the federal
standard of "substantial compliance" for purposes of receiving federal funding, the court found
that it violated the federal statute.

21 We are not convinced, however, that the standard for termination of federal funding,
22 a virtual death sentence for a state's program, is the appropriate one to define the
rights of applicants and recipients of program benefits. The funding standard is
not intended to be the measure of what the regulations require; [footnote omitted]
it is intended to measure how great a failure to meet those requirements should
23 cause funds to be cut off. The language of the federal regulations is unequivocal,
and states that a decision "shall" or "must" be made within the specified number of
days. The regulations' commands effectuate the purposes of the federal categorical
24 programs, to render reasonably prompt assistance to persons in dire need. From the
standpoint of the applicants or recipients who are denied hearings and decisions
within the time mandated by federal regulations, it is no comfort to be told that
there is no federal remedy because the state is in "substantial compliance" with the
25 federal requirements.

26 Id. at 1387. In fact, all federal welfare, Medicaid or other similar claims are brought against
state agencies with approved plans. If DSHS was right, these claims would never get to court, must
27 less ever be granted.

28 ²⁵ E.g., Anderson v. Morris, 87 Wn.2d 706, 558 P.2d 155 (1976) (finding that DSHS rule
restricting AFDC eligibility violated federal law); Berry v. Burdman, 93 Wn.2d 17, 604 P.2d 1288
(1980) (same), cert. den. 451 U.S. 1021 (1981).

1 claims, it is surely irrelevant for state law claims.

2 7. *DSHS's Inconsistent Interpretations of Chap.*
3 *74.13 RCW Would Leave it Without Meaning.*

4 DSHS in this litigation has offered inconsistent views
5 about the scope of Chap. 74.13 RCW and its reference to "home-
6 less children". Its present interpretation, when joined with
7 the court's previous rulings, would remove most children from
8 the scope of Chap. 74.13 RCW.

9 In 1991, DSHS first proposed that Chap. 74.13 RCW referred
10 only to "children who are without families."²⁶ The court did
11 not agree and declined to dismiss the plaintiffs' claims under
12 Chap. 74.13 RCW.²⁷ DSHS then asserted that Chap. 74.13 RCW did
13 not include these children (i.e. "unaccompanied children")
14 because their "pertinent issues and claims are fundamentally
15 different from those of the current class representatives (who
16 are all members of homeless families)".²⁸ The court agreed and
17 excluded children without families from the lawsuit.²⁹

18 Having asked the court to limit the Chap. 74.13 RCW claims
19 to children with families, DSHS now seeks to exclude them as
20 well. In this way, DSHS's present interpretation would leave
21 Chap. 74.13 RCW virtually empty of children.³⁰

22 ²⁶ Defendants' Reply Memorandum in Support of Motion for Judgment on the Pleadings,
23 page 35 (October 6, 1991).

24 ²⁷ Order on Defendants' Motion for Judgment on the Pleadings, § 7 (A) and (B) (August
25 21, 1992).

26 ²⁸ Memorandum re: Defendants' Evidentiary Objections to Declarations of Tom Pirie and
27 Eileen Putter, page 1 (January 15, 1993).

28 ²⁹ Order Denying Motion to Include "At-Risk" Youth (May 13, 1993).

³⁰ DSHS' shifting interpretation of the word "homeless" makes any legislative acquies-
cence even less probable or decipherable. Any deference DSHS might ask for its present interpre-
tation is also undermined by its own uncertainty about the matter.

1 B. Mandatory prevention and reunification efforts can
2 require housing assistance when it is necessary and
3 effective.

4 DSHS suggests that the "overall purpose" of the foster care
5 statutes is to provide a procedure for the removal and return of
6 children as the unassisted circumstances of their lives may
7 require, without obliging DSHS actually to do anything specific
8 to reduce their need for placement.³¹ According to this view,
9 DSHS's responsibilities under state law are reduced largely to
10 matters of procedure and paperwork. DSHS would diminish them
11 further to the filing of the plan that the federal government
12 requires in order to provide federal funding for foster care
13 placements, and the written promise in that plan to make the
14 very "reasonable efforts" that it now asserts are virtually
15 unreviewable or unenforceable.³² However indifferent federal
16 law might be in this way, state law is more meaningful.

17
18 ³¹ The overall purpose of RCW 13.34 is to provide procedural due
19 process protection for individual families involved in dependency,
20 termination and guardianship proceedings. There is no legislative
21 history or declaration of purpose by the legislature which would
22 enable this court to construe RCW 13.34 as delegating authority to
23 the Department to create specific programs for a class of
24 plaintiffs.

25 Defs.' Memo., page 40. DSHS repeats arguments that it made in 1991 when it unsuccessfully sought
26 dismissal of the plaintiffs' foster care claims under state law. See Defendants' Memorandum in
27 Support of Motion for Judgment on the Pleadings, pages 54 - 65; Defendants' Reply Memorandum in
28 Support of Motion for Judgment on the Pleadings, pages 33 - 56. The plaintiffs have addressed
these arguments previously. Memorandum Opposing Defendants' Motion for Judgment on the Pleadings,
pages 12 - 36.

32 ³² Id. at 38 - 39. ("Therefore, it has met its duty under federal and state law
regarding "reasonable efforts" to prevent or eliminate the need for removal of a child and to make
it possible for a child to return home.") The federal oversight, in fact, does not even review
whether DSHS is providing any services. Instead, it is only a paper review to determine whether
the dependency courts are making the "reasonable efforts" finding:

[A]dministrative monitoring (to determine eligibility for federal matching funds)
of the states conducted by the Federal Government to determine compliance with the
"reasonable efforts" requirement merely examines to see if the finding has been made
with no further inquiry.

S. Goodman and J. Hurley. REASONABLE EFFORTS: WHO DECIDES WHAT'S REASONABLE, page 5 (U.S.
Department of Health and Human Services 1993).

1. State law requires DSHS to provide necessary preventive and reunification services.

State laws require DSHS, at the direction of the superior court if necessary, to provide substantive preventive and reunification services. See Plaintiffs' Memorandum Opposing Defendants' Motion for Judgment on the Pleadings, page 18 - 27.³³ For example, DSHS, as a part of its placement authority, must make "reasonable efforts" "to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home;" RCW 13.34.060 (8); RCW 13.34.130(1)(b). If a child is removed from her home, the court must review the case periodically to ensure that "reasonable services have been provided to or offered to the parties to facilitate reunion," RCW 13.34.130(5)(b)(i). The court also "shall establish in writing . . . [w]hether additional services are needed to facilitate the return of the child to the child's parents; if so, the court shall order that reasonable services be offered specifying such services;" RCW 13.34.130(5)(b)(vii).³⁴

³³ See the statutes reviewed in footnote 35 below and the "reasonable efforts" statutes themselves. It is true that Chap. 13.34 RCW also imposes complex procedural requirements; but these procedures are designed to insure that all the parties, including DSHS, do what they are supposed to do. E.g., Courts are required to review the cases every six months to ensure that "reasonable services have been provided to or offered to the parties to facilitate reunion. . . ." RCW 13.34.130(5)(b)(i); the court requires the submission of a plan precisely to permit a reliable assessment of the family's needs. RCW 13.34.120.

³⁴ DSHS cites RCW 13.34.130(3)(b)(iv) to limit its duty to provide only those services that it makes available or that are in the community. Defs.' Memo., page 37. DSHS's interpretation does not follow from the words of the provision. This provision refers to the service duties of the "agency charged with supervising a child in placement" and separately mentions DSHS. For this reason, the service duties refer, not to DSHS, but to private foster care agencies, whose responsibilities are naturally less subject to state mandate:

The agency charged with supervising a child in placement shall provide all reasonable services that are available within the agency, or within the community, or those services which the department of Social and Health Services has existing contracts to purchase. It shall report to the court if it is unable to provide such services.

RCW 13.34.130(3)(b)(iv)(emphasis added). The legislature, in fact, has directed that DSHS has "authority to purchase care for children; and shall follow in general the policy of using properly

1 2. State law requires reasonable services that
2 address the need; sometimes that means housing
3 assistance.

4 DSHS has noted that the foster care statutes do not specify
5 shelter or housing assistance; it infers from this that such
6 assistance can never be a required part of preventive and reuni-
7 fication efforts. This conclusion poses several problems.

8 First, the laws do not mention any particular service, housing
9 or otherwise. This argument would mean that DSHS cannot be
10 prevalled upon to do anything. Second, the child welfare laws
11 do mention homelessness (Chap. 74.13 RCW). To the extent that
12 Chap. 74.13 RCW is read together with Chaps. 74.14A and 13.34
13 RCW, then of all the needs, housing is more directly mentioned
14 than others. Third, DSHS's argument still does not account for
15 the clear statutory duty to provide services.

16 The statutes explain why housing assistance can be required
17 in the plaintiffs' foster care cases: rather than specifying
18 particular services, they require services that respond to the
19 needs that gave rise to the placement or retention of the
20 child.³⁵ When the caseworker and the dependency court find

21 approved private agency services for the actual care and supervision of such children" RCW
22 74.13.031(8)(emphasis added). Even if applied to DSHS, the provision would only exclude those more
23 exotic services that DSHS cannot be expected to provide because they cannot be obtained in the
24 community. Shelter and housing, in contrast, is available for purchase.

25 DSHS's interpretation of RCW 13.34.130(3)(b)(iv) also cannot be reconciled with the clear
26 service requirements of the other statutes or their purpose. By its view, DSHS would have full
27 ability to determine and limit the extent of its own service obligations by simply declining to
28 provide the service. DSHS's obligation would thus be reduced to a duty to provide only those
29 services that it does provide. This circular interpretation would effectively efface the other
30 statutes and deprive the dependency courts of any review authority.

31 ³⁵ See Plaintiffs' Memorandum Opposing Defendants' Motion for Judgment on the
32 Pleadings, pages 28 - 31. The statutes are insistent that the services be tailored to the indivi-
33 dual needs of the family in question. "Reasonable efforts" are intended "to prevent or eliminate
34 the need for removal of the child . . . and to make it possible for the child to return home; . .
35 . . ." (RCW 13.34.060(8); RCW 13.34.130(1)(b)) and "to facilitate reunion" (RCW 13.34.130(5)(b)(i);
36 RCW 13.34.130(5)(b)(vii)). Other statutory sources of DSHS's preventive and reunification duty
37 also make clear that the services must address the problem. RCW 74.13.020 requires DSHS to provide
38 "child welfare services" "for the purpose of (1) Preventing or remedying, or assisting in the
39 solution of problems which may result in families in conflict, or the neglect, abuse,

1 housing assistance to be necessary and effective for prevention
2 or reunification, then it is required. If they find it to be
3 unnecessary or ineffective, than it is not required.³⁶

4 The plaintiffs agree that this assessment must be done case
5 by case within the dependency system "where the court weighs the
6 individual circumstances of each family and the testimony of the
7 parties regarding services and parental deficiencies." Defs.
8 Memo., page 41. The plaintiffs have stated this view repeatedly

9
10 exploitation, or criminal behavior of children; . . . (emphasis added). Furthermore, DSHS "shall:

11 (3) [investigate complaints of neglect, abuse or abandonment] and on the basis of
12 the findings of such investigation, offer child welfare services in relation to the
13 problem to such parents . . .

14 RCW 74.13.031 (emphasis added). The requirement to offer responsive services is restated in Chap.
15 74.14A. RCW:

16 The department of social and health services shall address the needs of emotionally
17 disturbed and mentally ill children, potentially dependent children, and families-
18 in-conflict by:

19 (1) Serving children and families as a unit in the least restrictive setting
20 available and in close proximity to the family home, consistent with the best
21 interests an special needs of the child(sic):

22 (2) Ensuring that appropriate social and health services are provided to the
23 family unit both prior to the removal of a child from the home and after family
24 reunification.

25 (3) Developing and implementing comprehensive preventive and early intervention
26 social and health services which have demonstrated the ability to delay or reduce
27 the need for out-of-home placements and ameliorate problems before they become
28 chronic or severe;

(4) Developing coordinated social and health services which:

(a) Identify problems experienced by children and their families early
and provide services which are adequate in availability, appropriate to the
situation and effective;

(b) Seek to bring about meaningful change before family situations become
irreversibly destructive and before disturbed psychological behavioral patterns and
health problems become severe or permanent;

(c) Serve children and families in their own homes thus preventing
unnecessary out-of-home placement or institutionalization;

(d) Focus resources on social and health problems as they begin to
manifest themselves rather than waiting for chronic and severe patterns of illness,
criminality, and dependency to develop which require long-term treatment,
maintenance or custody; . . .

RCW 74.14A.020 (emphasis added.)

36 DSHS fears that this ruling would result in an "avalanche" of litigation from
children and their parents "who do not receive the precise services they desire in Juvenile Court."
Defs'. Memo. page 41. This claims is not about a family's "desires". Even if the plaintiffs'
claim were expanded to other services, it would remain narrowly focused on those reasonably obtain-
able services that the dependency system finds necessary and effective to prevent or shorten a
placement. Moreover, these assessments would be made in a dependency system that relies heavily
on DSHS's judgment. If this would result in an avalanche, then it is only to avoid the more
expensive and deplorable avalanche of avoidable foster care placements of children.

1 from the start of this litigation.³⁷ The problem is that, even
2 when the assessment is made in an individual case that housing
3 assistance is necessary, DSHS does not equip its caseworkers or
4 the dependency court with the necessary housing resources.

5 C. The responsibilities or efforts of other agencies,
6 state and federal, do not excuse DSHS from fulfilling
its own duties.

7 DSHS seeks to escape a duty toward the plaintiffs by noting
8 that other agencies of government, state and federal, have
9 responsibilities of their own.³⁸ The efforts of these other
10 agencies, however, cannot diminish DSHS's duty. These other
11 agencies are governed by different statutes. The court has no
12 reason to infer from them a repeal or limitation of DSHS's own
13 duties.³⁹ In fact, DSHS's own statutes presuppose the efforts
14 of others. Most importantly, these other efforts still leave
15 nearly 70,000 children homeless. For their assistance, the
16 fulfillment of DSHS's duties remains pivotal.

17 1. *The court has no reason to infer a limitation or*
18 *repeal of DSHS's child welfare duties.*

19 The language of Chaps. 74.13, 74.14A and 13.34 RCW contains
20 no exemption from responsibility just because other agencies are
21 also helping pursuant to separate mandates of their own. In

22 ³⁷ E.g., Plaintiffs' Initial Conference Statement, page 2 (September 3, 1991).

23 ³⁸ Defs.' Memo., pages 30 - 36. The defendants mention the Washington State Department
24 of Community Development (DCD), the United States Department of Housing and Urban Development
(HUD), and public housing authorities. The legislature recently merged DCD with the Department of
25 Trade and Economic Development into a new Department of Community, Trade and Economic Development.
Laws of 1993, Chap. 280, § 20. The defendants even mention the Governor's office.

26 ³⁹ The court in *Maticka v. City of Atlantic City*, 524 A.2d 416, 425 (N.J. App. 1987),
27 in fact, cited the efforts of other branches of government, including the Governor's office, to
28 fortify, not weaken, its conclusion that the state welfare department was in violation of its own
duties to homeless families: "Thus all three branches of government have concurred in the principle
that the prevention of homelessness is a necessary governmental function, at least, when all
private resources have proved unavailing."

1 fact, the child welfare laws, in imposing duties on DSHS,
2 presume that other services will also be available.⁴⁰ Nor is
3 there any language in statutes governing DCD, HUD or the housing
4 authorities that indicate an intent to absolve DSHS of its
5 responsibilities.⁴¹ Absent any statutory repeal or abrogation
6 of DSHS's duty, the court has no reason to infer it.

7 Federal legislation governing HUD or the public housing
8 authorities could have this pre-emptive effect only under the
9 narrow scope of the Supremacy Clause governing irreconcilable
10 conflicts between federal and state law.⁴² No such conflict
11 arises between the state's child welfare states and the several
12 federal statutes mentioned by DSHS.

13 The state statutes governing DCD also give no reason to
14 infer the repeal of the DSHS statutes. The plaintiffs have
15 already discussed the strong constitutional aversion to repeals
16 or limitation by implication:

17 Authority is legion that implied repeals of statutes
18 are disfavored and courts have a duty to interpret
19 statutes so as to give them effect.

20 Bellevue School District v. Brazier Constr., 103 Wn.2d 111, 122,

21 ⁴⁰ RCW 74.13.031(1), for example, requires DSHS not only to "establish" but also
22 "strengthen" services. It also requires DSHS's efforts to be "coordinated", presumably with the
23 efforts of others.

24 ⁴¹ When the legislature, in assigning new duties to another department, wanted to
25 relieve DSHS of responsibility, it has said so explicitly. For example, it did this when it
26 created the Department of Health, with responsibilities that DSHS used to perform:

27 The powers and duties of the department of social and health services and the
28 secretary of social and health services under the following statutes are hereby
transferred to the department of health and the secretary of health: [followed by
an itemized list of duties]

RCW 43.70.080. This specificity is particularly helpful because DSHS and the Department of Health
still retain overlapping areas of responsibility for health policy. There is no such renunciation
of DSHS duties for homeless children when the legislature also assigned overlapping duties to DCD
or other agencies.

⁴² See E.g., Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476, 2481, 59 U.S.L.W.
4755 (1991).

691 P.2d 178 (1984).⁴³

The defects in DSHS's proposal are evident from the confusion it would invite. It would subvert the duties that state law imposes on state agencies which, under DSHS's view, could then evade their responsibilities by identifying overlapping efforts of other state or federal agencies. Such overlap appears in many areas besides homelessness assistance, between sister state agencies⁴⁴ and between state and federal agencies.⁴⁵ DCD and DSHS in particular share overlapping areas of responsibility beside housing and shelter.⁴⁶ DSHS's proposal would allow any or all agencies with shared responsibility in an area to repudiate its own role. In this view, the forsaken clients would then be invited to seek their redress from the other agencies, who could reply with the same repudiation.

The better interpretation, the one congenial to clear statutory language, is to reaffirm DSHS's duties. DSHS must

⁴³ See also Plaintiffs' Response to Defendants' Memorandum re Family Preservation Services Act and Supplemental Facts re Hill and Sanders, pages 2 - 3 (June 22, 1992).

⁴⁴ E.g., Environmental and resource protection is a shared responsibility among the Department of Ecology, Department of Fisheries, and Department of Wildlife; DSHS and the Department of Health share a responsibility for public health; both share this responsibility with county public health departments.

⁴⁵ E.g., environmental protection, medical coverage, fair housing enforcement, law enforcement, elementary and higher education, welfare.

⁴⁶ DCD has a wide range of responsibilities that overlap with many agencies' activities, including those of DSHS: E.g., RCW 43.63A.066 gives DCD "primary responsibility for providing child abuse and neglect prevention training" to preschool age children; RCW 43.63A.065(14) requires DCD to "administer programs that . . . address youth and domestic violence problems, provide . . . and administer family services and programs to promote the state's policy as provided in RCW 74.14A.025." (Re-enacted, 1993 Laws, Chap. 280, § 16(3)); DCD shares the "Agency Timber Task Force" with DSHS and other agencies. RCW 43.31.621; 43.63A.600; RCW 43.20A.750; DCD is responsible for operating the nursing home ombudsman office. RCW 43.190.030. Both DCD and DSHS participate in the "Child Care Coordinating Committee" established by RCW 74.13.090; they collaborate in the Family Policy Council established by Chap. 70.190 RCW; employee ownership program (RCW 43.63A.220 - .230); senior environment corps (RCW 43.63A.240 - .249); state fire protection and training services (RCW 43.63A.300 - .380); grants to public broadcast stations (RCW 43.63A.400); mobile home parks and manufactured housing (RCW 43.63A.430, .460); community diversification program (RCW 43.63A.460). The legislature restated these responsibilities when it merged DCD with the Department of Trade and Economic Development to form a new Department of Community, Trade and Economic Development. Laws of 1993, Chap. 280.

1 coordinate its efforts with DCD, the federal government and
2 others; but it must also fulfill its own duty. The legislature
3 expressed this expectation when it created DSHS and all state
4 agencies, "which shall be charged with the execution, enforce-
5 ment, and administration of such laws, and invested with such
6 powers and required to perform such duties, as the legislature
7 may provide." RCW 43.17.010.

8 Courts, in fact, have regularly disappointed agencies which
9 sought to evade their duty to provide services by citing to the
10 duties imposed by other state and federal laws.⁴⁷ The court in
11 Jacquins v. DSHS, *supra*, rejected DSHS's attempt in the over-
12 lapping area of welfare programs to evade its responsibility to
13 provide AFDC under state law in the face of a federal statute
14 that addressed the same situation. More generally, courts
15 determine an agency's responsibility by the statutes that govern
16 it, despite other statutes that charge other state officials or
17 agencies with complimentary duties in the same situation.⁴⁸
18 The court should do the same with DSHS.

21 47 E.g. Town of Cleveland v. Industrial Commission, 286 N.W. 558, 559- 560 (Wis.
22 1939)(A local government could not evade its responsibility under state law to provide "poor
23 relief" to indigent families just because the state government also provided them with AFDC and
24 even though the state's AFDC statute stated that AFDC "shall be the only form of public assistance
25 granted to the family." The Court's focus was on the separate statute directed at the local
26 government. "There is no provision . . . by reason of which the receipt of [AFDC] . . . can be
27 deemed to absolve a town or its officers from the performance of their duty to provide poor
28 relief."); State ex rel Tiner v. Milwaukee City, 260 N.W.2d 393 (Wis. 1977)(same); State ex rel.
Ventrone v. Birkel, 392 N.E.2d 1085 (Ohio App. 1977)(county must comply with state law directing
it to provide adequate "poor relief" despite the less generous standards of the state welfare
department under other state laws), *aff.* 377 N.E.2d 780 (1978).

21 48 E.g., In State v. Poupart, 54 Wash. App. 440, 773 P.2d 893 (Div. I 1989), *rev. den.*
22 113 Wn.2d 1008 (1989), the court distinguished between the separate and simultaneous statutory
23 duties of the state's prosecuting attorney, the probation department and the DCFS caseworker in the
24 same juvenile delinquency case that allowed them to recommend different sentences. In Goodman v.
25 Em. Sec. Dept., 69 Wash. App. 98, 104, 847 P.2d 29 (Div. II 1993), the court ruled that the state's
26 Personnel Appeals Board was obliged to adjudicate a state employee's contractual rights to
27 reinstatement even though another state agency has a similar responsibility.

2. DSHS is still obliged to those plaintiffs
unassisted by the efforts of others.

If the efforts of others were remotely adequate, then the scope of DSHS's duties would be unimportant. But those efforts leave nearly 70,000 Washington children homeless yearly; about 50,000 of them are without shelter.⁴⁹ These unassisted families have the claims in this lawsuit. The efforts of other agencies that have helped other people cannot excuse DSHS's own duty to the plaintiffs.⁵⁰

II. DSHS DENIES THE PLAINTIFFS DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

A. DSHS Lacks Adequate Procedures and Criteria.

The plaintiffs have already discussed their procedural due process claims. Plaintiffs' Memorandum Opposing Defendants' Motion for Judgment on the Pleadings, page 55 - 58. DSHS seeks summary judgment on this issue by asserting that it has no statutory duty to the plaintiffs. Defs.' Memo., page 27. The plaintiffs have also discussed their contrary view of this statutory question.⁵¹

⁴⁹ Stipulation of Facts, § 1.

⁵⁰ For example, in Poverty Resistance Center v. Hart, 271 Cal. Rptr. 214, 222 - 223, 213 Cal. App. 3rd 295 (1989) the court found that the county's general assistance program violated state law standards of adequacy. The court also ruled that the county may not excuse these inadequacies by showing that it also allocated other funds to service providers and charities in the community whose efforts were also insufficient to meet the need. Id. at 221 - 222.

⁵¹ DSHS mistakenly argues that this case is "identical" to Aripa v. Social and Health Services, 91 Wn.2d 135, 588 P.2d 185 (1978) where the court refused to order DSHS to provide "individualized comprehensive alcohol treatment" to prison inmates. Defs.' Memo., page 28. Aripa differs from this case in two most meaningful ways that the court emphasized: first, the statute in question governing DSHS's alcohol treatment program merely required it to "cooperate with public and private agencies in establishing and conducting" treatment programs. Id. at 137, 138. This is a conspicuous contrast to DSHS's affirmative and substantive duties to "develop, administer, supervise, and monitor a coordinated and comprehensive plan that establishes, aids, and strengthens services for the protection and care of homeless . . . children." RCW 74.13.031(1); second, the court also found that DSHS was, in fact, providing treatment services. Id. at 137 - 138.

1 B. DSHS's Failure to Use the Least Restrictive Method of
2 Intruding into the Plaintiffs' Family Deprives them of
3 Liberty Without Due Process of Law.

4 The plaintiffs' have discussed their substantive due
5 process claims. Plaintiffs' Memorandum Opposing Defendants'
6 Motion for Judgment on the Pleadings, pages 51 - 55. The
7 defendants state that the court has dismissed these claims.
8 Defs.' Memo., page 1. The plaintiffs were surprised to read
9 this. Instead, they understand paragraph 7(D) of the Order on
10 Defendants' Motion for Judgment on the Pleadings to preserve
11 these due process claims. Some clarification from the court
12 would be helpful.⁵²

13 C. DSHS Denies the Plaintiffs the Equal Protection of
14 RCW 74.13.031 and 73.13.020.

15 The court did dismiss the plaintiff's equal protection
16 claims "without prejudice" to await further development of the
17 facts. Order on Defendants' Motion for Judgment on the
18 Pleadings, § 3. Foreclosing these claims on summary judgment,
19 therefore, would be premature.

20 With the defendants' summary judgment motion, however, this
21 claim has become clearer. RCW 74.13.031 and 74.13.020 require
22 DSHS to serve "homeless runaway, dependent and neglected
23 children." All these children are entitled to the equal protec-
24 tion of this law that mentions them. As a constitutional

25 ⁵² By letter to the court dated August 13, 1992, the parties reported that they could
26 not agree on whether the court had dismissed the substantive due process claims. They enclosed a
27 proposed order that would have dismissed these claims and asked the court for clarification. The
28 court did not sign that version; instead, it signed one finding due process claims without distin-
 guishing between procedural and substantive due process. Order, § 7(D). The court's order does
 state that the plaintiffs have no constitutional right "to affirmative assistance from the defen-
 dants to maintain family integrity." § 2.2. This does not address the circumstance when the
 family's integrity is threatened by the state's own foster care placement of the children; it is
 precisely in the face of state action that the "least restrictive alternative" requirement becomes
 applicable.

1 minimum, this means an equal acknowledgement of responsibility
2 from DSHS. DSHS, however, has repudiated its duty under this
3 statute to the homeless children in favor of the "abused and
4 neglected" children. Defs'. Memo., page 19. This overt dis-
5 crimination against homeless children can have no legitimate
6 basis since it also violates the statute.

7
8 III. THE INDIVIDUAL DAMAGE CLAIMS OF THE NAMED PLAINTIFFS
9 REQUIRE A TRIAL.

10 A. DSHS does not have "discretionary immunity" from
11 liability for the damage resulting from its failure to
12 fulfill mandatory duties.

13 DSHS has no "discretionary immunity" from tort liability
14 for the damage resulting from its default of mandatory
15 duties.⁵³ The defendants cannot fulfill at least the third and
16 fourth criteria that Evangelical United Brethren Church v. State
17 67 Wn.2d 246, 255, 407 P.2d 440 (1965) described to govern the
18 question. In fact, DSHS has not even exercised the discretion
19 that it claims is immune from liability.

20 DSHS's omission cannot meet the third criteria because it
21 did not "require the exercise of basic policy evaluation, judg-
22 ment, and expertise". *Id.* Instead, the omitted services to the
23 plaintiffs are required by mandatory statutory and constitu-
24 tional duties. There is no evaluation or judgment that DSHS can
25 make, however expert, that can disavow this duty.

26 DSHS also fails to meet the fourth criteria. DSHS does not

27 ⁵³ The court has already rejected DSHS claim of "discretionary immunity" which the
28 parties have previously discussed. Defendants' Memorandum in Support of Motion for Judgment on the
Pleadings, pages 62 - 65; Defendants' Memorandum in Support of Motion for Clarification or Reconsi-
deration, pages 2 - 7; Plaintiffs' Memorandum Opposing Motion for Reconsideration, pages 1 - 3.
The court found that the plaintiffs' stated a claim for damages under state law. Order on
Defendants' Motion for Judgment on the Pleadings, § 7 (F).

1 "possess the requisite constitutional, statutory, or lawful au-
2 thority and duty to do or make the challenged act, omission or
3 decision." *Id.* Plaintiffs' damage claims arise directly from
4 DSHS's omission of services that the law requires it to provide.
5 Using language that applies in this case, the Court in Miotke v.
6 Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984) rejected the state's
7 defense of discretionary immunity for its allowance of sewerage
8 discharge in violation of the law:

9 Unfortunately, no matter how reasonable their decision
10 might have been (and we make no determination of that
11 matter), defendants were not authorized to make it.

12 *Id.* at 329.

13 The purpose of "discretionary immunity" does not even apply
14 in this case. Its purpose is "to assure that courts refuse to
15 pass judgment on policy decisions in the province of coordinate
16 branches of governments". King v. Seattle, 84 Wn.2d 239, 246,
17 525 P.2d 228 (1974). The duty to serve homeless children and
18 those families who need housing to prevent or shorten their
19 children's foster care placements is not a policy decision
20 within the province of an agency to repudiate. It is a legal
21 requirement in the province of the court to declare and enforce.

22 Finally, even if the "discretionary immunity" doctrine was
23 applicable, DSHS does not qualify because it has not exercised
24 any discretion. The exercise of discretion is a basic require-
25 ment of the immunity. "Subsequent to the enunciation of [the 4
26 part test in Evangelical for discretionary immunity the Court]
27 additionally required a demonstration that conscious balancing
28 of risks occurred in the decision making process.":

1 [T]o be entitled to immunity the state must make a
2 showing that such a policy decision, consciously
3 balancing risks and advantages, took place. The fact
4 that an employee normally engages in "discretionary
5 activity" is irrelevant if, in a given case, the
6 employee did not render a considered decision.

7 Miotke v. Spokane, 101 Wn.2d at 336. DSHS's failure to serve
8 the plaintiffs results, not from its exercise of discretion, but
9 from a repudiation of the duty.

10 B. DSHS cannot evade liability because the laws did not
11 specify the required services or because of "policy
12 considerations".

13 The plaintiffs have already discussed the defendants'
14 observation that the laws do not specify housing assistance.
15 See above pages 18. As a defense to tort liability, this lack
16 of specificity is particularly misplaced. DSHS has not just
17 omitted a specific service that homeless children need; it has
18 disavowed the duty. A fire department with a duty to put out
19 fires is not excused because the statute does not specify water
20 hoses and ladders for the job. A hospital with a statutory duty
21 to provide emergency care must diagnose and undertake a course
22 of treatment dictated by the standards of the profession; it
23 does not look to the law for the name of the medicine. The
24 laws' lack of specificity does not excuse the fire fighter who
25 ignores the fire alarm or the doctor who shuts the emergency
26 room door. Nor does it excuse a child welfare agency that
27 appears baffled because its governing statute does not specify
28 exactly what to do for homeless children.

DSHS also claims that "policy considerations" preclude
proximate cause for tort liability. Defs.' Memo., page 45.
Since DSHS did not specify what these considerations are, a

1 response is difficult. More generally, however, the policy
2 question of proximate cause is, to a large degree, determined by
3 the finding of DSHS's duty to the plaintiffs:

4 Whether liability should attach is essentially another
5 aspect of the policy decision which we confronted in
deciding whether the duty exists.

6 Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 476, 656 P.2d 483
7 (1983); Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243
8 (1992)("The question of legal causation is so intertwined with
9 the question of duty that the former can be answered by
10 addressing the latter.")

11 Stated another way, DSHS's default of duties is the
12 proximate cause of that harm to the plaintiffs that the duties
13 were intended to avoid. Ms. Sanders, for example, needed
14 housing to recover her children. After a delay of over a year
15 attributed solely to her lack of housing, she got them back 9
16 days after she finally was able to procure an apartment. If
17 DSHS had provided housing assistance, this tragic delay would
18 not have happened. That is the cause in fact. The reason for
19 the duty to assist her was to avoid this very delay in reunifi-
20 cation.⁵⁴ That is the legal cause.

21 C. Plaintiffs' injuries are actionable.

22 Liability for default of a duty imposed by law requires
23 only "culpable neglect regarding, or indifference to, that
24 noncompliance." Halvorson v. Dahl, 89 Wn.2d 673, 678, 574 P.2d

25 ⁵⁴ The facts of the individual plaintiffs, including those that are disputed, are
26 reviewed in the parties' class certification briefs, with the accompanying declarations and
27 deposition transcripts. Supplementing this record, attached to this brief, are the Third
28 Declaration of Bradford K. Kinsey, G.A.L., and the Second Declaration of Elizabeth Sanders. The
plaintiffs note that DSHS has omitted any discussion of plaintiffs Anita Elliott and her son.
While they were not included in the agreed order of class certification as class representatives,
their individual claims are still part of the case.

1 1190 (1978). The liability can cover many types of injury,
2 including but not limited to the negligent infliction of emo-
3 tional distress.⁵⁵ The type and extent of damage will depend
4 on the facts of each plaintiffs' case. This issue is not amen-
5 able to summary judgment. E.g., Sintra, Inv. v. Seattle, 119
6 Wn.2d 1, 829 P.2d 765 (1992), cert. den. 113 S.Ct. 676 (1992).

7
8 IV. CONCLUSION

9 The plaintiffs agree that DSHS's motion for summary
10 judgment, along with the plaintiffs' motion, pose legal ques-
11 tions that do not require a trial to resolve. A trial is unne-
12 cessary to reaffirm the statutory and constitutional duties that
13 DSHS disavows. The court should reaffirm these duties by
14 denying the DSHS's motion.

15 Dated: October 8, 1993

16 Michael Mirra
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17 Attorneys for Plaintiffs

18
19 I certify that on October 8, 1993 I had a copy of this
20 document, along with attachments, delivered to Michael Collins
21 and Charlotte Clark Mahoney, defendants' attorneys, at 900 4th
22 Avenue, Suite 2000, Seattle, WA.

23 Michael Mirra
Michael Mirra

24 a.52:HOMCHIL.234

25 ⁵⁵ E.g., Babcock v. State, 116 Wn.2d 596, 622, 809 P.2d 143 (1991)(state can be liable
26 for negligence, outrage, alienation of affections and violation of constitutional rights for having
27 placed children with a sexually abusive foster parent.); Miotke v. Spokane, 101 Wn.2d 307, 337, 678
28 P.2d 803 (1984)(Affirming \$ 245,000 damage award for state's violation of environmental laws
resulting in loss of property rights, negligent infliction of emotional distress, loss of enjoyment
of their waterfront property, out-of-pocket expenses.); Halvorson v. Dahl, 89 Wn.2d 673, 678, 574
P.2d 1190 (1978)(wrongful death resulting from failure to enforce fire codes); Ueland v. Pengo
Hydra-Pull Corp., 103 Wn.2d 131, 691 P.2d 190 (1984)(loss of parent-child consortium).