

Civil Track I
Judge Ann Schindler

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

WASHINGTON STATE COALITION FOR)
THE HOMELESS; STANLEY and MARIE)
HILL, and their minor children,)
BAYYINAH, AQUILA, STANLEY, TAMIKA,)
and HABIBAH; and KERRY COUGHLIN,)
and her minor children, JC, JV,)
and LV, through their guardian ad)
litem BRADFORD KINSEY; ELIZABETH)
SANDERS, and her minor children)
AS, ES and SS; and other persons)
similarly situated,)

Plaintiffs,)

vs.)

DEPARTMENT OF SOCIAL AND HEALTH)
SERVICES; and JEAN SOLIZ, in her)
official capacity as Secretary)
of the Department of Social and)
Health Services; and her)
successors,)

Defendants.)

NO. 91-2-15889-4

DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

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5 **I. PROCEDURAL BACKGROUND**

6 The plaintiffs filed this class action on March 28, 1991. On
7 September 23, 1991 they filed their Second Amended Complaint.
8 They alleged that defendants violated the following state and
9 federal laws: RCW 74.13, RCW 74.14A, RCW 13.34, 42 U.S.C. § 625
10 et. seq., 42 U.S.C. § 671 et. seq., the due process clauses and
11 equal protection laws of the Washington State and United States
12 Constitutions.

13 On August 21, 1992, this court, pursuant to Defendants'
14 Motion for Judgment on the Pleadings, dismissed the federal
15 statutory claims, the equal protection claims and the substantive
16 due process claim. On December 12, 1992, plaintiffs and
17 defendants entered a stipulated order of class certification.

18 **II. UNDISPUTED FACTS MATERIAL TO THIS MOTION**

19 **A. THE CHILD WELFARE SYSTEM**

20 **1. The Child Welfare Plans**

21 The Department of Social and Health Services' (Department)
22 Child Welfare Plans (Plans) for the fiscal years 88-89, 90-91, and
23 92-93 are part of the record. Exs. A-C. Each of these Plans has
24 been approved by the federal government. Declaration of Richard
25 Anderson, App. 1-2. The Plans describe the services available
26 within the Division of Children and Family Services (DCFS) to

1 prevent the placement of children into out-of-home care, services
2 to children and families while in out-of-home care and services to
3 reunify families.¹

4 Each of the Plans contains an overview of the Child Welfare
5 System in the State of Washington. The Plans describe the child
6 abuse and neglect intervention system, including a description of
7 services available to prevent and alleviate abuse and neglect, a
8 description of the services available for families in conflict,
9 the foster care system, training, and other services or special
10 projects.

11 At the end of each Plan is the DCFS budget, a list of goals
12 and objectives for the future relating to child welfare services
13 and a report on the Department's implementation of goals and
14 objectives of past plans. Ex. A at 66-74, Ex. B at 101-110, Ex.
15 C at 83-90. The report on goals and objectives provide more
16 specific information on certain services and reflects the ongoing
17 nature of improvements in the system. For example, in the 1988-89
18 Plan, under preventative services, the Department reported
19 providing training for day care operators with the goal of
20 preventing abuse and neglect. Ex. A at 67. The reports on
21 achievements of goals also reflect the limitations of the system.
22 In the 1990-91 Plan, the Department reported implementing a number
23 of tasks which the Department established in response to the 1987

24
25 ¹ A July 1993 plan to enhance services to children and
26 families who lack shelter is also part of the record. Ex. D.
This plan has not yet been implemented, but the work plan for
implementation is also included in the record. Ex. D(5).

1 Governor's Child Protective Services Report. The Department
2 emphasized that, "This does not mean that all of the Governor's
3 Report was completed. Complete implementation would require
4 significant levels of new funding." Ex. B at 106.

5 The Department's most recent Plan describes the
6 administration of child welfare services, the goals the agency has
7 set, the structure of the delivery system, the child protective
8 service system, family reconciliation services, the foster care
9 system, descriptions of different services available to prevent
10 and alleviate abuse and neglect, training and a number of other
11 issues regarding the child welfare system. Ex. C.

12 The Plan contains a section called "Community Services" which
13 states, in relevant part:

14 DCFS coordinates with a multitude of services provided
15 and funded by United Way, private agencies, other DSHS
16 divisions and other local state and federal government
entities to ensure that families with children receive
appropriate services.

17 A description of all the services provided by other
18 community sources that contribute to reduction of abuse
would be a volume in itself.

19 Id. at 30.

20 The Plan contains a section called "Other Programs of DCFS"
21 which includes a description of the Department's Victims of
22 Domestic Violence Program which helps fund domestic violence
23 shelters, a hotline, counseling and legal advocacy for domestic
24 violence victims. Id. at 70-71.

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1 child or family. FRS provides assessment, counseling services and
2 referrals.

3 The Child Welfare Services (CWS) program receives transfers
4 of children from CPS and FRS who need ongoing foster care
5 services. CWS also receives cases where there is no conflict at
6 home but where the child has emotional or behavioral problems
7 which cannot be dealt with in the home. CWS additionally handles
8 adoption requests, adoption development, interstate courtesy
9 supervision, voluntary relinquishment requests, agreed
10 guardianships and requests for assistance in caring for a child
11 when a caretaker has medical/psychiatric problems. Families and
12 children in CWS are eligible for the same services as CPS
13 families.

14 **3. Child Welfare System Reports.**

15 The two most recent Plans contain a section "DSHS Studies the
16 System." Ex. B at 8, Ex. C at 65. In 1987, and 1988, seven task
17 forces studied various aspects of the child welfare system. In
18 1989 and 1990 there were four reports which focused on adoption
19 and permanent planning issues.

20 In addition, other major studies of child welfare have been
21 done.

22 **a. The Children and Family Services Act Reports.**

23 The Children and Family Services Act was passed in 1983.
24 Laws 1983, ch. 192. In the Act, the legislature required the
25 Department to develop a plan for the implementation of sections 2
26 through 4 of the Act and to submit it to the appropriate

1 committees of the House of Representatives and the Senate by
2 November 15, 1983. Id. § 5.³ Pursuant to this directive, the
3 Department, with an advisory committee of community
4 representatives, produced "Children and Family Services Act -
5 Initial Implementation Plan", November, 1983. Implementation
6 Plan, Ex. O. Section two of the Implementation Plan provided the
7 legislature with a thorough description of all services available
8 for children, youth, and families.⁴ Id. at 32-93.

9 Section three of the Implementation Plan describes actions
10 the Department would implement within existing resources, and
11 sections four and five describe actions the Department could
12 undertake with more resources and with changes to various
13 statutes. Id. at 162-213.

14 This exhaustive study does not mention homeless children nor
15 does it describe any housing assistance programs for homeless
16 children.⁵

17
18
19 ³ The legislature specifically directed the Department to
20 address certain topics within the implementation plan. § 5 of
the Act is attached to this memorandum. App. 9-10.

21 ⁴ The introduction states that "it is important to remember
22 that DSHS is not the sole provider of services to children and
23 families. A wide variety of other public and private entities
also deliver essential services throughout Washington State".
Ex. O at 32.

24 ⁵ The study does contain a reference to providing eight
25 foster beds for "homeless youth" who are referred to as "street
26 kids" who need help to escape lives of teenage prostitution.
Ex. O at 161. The efforts to help street youth have continued
and have grown significantly. See Child Welfare Plan, 92-93,
Ex. C at 36.

1 b. The Governor's Commission on Children.

2 On January 10, 1989, the Governor's Commission on Children
3 submitted its final report to Governor Gardner and to the
4 appropriate committees of the legislature. Ex. S. The
5 commission's task was to "develop a long-term children's services
6 strategy for the development of an effective, comprehensive
7 coordinated children's service delivery system that will meet the
8 needs of children in the state." RCW 43.260.010(2)(a), App. at
9 11. The commission examined existing services for children and
10 families, services needed and made numerous recommendations. It
11 obtained input from providers with expertise in different service
12 areas and from agencies familiar with services and fiscal
13 management. Id. The report was requested in response to the
14 growing number of problems facing the children of the state. The
15 report studied children at risk, children in need of protection,
16 children in need of rehabilitation and children in need of
17 treatment and issued a number of specific recommendations in each
18 area. Ex. S at 3-6.

19 The Commission acknowledged:

20 Chronic under-funding of children's programs has led to
21 the present crisis. Children have not been a priority
for state funded services.

22 Funding of preventive services is disproportionately
23 low. If, however, funds are taken from existing services
to fund preventive services, a dilemma is created:
24 Children and families with critical needs might not be
served. . . .

25 The Commission has come to the conclusion that there is
26 simply not enough public money currently available to

1 continue to take care of existing crises and meet future
2 needs in a proactive planned way.

3 Id. at 10.⁶

4 The Commission, during the course of its report, studied the
5 child welfare system and made a number of recommendations of ways
6 to improve the system. Id. at 55-75. None of these
7 recommendations included housing assistance for "homeless"
8 children.

9 The Commission, in a separate section, recognized that the
10 Department of Community Development (DCD) statistics indicated
11 that a large number of children are homeless. The Commission made
12 a number of recommendations to address this problem, including:
13 Providing state funds to local governments for more emergency
14 shelters, providing state funds to local governments for day care,
15 having school districts and local governments coordinate efforts
16 to ensure that homeless children attend school, and guaranteeing
17 loans to local governments to improve the affordable housing
18 stock. Id. at 120.

19 **B. PLAINTIFFS' FACTS**

20 **1. The Hills**

21 The Hills have five children. In 1984, Mrs. Hill lived in
22 public housing with her two daughters, and later with Stanley, Jr.

23 ⁶ In 1989 Initiative Measure 102, commonly known as the
24 Children's Initiative, was defeated by the electorate. This
25 measure was intended to fund children and family services and
26 education for children. App. 12-16. It would have appropriated
a significant amount of money for preventive and early
intervention services, family support services, emergency
services for homeless children, etc. Id.

1 and Tamika, who were born in 1985 and 1987, respectively. M.H.
2 18:21-25; 20:4; 20:17-19; 20:24- 21:2.⁷ The family was supported
3 by public assistance and AFDC from 1984 to 1988. M.H. 41:4-6;
4 42:3-7; 59:18-21.

5 In April, 1990, the Hills moved to California. M.H.25:15.
6 In June, 1990, they returned to Seattle and received housing from
7 Seattle Emergency Housing Services (SEHS), a local public housing
8 service. M.H. 71:23-72:15. They lived in housing supplied by
9 SEHS, until they moved into "Section 8" housing in early 1992.
10 Each of the units of SEHS housing in which they have lived has had
11 three bedrooms, and one or two baths. M.H. 51:2-12; Ans. to
12 interog. no. 1.40.

13 In July, 1991, the Hills were awarded a "Section 8" housing
14 subsidy for a 4-bedroom unit from the Seattle Housing Authority
15 (SHA). M.H. 74:2-9. However, SHA required that they pay
16 delinquent back rent from when they moved out of the public
17 housing in 1988. M.H. 74:10-25; 75:1-3. In August, 1991, the
18 Department denied the Hills' request for emergency assistance to
19 pay the delinquent rent. At the same time, the Department
20 approved medical coverage for the children and the Hills'
21 eligibility for food stamps. M.H. 75:4-24. Since early 1992, the
22

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24 ⁷ Citations to depositions and exhibits are to those filed
25 with declarations in the Motions and Replies to Motion
26 Certifying the Class. The abbreviations are as follows:
Deposition of Marie Hill, M.H.; of Stanley Hill, S.H.; of Kerry
Coughlin, K.C.; of Bruce Norton, B.N.; and of Elizabeth Sanders,
E.S.

1 family has lived in a "Section 8" apartment, subsidized by the
2 federal government.

3 In September, 1991, the Hills were paying about \$200 per
4 month to SEHS for a three bedroom, two bathroom apartment. M.H.
5 52:10-25. SEHS also offered help with food, clothing, assistance
6 from counselors and day care for the younger children. The Hills
7 received approximately \$300 a month in food stamps from the
8 Department; in addition, their children were enrolled in medical
9 assistance programs through the Department. M.H. 50:22-24; 59:14;
10 75:5-9.

11 Mr. Hill has been employed for most of the time the Hills
12 have lived in Seattle. He often earned a wage that excluded the
13 family from receiving income assistance from AFDC.

14 The Hills deny that their children are abused, neglected,
15 abandoned, delinquent, emotionally disturbed or mentally ill.
16 M.H. 52:10-25. They are not aware of any efforts to place their
17 children in foster care. M.H. 39:7-12; 61:15-18. They consider
18 themselves capable parents, and no one has suggested otherwise.
19 M.H. 61:24-62:3; S.H. 29:3-5.

20 In their depositions, the Hills requested a four-bedroom
21 house in a nice area. M.H. 64:1-11. They stated they could spend
22 about \$200 to \$300 per month for housing and would need public
23 housing or a monthly rental subsidy for the foreseeable future.
24 M.H. 64:17-19; 65:14-24. They requested that DSHS ensure that
25 they receive the kind of housing they desire, and long-term rental
26 assistance. M.H. 64:20-23; 78:19-25. In her deposition, Ms. Hill

1 indicated that part of her damage claim is based upon the refusal
2 of the department to give them emergency aid and on their
3 financial losses because of the distance Mr. Hill had to travel
4 during the time their public housing was in Everett and Mr. Hill
5 worked in Seattle. M.H. 62:12-63:19.

6 2. The Coughlins

7 Kerry Coughlin is 35 years old. K.C. 4:14-15. She has a
8 history of alcohol and drug abuse dating back to at least 1974.
9 K.C. 11:12-16; 12:25-13:14. She started using heroin in 1985 and
10 considers herself an addict. K.C. 10:2-4.

11 Ms. Coughlin has four children, K.C. 27:10-13, and has
12 received public assistance from the Department since the birth of
13 her first child in 1976. K.C. 30:8-10. Ms. Coughlin came to the
14 attention of Child Protective Services when CPS received five
15 referrals for abuse and neglect between January 1989 and March
16 1990. Ex. 7.

17 Ms. Coughlin's children lived with relatives and friends
18 almost continuously from March, 1990, until they were placed in
19 foster care. K.C. 24:16-25:25; 28:4-29:10; 33:20-24; 50:18-54:6.
20 Ms Coughlin moved around the state, sometimes with her boyfriend.
21 K.C. 31:7-16. In February, 1991, dependency petitions were filed
22 based on Ms. Coughlin's drug dependency. Ms. Coughlin's
23 whereabouts were unknown. K.C. 63:18-64:12. Ms. Coughlin met
24 with the caseworker in February, and was advised that she needed
25 to show evidence of a drug-free life and have a stable living
26 situation suitable for her children. She was further advised

1 that the first step was a drug abuse evaluation. K.C. 67:21-68:6;
2 68:14-24. Ms. Coughlin was arrested the next week for heroin
3 possession. K.C. 71:22-72:2.

4 In May, 1991, Ms. Coughlin, with counsel, signed an agreed
5 order of dependency. It was agreed that it was in the children's
6 best interests to remain in foster care, and that she would
7 undergo drug treatment, among other conditions. 76:20-77:5; Ex.
8 11, D26 - 1039-1045. At all times during the dependency
9 proceedings, the court held all of the hearings required under RCW
10 13.34.

11 Since 1974, Ms. Coughlin has been in four inpatient drug
12 treatment programs, three methadone treatment programs, and a
13 variety of other outpatient programs. Supplemental Ans. to
14 interrog 1.29. She has relapsed into drug use after completing
15 each program. K.C. 20:23-21:10. After the dependency petitions
16 were filed, Ms. Coughlin enrolled in an inpatient drug treatment
17 program at Valley General Hospital, until April 10, 1991, followed
18 by an outpatient program at Evergreen Manor in Monroe. K.C. 78:4-
19 80:4. The outpatient program was paid for by funds from the
20 Alcohol and Drug Abuse Treatment Support Act (ADATSA), a
21 Departmental program, under which Ms. Coughlin also received a
22 monthly stipend and \$100 per month in food stamps. K.C. 80:5-12.
23 Ms. Coughlin stated in her declaration that she was homeless after
24 her discharge from Valley General inpatient program. She
25 indicated on her application to ADATSA that she was living in a
26 rented room in Monroe, Washington. She stated that she had

1 informed her caseworker of that address and that she was living
2 there. In her deposition, she stated that she did not actually
3 stay at that location, but moved around, staying with friends.
4 K.C. 88:20-89:2; 96:12-25.

5 Ms. Coughlin agreed that she was not ready to assume the
6 full-time custody and care of her children. K.C. 105:18-20. Ms.
7 Coughlin wanted DSHS to provide her with a three bedroom apartment
8 and to facilitate overnight and weekend visits with her children
9 so that she would feel more secure. She believed an apartment
10 would help her overcome her drug dependency. K.C. 98:10-24.

11 Some time in 1992, Ms. Coughlin was approved for Supplemental
12 Security Income. In March, 1993, Ms. Coughlin relinquished the
13 rights to her children.

14 **3. The Sanders**

15 Elizabeth Sanders has three children, A., E., and S. This
16 family came to the attention of CPS in April of 1988 when A.S.,
17 who was eight at the time, disclosed that she had been sexually
18 abused by her stepfather, James Sanders. E.S. 27:13-29:9. The
19 children had also been subjected to significant domestic violence.
20 The Sanders had separated several times as a result. 23:10-23;
21 24:22-25:20; 26:10-27:1.

22 When A. disclosed the sexual abuse to Ms. Sanders, she made
23 a referral to CPS. E.S. 29:16-17. A CPS caseworker arranged for
24 Ms. Sanders and her children to be picked up and transported to an
25 emergency shelter that day. E.S. 29:18-30:5. However, Ms.
26 Sanders left the safe house with the children three days later,

1 without notice to the domestic violence project or to the
2 caseworker. E.S. 30:7-14. A dependency petition was filed by the
3 caseworker at this time due to concerns about Ms. Sanders' ability
4 to protect the children, but the children were not placed in
5 foster care. B.N. 14:25-16:19.

6 The next month, Ms. Sanders took her children and left the
7 State. Her purpose in doing so was to help Mr. Sanders avoid
8 prosecution for pending criminal charges arising from the sexual
9 assault of A. E.S. 33:12-21. From August, 1988, to April, 1989,
10 Ms. Sanders and the children lived in a two bedroom apartment in
11 Costa Mesa, California paid for by Mr. Sanders. Ans. to Interrog.
12 1.40; E.S. 33:1-11.

13 In March, 1989, the children were returned to Washington
14 pursuant to a Juvenile Court order. E.S. 34:16-35:12. Ms.
15 Sanders agreed to dependency in November, 1989, based on the facts
16 established by the Sanders' criminal convictions: Mr. Sanders of
17 Statutory Rape of A. and Ms. Sanders of Felony Witness Tampering.
18 E.S. 38:15-16. Ms. Sanders lived with Mr. Sanders until he went
19 to prison. E.S. 36:13-15. She agrees that while she was living
20 with Mr. Sanders, it would have been dangerous for the children to
21 have been returned. E.S. 36:16-19. At all times in the course of
22 the dependency, the court held all of the hearings required under
23 RCW 13.34.

24 In June, 1990, the children were moved from foster care to
25 relative care at the request of Ms. Sanders. E.S. 45:8-19. She
26 was planning to reunite with them when she could afford it. E.S.

1 46:22-47:5. However, the previous month she changed jobs and
2 accepted a night security job at an "adults-only" retirement
3 complex that required her to live on the premises in an apartment
4 that was provided to her as part of her compensation. E.S. 11:11-
5 23; 16:1-18. At the time she took the job, she realized that her
6 children would not be able to live with her. E.S. 16:11-23;
7 45:20-23. She did not intend at that time to be immediately
8 reunited with her children. E.S. 46:14-47:10.

9 In October, 1990, the juvenile court reiterated that the
10 children could be reunited with Ms. Sanders as soon as she was in
11 a situation to have the children returned to her. B.N. 46:2-25.
12 She had not been in contact with her caseworker in several months.
13 B.N. 49:2-9. She had been having the children with her regularly
14 on weekends for overnight visits. E.S. 49:22-25.

15 Ms. Sanders' caseworker was not able to contact her again
16 until June 1991, despite numerous attempts by phone, letter, and
17 via relatives. B.N. 52:21-53:3. The caseworker was prepared to
18 reunify the family as soon as Ms. Sanders obtained appropriate
19 housing. He wanted to supervise an in-home dependency to assure
20 himself of her ability to care for them. B.N. 109:19-110:5. She
21 had had contact from Mr. Sanders as recently as a month prior to
22 her deposition on October 15, 1991. E.S. 44:16-23.. She testified
23 that she has not divorced Mr. Sanders due to finances. E.S.
24 99:13-15.

25 Ms. Sanders requested that the Department provide her with
26 financial and medical assistance, and food stamps for herself and

1 her family. E.S. 97:14-19. She requested that the Department
2 provide a three bedroom apartment for her and the children. E.S.
3 86:2-5. She believed that the defendants should pay all or most
4 of the monthly rent at first; she could not say how long she would
5 need this assistance. E.S. 85:19-88:2.

6 The caseworker supplied Ms. Sanders with referrals for low-
7 income housing when he was notified that she no longer intended to
8 go to Arizona with the children, but it took her some time to
9 follow up on them. B.N. 110:13-18; E.S. 78:25-80:25. Ms. Sanders
10 made arrangements with her employer, in late 1991, to work full
11 time during the day when her children come to live with her. B.N.
12 53:11-18. She found housing suitable for her and the children,
13 her children were returned to her and the dependency was
14 dismissed.

15 III. SUMMARY OF ARGUMENT

16 Pursuant to RCW 74.13 and RCW 74.14A the legislature granted
17 the Department of Social and Health Services (Department) broad
18 discretion to decide what child welfare services to provide. The
19 legislature decided to rely on the expertise of the Department and
20 "[t]he wisdom, necessity or expediency of a legislative enactment
21 is not subject to judicial review." School Directors v. Dept. of
22 L & I, 82 Wn.2d 367, 374-5, 510 P.2d 818 (1973).

23 Plaintiffs state that they are homeless and imminently
24 homeless families⁸ and, pursuant to RCW 74.13.031, 74.14A et seq.

25
26 ⁸ A copy of the Stipulated Order of Class Certification
containing the definition of the class is attached. App. 17-18.

1 and parts of 13.34 they are entitled to receive housing assistance
2 from the Department. They define "housing assistance" as:

3 "Housing assistance" is help that provides
4 necessary emergency shelter and transitional or
5 permanent housing. It can take a variety of forms,
6 including cash assistance for rent, deposits and other
fees, vouchers, counseling and other services to help a
family locate housing, or the provision of the shelter
and housing itself.

7 Plaintiff's Second Amended Complaint at 3.

8 The Department has created a system of providing child
9 welfare services to children at risk of abuse and neglect. The
10 State's Child Welfare Plans delineate the various services offered
11 by the State. For example, The Plans describe case management
12 services, day care, shelters and counseling for domestic violence
13 victims, home-based services, case management, home-builders,
14 foster care and other services. Exs. A-C.

15 The statutes do not require housing assistance and a "court
16 may not read into a statute those things which it conceives the
17 legislature may have left out unintentionally." Bennett v. Hardy,
18 113 Wn.2d 912, 784 P.2d 507 (1990).

19 In addition, Congress and the Washington State Legislature
20 have directly addressed the housing needs of low-income families,
21 homeless families and families with children in foster care. They
22 have delegated responsibility in these areas to agencies with
23 considerable expertise in housing: the Federal Housing and Urban
24 Development (HUD) and the Washington State Department of Community
25 Development (DCD). See discussion infra at pp. 30-36.

1 The legislature has lawfully delegated to the Department the
2 authority to provide child welfare services. The Child Welfare
3 Plans describe the services available. The plaintiffs do not
4 maintain that child welfare services are not provided. Instead,
5 the plaintiffs seek to dictate the precise nature of the services
6 offered by defendants. They seek to compel the Department to
7 provide specific housing assistance. In short, the plaintiffs
8 seek to substitute their judgment for the judgment of the
9 Department as to the proper amount and scope of child welfare
10 services.

11 There is no statutory or case law authority to support the
12 plaintiffs' position. The State statutes dealing with the welfare
13 of children and the State Plans that the Department has developed
14 confer no entitlement to specific housing services on any class of
15 plaintiffs. Nor does the "reasonable efforts" clause of RCW
16 13.34 contain any language which allows this court to create a
17 housing program, at state expense, for a class of plaintiffs.

18 The absence of a statutory foundation for a right to specific
19 housing services for the plaintiff class entitles the defendants
20 to summary judgment as a matter of law on the remaining state law
21 claims.

22 IV. ARGUMENT

23 A. THE GENERAL CHILD WELFARE PROVISIONS OF RCW
24 74.13 AND 74.14A PROVIDE THE DEPARTMENT WITH
25 BROAD DISCRETION TO DETERMINE WHO RECEIVES
26 CHILD WELFARE SERVICES AND WHAT THE SERVICES
WILL BE.

1 1. The Legislature Did Not Intend The Department To
2 Establish A "Housing Assistance" Program For
3 Homeless Children Pursuant to RCW 74.13.

4 The goal of statutory construction is to carry out the intent
5 of the legislature. Perry v. Island Savings and Loan, 101 Wn.2d
6 795, 806, 684 P.2d 1281 (1984). In construing the legislature's
7 intent the Supreme Court has stated that "...we must construe the
8 statute by evaluating such indicia as the legislative history of
9 the enactment of the statutes, and of subsequent amendments
10 thereto, the interpretation given by administrative agencies, and
11 the expression of legislative purpose, if any." Green River
12 College v. HEP Board, 95 Wn.2d 108, 113, 622 P.2d 826 (1980). See
13 Bradley v. Dept. Labor & Industries, 52 Wn.2d 780, 786-7, 329 P.2d
14 196 (1958). (An agency's interpretation is entitled to
15 considerable weight in determining legislative intention.)

16 The plaintiffs' case is predicated on one word in RCW 74.13
17 which states that the Department shall have a plan for "homeless,
18 runaway, dependent, or neglected children." RCW 74.13.031(1).⁹
19 The word "homeless" is also in the definition section of the
20 statute. RCW 74.13.020(2). They maintain that this statutory
21 language requires the Department to have a housing assistance
22 program for homeless children. The Department, however, has never
23 interpreted "homeless" to signify lack of housing. The Department
24 has interpreted this statute to require that it implement a plan
25 that addresses the needs of abused and neglected children. The

26 ⁹ RCW 74.13.031(1) and RCW 74.13.020(2) are attached. App.
19-20.

1 legislature, which has amended the statute numerous times, has
2 affirmed the Department's interpretation.

3 Every factor in Green River, supra supports the Department's
4 interpretation. First, the declaration of purpose of the relevant
5 statutory language for child welfare services is general and
6 states:

7 The purpose of this chapter is to safeguard,
8 protect and contribute to the welfare of the children of
9 the state, through a comprehensive and coordinated
10 program of public child welfare services providing for:
11 Social services and facilities for children who require
12 guidance, care, control, protection, treatment or
13 rehabilitation; setting of standards for social services
14 and facilities for children; cooperation with public and
15 voluntary agencies, organizations, and citizen groups in
16 the development and coordination of programs and
17 activities on behalf of children; and promotion of
18 community conditions and resources that help parents to
19 discharge their responsibilities for the care,
20 development and well-being of their children.

21 RCW 74.13.010 (emphasis added).

22 The declaration is aimed at all children in the State of
23 Washington. It does not indicate an intention to establish a
24 housing program or any other specific program, for, or limited to,
25 any class of children. The declaration also recognizes that
26 parents are responsible for the "care, well-being and development
of their children." Id.

Second, the Department has consistently fulfilled its duty to
have a plan for "homeless, dependent, runaway or neglected
children" by producing and implementing child welfare plans.
These plans describe the child welfare services available in the
state. The focus is on children who are at risk of abuse and

1 neglect and families in conflict. Homeless children are not
2 separated from other children in the services offered nor are
3 there any provisions for "housing assistance" only for "homeless"
4 children. See Exs. A-C.

5 Courts defer to agency expertise when they interpret a
6 statute. White v. State, 49 Wn.2d 716, 725, 306 P.2d 230 (1957).
7 And the persuasive force of a Department's interpretation is
8 increased when "[T]he section is subsequently (1) considered by
9 the legislature, (2) amended in some other particular, and (3) the
10 administrative construction of the section is not repudiated."
11 (cites omitted). Id. at 725. Each of these factors applies in
12 this case.

13 When the legislature enacted RCW 74.14A, it requested two
14 reports which examined the child welfare system. Exs. O, P.
15 Neither report documented a housing assistance program for
16 homeless children, yet the legislature made no effort to direct
17 the Department to create such a program. The report of the
18 Governor's Commission on Children also examined the child welfare
19 system and made no recommendations regarding housing assistance
20 programs. Ex. S. These reports are probative of the
21 legislature's knowledge of the child welfare system. The
22 legislature knew there were no specific programs for "homeless"
23 children and never intended to create any. Cf. Green River, supra
24 at 831 (court finds report to legislature probative of legislative
25 intent). The legislature has amended RCW 74.13.031 numerous
26 times, and has never sought to have the Department file a plan for

1 "homeless" children.¹⁰ The legislature has also amended other
2 parts of RCW 74.13 and has established specific services by
3 creating and describing specific programs.¹¹ It is obvious that
4 the Department has properly interpreted the statute and carried
5 out the legislature's intent.

6 Third, the legislative history supports the Department's
7 interpretation. The word "homeless" was not intended to signify
8 a lack of housing when the statute was passed by the legislature
9 in 1937. It referred to children who did not have families.

10 The word "homeless" was used in the 1935 Social Security Bill
11 passed by Congress to provide federal funding to the states for
12 social welfare programs. Section 521 of that bill, in relevant
13 part, provided:

14 Sec. 521. (a) For the purpose of enabling the
15 United States, through the Children's Bureau, to
16 cooperate with establishing, extending, and
17 strengthening, especially in predominately rural areas,
18 public-welfare services (hereinafter in this section
19 referred to as "child-welfare services") for the
protection and care of homeless, dependent, and
neglected children, and children in danger of becoming
delinquent. . .

20 ¹⁰ Parts of RCW 74.13.031 have been amended by Laws 1983,
21 ch. 118, § 3; Laws 1983, ch. 246, § 4; Laws 1987, ch. 170, § 10;
Laws 1987, ch. 505, § 69; Laws 1990, ch. 146, § 9.

22 ¹¹ See e.g. RCW 74.13.095 (legislature recognized shortage
23 of affordable day-care and authorized an expansion grant for
24 that service) Laws 1988, ch. 213, § 3; RCW 74.13.075
25 (legislature recognized problems with accessibility to services
26 for sexually aggressive youth so established a program and
funded it) Laws 1990, ch. 3, § 305; RCW 74.13.250 (legislature
recognized and established a program for preserving and training
of foster parents) Laws 1990, ch. 284, § 2; RCW 74.13.270
(legislature established a program for respite care for foster
parents) Laws 1990, ch. 284, § 8.

1 Social Security Act, 74 Stat 620, ch. 531, § 521, (1935) (emphasis
2 added).

3 The U.S. House of Representatives Report accompanying the
4 1935 Social Security Act discusses the purpose of this particular
5 provision relating to "child welfare" services:

6 . . . These services are concerned with the 300,000
7 dependent and neglected children, the 200,000 children
8 who annually come as delinquents before the courts, and
the 70,000 illegitimate children born each year.

9 H.R. Rep. 74-615, 74th Cong., 1st Sess., 24 (1935). It is evident
10 from this language that Congress was not speaking in terms of a
11 separate category of children whose families lacked housing, but
12 of children who lacked a family unit, whether by virtue of
13 abandonment, illegitimacy or delinquency.

14 In 1937, the Washington legislature passed S.B. 295 "An Act
15 relating to and providing for aid to dependent children, child
16 welfare services and services to crippled children as included in
17 the Federal Social Security Act...". See preamble to Chap 14,
18 1937 Wash. Laws 452. Section 6 of the state act provided:

19 Child Welfare Services. The department of social
20 security, through and by means of the division for
21 children, shall have the power to cooperate with the
22 Federal government, its agencies or instrumentalities in
23 developing, administering and supervising a plan for
24 establishing extended aid and strengthening services for
25 the protection and care of homeless, dependent, and
26 neglected children, and children in danger of becoming
delinquent.

(Emphasis added).

24 Because the 1937 state act was modelled after the 1935 Social
25 Security Act--and adopted this specific language verbatim--the
26

1 purpose behind the state enactment can be discovered by
2 understanding the purpose behind its federal counterpart. See
3 Everett Concrete v. Dept. of Labor & Industries, 109 Wn.2d 819,
4 823, 748 P.2d 1112, 1114 (1988).

5 This definition of "homeless" as a child lacking a family
6 unit is consistent with other child welfare statutes in existence
7 at the time of the 1937 legislation. See "an Act for Protection
8 of Orphan, Homeless, Neglected or Abused Children," 1903 Wash.
9 Laws, ch. 49, later codified at RCW ch. 26.27, repealed, 1984
10 Wash. Laws, ch. 155 § 39 (providing for foster care placement and
11 adoption of children through benevolent or charitable societies
12 incorporated . . . for the purpose of receiving caring or placing
13 out for adoption, or improving the condition of orphan, homeless,
14 neglected or abused minor children . . .". Id., § 1.¹²

15 Since 1937, the reference to services for protection and care
16 of "homeless . . . children" has remained substantially unchanged
17 in both state and federal statutes, notwithstanding numerous
18 recodification of the respective child welfare statutes. See 42
19 U.S.C. § 625(a)(1)(A).¹³ Accordingly, the term has retained its

20
21 ¹² This definition of "homelessness" is further supported
22 by the child welfare literature of the early 20th century, which
23 commonly used the term "homeless child" to refer to a child that
24 had no family or had to be removed from it. See generally,
25 Proceeding of the Conference on the Care of Dependent Children
26 in Washington D.C., Document No. 721 (GPO 1909).

24 ¹³ Federal law defines child welfare services as "public
25 social services which are directed toward the accomplishment of
26 the following purpose: (A) protecting and promoting the welfare
of all children, including handicapped, homeless, dependent or
neglected children; . . . " 42 U.S.C. § 625(a)(1).

1 original meaning through subsequent legislative reenactment. See
2 Perry v. Island Saving & Loan Ass'n, 101 Wn.2d 795, 805 n.6, 684
3 P.2d 1281, 1287 n.6 (1984) (provisions of prior statute carried
4 forward and reenacted in subsequent statute should be construed as
5 law continuing from first enactment); Kuehl v. Edmonds, 91 Wn.
6 195, 198, 157 P. 850 (1916). The original legislative intent of
7 the statutory language providing for the "protection and care of
8 homeless . . . children" cannot be construed to pertain to
9 children whose families lack adequate housing.

10 Additionally, the general language and the word "homeless" of
11 RCW 74.13.03 are derived from the federal statute requiring states
12 to provide child welfare services. See fn. 13, supra. The State
13 Child Welfare Plans are sent to the federal government and, even
14 though they contain no housing assistance programs for homeless
15 children, have been approved by the federal government.
16 Declaration, App. 1-2. Clearly, the federal government does not
17 construe the word "homeless" children to signify lack of housing.

18 2. The Children And Family Services
19 Act, RCW 74.14A, Was Not Intended
20 to Create a "Housing Assistance"
21 Program.

22 The plain language of RCW 74.14A.020 sets forth policy
23 guidelines.¹⁴ There are no references to "homeless children" or
24 to any specific child welfare services. It is well established in
25 Washington that "statutory policy statements as a general rule do

26 ¹⁴ The statute is attached. App. 21-24.

1 not give rise to enforceable rights and duties." Aripa v. Social
2 and Health Services, 91 Wn.2d 135, 139, 588 P.2d 185 (1978).

3 The plaintiffs maintain that RCW 74.14A creates the right to
4 "housing assistance" for "homeless" children. The language of RCW
5 74.14A is general and was intended as policy guidelines for the
6 Department. The statute speaks in broad terms of serving families
7 in the least restrictive setting, of coordinating services, and
8 implementing comprehensive preventative and early intervention
9 services. RCW 74.14A.020. No specific services are specified.
10 The legislature has demonstrated, in RCW 73.13, its ability to
11 delineate services when it desired to. See fn. 11, supra.

12 The clear intent of the legislature was to set broad
13 guidelines and goals for the Department. This intent was
14 confirmed by the legislature in a 1992 amendment which states in
15 part:

16 To update, specify, and expand the policy stated in
17 RCW 74.14A.020 the following is declared:

18 It is the policy of the State of Washington to
19 promote . . .

RCW 74.14A.025 (emphasis added).

20 This amendment leaves no doubt that RCW 74.14A sets policy
21 guidelines but does not mandate the creation of specific services.
22 The Department has consistently interpreted RCW 74.14A as policy
23 guidelines, not authorization for specific services. Declaration,
24 App. 1-2. The history of RCW 74.14A supports the Department's
25 position. In 1983, when 74.14A was originally passed, the
26 legislature authorized the Department to do a study regarding

1 child welfare services. In doing so, the legislature deferred to
2 the Department's expertise in the area of child welfare issues.
3 The legislature placed the Department in charge of the studies and
4 made it responsible for designing the specific action steps to be
5 taken to implement the legislature's policies.

6 The Department produced an "Implementation Plan," Ex. O, and
7 "A Cost Plan - Children and Family Services", November 1984,
8 ("Cost Plan"), Ex. P. The Cost Plan documented the Department's
9 progress in the Implementation Plan and it described the cost of
10 child welfare services enhancements. Id. at 4. The enhancements
11 were not funded and the Department has construed RCW 74.14A to be
12 policy guidelines. Declaration, App. 1-2.

13 The Implementation Plan and Cost Plan requested by the
14 legislature demonstrate that the legislature had concerns about
15 the child welfare system but that there were no specific concerns
16 regarding "homeless" children as a separate category, or "housing
17 assistance". None of the action steps in the two studies involved
18 housing assistance nor did the legislature direct the Department
19 to address the issue.

20 3. There Is No Due Process Violation
21 Because RCW 74.13 and 74.14A Do Not
22 Create Entitlements To Housing
Assistance.

23 The legislature has, pursuant to RCW 74.13 et seq., delegated
24 to the Department the responsibility for providing child welfare
25 services in the State. RCW 74.14A provides policy guidelines for
26 the delivery of child welfare services. Neither statute provides

1 an entitlement which provides plaintiffs with procedural due
2 process rights. The court has already rejected plaintiffs'
3 substantive due process claim regarding housing. See Order on
4 Judgment on the Pleadings at 3, § 2.2.

5 This case is identical to Aripa v. Social and Health
6 Services, 91 Wn.2d 1351, 588 P.2d 185 (1978), where petitioners
7 claimed a "statutory right" to comprehensive individualized
8 alcohol treatment, including inpatient, outpatient and
9 intermediate care. Id. 91 Wn.2d at 138. They relied on language
10 which stated that "The Department shall . . . (3) cooperate . . .
11 in establishing and conducting programs to provide treatment for
12 alcoholics . . . who are clients of the correctional system". Id.
13 at 137. The Court observed that the Department provided alcohol
14 treatment services. Id. The court then held that since the
15 statutes did not specify the precise programs the Department
16 needed to offer "the petitioners' proposition that individualized
17 comprehensive alcohol treatment is statutorily guaranteed is
18 without merit." Id. at 138.

19 In this case, the child welfare statutes, similar to the
20 statutes in Aripa, allow the Department to decide the services
21 that will be provided. The Department provides services but it
22 does not provide the precise services the plaintiffs desire. This
23 court must hold, as the Aripa court did, that the plaintiffs do
24 not have a statutory right to housing assistance and that their
25 procedural due process claim is without merit.

1 Other jurisdictions have rejected procedural due process
2 claims for child welfare services. In B.H. v. Johnson, 715 F.
3 Supp. 1387 (N.D. Ill. 1989) the court rejected a due process claim
4 on behalf of foster care children because there were no "standards
5 in the statutory provisions they cite by which a due process
6 hearing can determine what services are available or appropriate
7 under the circumstances." Id. at 1399. The court recognized that
8 terms such as "appropriate services," "services necessary to his
9 or her proper development . . ." and "stabilize the home
10 environment, preserve family life whenever possible and protect
11 the health and safety of children" are all incapable of precise
12 definition. Id. at 1400.

13 In Minnesota, the court reached the same conclusion and held
14 that a family did not have a property interest in social services.
15 Doe v. Hennepin County, 858 F.2d 1325, 1328-29 (8th Cir. 1988).
16 The plaintiff's due process claim was based on the general child
17 protection statute but the court rejected the claim stating that:

18 To have an entitlement the benefit must be clearly
19 definable; public assistance, social security or
20 unemployment benefits are examples of such. Goldberg v.
21 Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287
22 (1970). As the district court observed, the social
23 services defined by Minnesota statutes will not be
24 proper in some cases, and immediate separation of the
25 family may be necessary. The provision of social
26 services is qualified by the considerable discretion
placed in the hands of those who administer it. The
district court also pointed to the lack of specificity
of the Minnesota statute, and it did not err in
concluding that there was no specific entitlement to
such services.

Id.

1 RCW 74.13 and RCW 74.14A do not provide an entitlement of any
2 child welfare services to any persons and certainly do not provide
3 an entitlement to housing assistance to "homeless children" as
4 defined by the plaintiffs.

5 B. BOTH CONGRESS AND THE STATE LEGISLATURE HAVE
6 ADDRESSED THE HOUSING NEEDS OF LOW-INCOME,
7 INCLUDING HOMELESS, FAMILIES IN OTHER
8 STATUTES.

9 1. Federal Programs For Housing And For The Homeless.

10 The origin of public housing was the United States Housing
11 Act of 1937. 42 U.S.C. §§ 1437 et seq. Congress renewed its
12 commitment to housing for low-income persons in 1949 with the
13 Federal Urban Renewal Program, 42 U.S.C. §§ 1450 et. seq. and in
14 1968 Congress established a ten-year goal "to meet all of the
15 nation's housing needs and eliminate all of its substandard
16 housing." Housing and Urban Development Act of 1968, 12 U.S.C. §§
17 1701. et. seq.

18 Most recently, Congress passed the Cranston-Gonzales National
19 Affordable Housing Act, 42 U.S.C. § 12701 et seq with the goal of
20 providing decent housing for low and moderate-income families.
21 The Act states that its objective is to "ensure that every
22 resident of the United States has access to decent shelter or
23 assistance in avoiding homelessness . . ." 42 U.S.C. 12702(1).

24 The goal of the Act is to expand the supply of rental housing
25 available by investing in affordable housing. the Act recognizes
26 the importance of increasing the investment of private capital in
affordable housing, establishing model programs for providing

1 safe, affordable housing and promoting cooperation and
2 coordination between the Federal, State and Local governments and
3 private industry and nonprofit organizations. 42 U.S.C. §§ 12
4 721-23.

5 The Act made several specific references to families with
6 children in foster care. It amended the Housing and Community
7 Development Act of 1974 to direct local government to include
8 needs and goals of families where lack of housing is a primary
9 factor for the placement of a child in foster care or is
10 preventing the discharge of a child from foster care. 42 U.S.C.
11 § 1439(a)(5), App. 25. It also directed housing authorities to
12 refrain from considering the temporary placement of a child in
13 foster care when considering the family composition and family
14 size for low-income housing. 42 U.S.C. § 1437a(b)(3)(c), App. 26.
15 And the Act authorized public housing agencies to coordinate with
16 child welfare agencies to make housing available to families where
17 lack of housing is the primary factor in the imminent placement of
18 a child in foster care or in preventing the discharge of a child
19 from foster care. 42 U.S.C. § 1437d(o), App. 27.

20 The Act also amended the U.S. Housing Act of 1937 to provide
21 preferences for public housing for homeless families and families
22 whose lack of housing is the primary reason their children will be
23
24
25
26

1 placed in foster care or cannot leave foster care. 42 U.S.C. §
2 1437d(c)(4)(A)(ii)¹⁵; App. 28-29. See 24 C.F.R. § 960.211(a)(3).

3 In 1987, Congress enacted the Stewart B. McKinney Homeless
4 Assistance Act. 42 U.S.C. §§ 11301 et seq. This Act made specific
5 findings that:

6 * * *

7 (3) the causes of homelessness are many and
8 complex, and homeless individuals have diverse needs;

9 (4) there is no single, simple solution to the
10 problem of homelessness because of the different sub-
11 populations of the homeless, the different causes of and
12 reasons for homelessness, and the different needs of
13 homeless individuals...

14 42 U.S.C. § 11301(a).

15 The purpose of the Act is to use "public resources in a more
16 coordinated manner..." 42 U.S.C. § 11301(b)(2). The Act
17 establishes a variety of programs: Federal Emergency Management
18 Food and Shelter Programs, Housing Assistance, Identification and
19 Use of Surplus Federal Property, Education, Training, and
20 Community Service Programs. 42 U.S.C. §§ 11301 et seq.¹⁶

21 ¹⁵ On August 1, 1990, the House voted to authorize \$28
22 billion in housing expenditures. A major feature of the bill was
23 a provision that would require HUD to provide rental aid to
24 families whose lack of adequate housing would result in their
25 children being placed in foster care. The Congressional Budget
26 Office estimated that the bill would cost more than \$1 billion
over five years. Kemp is Dealt Major Defeat on Home-Loan
Program, 48 Cong. Q. 2513, 2514 (1990). The entitlement to
housing assistance was not in the final bill.

¹⁶ The federal Interagency Council on the Homeless
distributes reports summarizing awards in regions and states.
Ex. R. Washington State is ranked 11th in the aggregate amount
of McKinney funds received for FY 87-92. Id.

1 2. Washington State Programs For Housing And For The
2 Homeless.

3 The Washington Department of Community Development ("DCD") is
4 the participating state agency for all programs of the federal
5 Department of Housing and Urban Development which funds the
6 production, development, rehabilitation and operation of housing
7 for low-income persons. RCW 43.63A.065(7).

8 The state has addressed the housing needs of low-income and
9 homeless families by enacting a number of statutes. These
10 statutes recognize that RCW 74.13, 74.14A and 13.34 do not provide
11 for housing assistance because "legislative bodies . . . are
12 presumed to have full knowledge of existing statutes affecting the
13 matter upon which they are legislating." Louthan v. King County,
14 94 Wn.2d 422, 429 617 P.2d 977, (1980).

15 The legislature enacted the "Housing Assistance For Low-
16 Income Persons", codified at RCW 43.185 et seq. This act
17 establishes the Housing Trust Fund and the Housing Assistance
18 Program. RCW 43.185.045 and 43.185.030.¹⁷ The legislature, in
19 its findings, recognized the need of very low-income persons.
20 43.185.010. It specifically allowed DCD to target moneys for
21 "shelters and related services for the homeless," RCW 43.185.070,
22 in addition to other low-income housing. The legislature has also
23 enacted the "Affordable Housing Program," RCW 43.185A, "for the
24 purpose of developing and coordinating public and private

25
26 ¹⁷ DCD publishes reports listing awards granted from the
Housing Trust Fund. Exs. I, J.

1 resources targeted to meet the affordable housing needs of low-
2 income households in the State of Washington." RCW 43.185A.020.

3 DCD has been actively involved in leading the State's efforts
4 to meet the needs of the homeless. It has established pilot
5 programs to evaluate the efficacy of different programs intended
6 to aid homeless families and prevent homelessness. Ex. Q. Its
7 1992 Comprehensive Housing Affordability Strategy contains data
8 about the housing needs of the State and a separate section on the
9 housing needs of the homeless. Ex. N at 28-32. This study
10 contains detailed information on the State's five year strategy
11 for affordable housing, which includes housing for the homeless.
12 Id. at 139-141. In December, 1992 DCD issued a new "Comprehensive
13 Housing Affordability Strategy" (CHAS) for 1993. Ex. N.1. This
14 document stated that:

15 The CHAS (Comprehensive Housing Affordability
16 Study) is a comprehensive planning document that
17 identifies a jurisdiction's overall needs for affordable
and supportive housing and outlines a strategy to
address those needs.

18 Id. at 1.

19 Shelter and services for the homeless were listed as the
20 number one priority. Id. at 7. The plan lists the projects that
21 DCD funds, plans to use state funds to obtain McKinney Act funds,
22 and plans to seek new funds for homelessness prevention and
23 intervention. Id. at 7-9. As for funding sources, the document
24 states:

25 The state distributes HUD's Emergency Shelter Grant
26 Program (ESGP) and the State's Emergency Shelter
Assistance Program (ESAP) to localities through a

1 weighted allocation process. These funds can be used
2 for a wide variety of types of programs, including
3 support and repair of shelters, motel vouchers,
4 services, and homelessness prevention activities. The
5 SRO [single room occupancy] Moderate Rehabilitation
6 Program and Supplemental Assistance for Facilities to
7 Assist the Homeless (SAFAH) were reauthorized by NAHA.
Most programs that fund construction, including WSHFC
programs, can be used to build transitional or permanent
housing for the homeless. The State's Housing
Assistance Program can be used to build or rehabilitate
homeless shelters and transitional housing, as well as
for rental assistance and homelessness prevention.

8 Id. at 9.

9 The legislature has also enacted a mortgage and rental
10 assistance program that targeted dislocated forest products
11 workers, and a "Rental Security Deposit Guarantee Program" aimed
12 at aiding "temporarily homeless persons or families." See RCW
13 43.63A.600, RCW 59.24.010. These programs are operated by DCD.

14 **3. The Governor's Advisory Council On Homelessness.**

15 In addition to the legislative enactments, the Office of the
16 Governor is addressing homelessness in Washington State. The
17 Governor's Task Force on Homelessness was formed to make
18 recommendations concerning homelessness in Washington State. The
19 mission of the Task Force was "to develop a comprehensive
20 political, economic, and social strategy to end homelessness in
21 Washington State." Ex. K at 2.

22 The Task Force report addresses affordable housing, income
23 maintenance, job training, education, health care and the need for
24 coordination between federal, state and local agencies and private
25 business and charitable organizations. Ex. K. This comprehensive
26

1 approach recognizes the complexity of the problem and the fact
2 that there is no single, simple solution to this social dilemma.

3 On February 23, 1991, Governor Gardner, by executive order,
4 established an Advisory Council on Homelessness. Ex. L. The
5 order stated that "because homelessness is a multifaceted problem,
6 its solution requires a coordinated blend of resources and efforts
7 from the private sector and all levels of government." Ex. L at
8 1. The Director of DCD was appointed chair of the Council. Id.
9 In January, 1993, the Council forwarded its first progress report
10 to the Governor detailing the numerous actions that were taking
11 place in government that impact homelessness. Ex. M.

12 C. RCW 13.34 DOES NOT CREATE A RIGHT TO A
13 HOUSING ASSISTANCE PROGRAM.

14 RCW 13.34 governs dependencies, guardianships and termination
15 of parental rights proceedings.¹⁸ There is no delegation of
16 authority in RCW 13.34 to the Department to provide housing
17 services or any specific services. The statute sets forth the
18 procedural protections afforded to families who are involved in
19 the above proceedings. See RCW 13.34.060 (right to shelter care
20 hearings); RCW 13.34.090 (right to an attorney, to introduce
21 evidence, and examine witnesses); RCW 13.34.100 (right to a fact-
22 finding hearing); RCW 13.34.120-130 (disposition hearing and
23 review hearings); RCW 13.34.150 (modification of orders); RCW
24

25 ¹⁸ The relevant portions of RCW 13.34 are attached. - App. 30-
26 33.

1 13.34.190 (standards for a termination proceeding); RCW 13.34.231
2 (standards for guardianship).

3 1. The "Reasonable Services" Required by RCW
4 13.34.130(5)(b)(i) Are Expressly Limited By
5 Statute.

6 Once a child has been found dependent the juvenile court
7 reviews the dependency every six months. RCW 13.34.130(5).
8 During the review the court is required to make specific findings
9 if the child is not returned home. RCW 13.34.130(5)(b). One of
10 the required findings is whether reasonable services were
11 provided. Id.

12 The statute provides:

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

20 RCW 13.34.130(3)(b)(iv) (emphasis added).

21 This section recognizes the fiscal and programmatic
22 limitations of providing services. There is no indication that
23 the legislature intended to create a "housing assistance" program.
24 In fact, it seems clear that the Department's obligation is to
25 help families access the available housing programs in the
26 community.

27 2. The "Reasonable Efforts" Requirements of RCW 13.34
28 Do Not Create A Right To Housing Assistance.

29 a. The Federal Act Requires Only That The State
30 Have An Approved Plan Providing For
31 Reasonable Efforts.

1 The requirement that the court find that reasonable efforts
2 were made to prevent or eliminate the placement of a child are
3 derived from federal law. RCW 13.34.060(8)(a) and
4 13.34.130(1)(b). Thirteen years ago, Congress enacted the
5 Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§
6 620-28, 670-79a, a federal-state cooperative funding statute,
7 which, under Title IV-E of the Social Security Act, 42 U.S.C. §§
8 670-79a, provides federal reimbursement to the States for certain
9 costs of maintaining a child in foster care. The State agreed to
10 file a plan with the Secretary of Health and Human Services
11 meeting certain requirements, including providing that "in each
12 case, reasonable efforts will be made (A) prior to the placement
13 of a child in foster care, to prevent or eliminate the need for
14 removal of the child from his home, and (B) to make it possible
15 for the child to return to his home." 42 U.S.C. § 671(a)(15). No
16 further definition or explanation of what constitutes "reasonable
17 efforts" is provided anywhere in the statute.

18 In Suter v. Artist M., 118 L.Ed.2d 1, 112 S.Ct. 1360 (1992),
19 the Supreme Court interpreted the "reasonable efforts" section of
20 the statute and held that

21 [t]his directive is not the only one given to the
22 States, and it is a directive whose meaning will
23 obviously vary with the circumstances of each individual
24 case. How the State was to comply with this directive,
and with the other provisions of the Act, was, within
broad limits, left up to the State.

25 Id. at 14.
26

1 The Court concluded that there was no federal enforceable
2 right and that "[t]he term 'reasonable efforts' . . . is at least
3 as plausibly read to impose only a rather generalized duty on the
4 State, to be enforced not by private individuals but by the
5 Secretary, in the manner prescribed." (emphasis added) Id. at 16.

6 The "reasonable efforts" language in RCW 13.34 is based on
7 the language from the Adoption Assistance Act. The supremacy
8 clause requires that the State definition of terms must be
9 consistent with the federal definition. Anderson v. Morris, 87
10 Wn.2d 706, 711 558 P.2d 155 (1976). The Department has a IVE plan
11 which has been approved by the Secretary of Health and Human
12 Services. Declaration, App. 1-2. Therefore, it has met its duty
13 under federal and state law regarding "reasonable efforts" to
14 prevent or eliminate the need for removal of a child and to make
15 it possible for a child to return home.

16 **b. There Is No Legislative Intent To**
17 **Grant "Housing Assistance" Pursuant**
to RCW 13.34.

18 The intent of the legislature "is to be determined in the
19 context of the entire statute, interpreted in terms of the
20 statute's general purpose." Anderson, supra at 716. The overall
21 purpose of RCW 13.34 is to provide procedural due process
22 protection for individual families involved in dependency,
23 termination and guardianship proceedings. There is no legislative
24 history or declaration of purpose by the legislature which would
25 enable this court to construe RCW 13.34 as delegating authority to
26

1 the Department to create specific programs for a class of
2 plaintiffs.

3 The "reasonable efforts" language used by the legislature
4 clearly contemplates individual decisions regarding individual
5 families and children. The legislature recognized, like the
6 United States Supreme Court, that "reasonable efforts" "will
7 obviously vary with the circumstances of each individual case."
8 Suter, supra at 14. In the highly charged and emotional area of
9 child welfare, the determination as to what, if any, efforts are
10 reasonable to keep or return an abused or neglected child home
11 must be measured against the unique circumstances and interests of
12 each child and his or her parents.

13 The Department, in chapter 23 of its case manual, has
14 recognized the requirement of "reasonable efforts" and the
15 individual nature of those efforts:

16 "reasonable efforts" do not mean that a laundry-list of
17 all services in the community be offered to a family.
18 Services should be carefully chosen to be responsive to
19 a particular family's needs. Offering a "shotgun" list
20 of services without careful planning may be as
ineffective as offering no services at all. When
available, services should be offered in the family's
own home at times appropriate to the family's schedule
and needs.

21 Ex. T at 23.20.

22 The Department manual recognizes that reasonable efforts will
23 vary depending upon the stage of a proceeding. In some cases,
24 when there is an initial 72 hour shelter care hearing, a
25 caseworker will not have had opportunity to provide any services
26 because of the emergent nature of the case. Id. at 23.20.

1 The highly individual nature of child welfare cases is
2 illustrated in In re Welfare of Hall, 99 Wn.2d 842, 664 P.2d 1245
3 (1983) where the Department, in a termination proceeding, was
4 obligated to affirmatively offer or provide necessary services.
5 In Hall, the Department failed to refer a parent to a parenting
6 class but, in the context of the parent's other deficiencies, and
7 the age of the child, the Court affirmed the termination. Id. at
8 1250. The court found the Department's actions were reasonable
9 given all of the facts of the case.

10 Decisions regarding "reasonable efforts" should be made in
11 Juvenile Court where the court weighs the individual circumstances
12 of each family and the testimony of the parties regarding services
13 and parental deficiencies. Any decision granting "housing
14 assistance" to a class of plaintiffs without consideration of any
15 other factors will undermine the individual caseworker's decision-
16 making and the Juvenile Court's role in determining reasonable
17 efforts in each individual case.

18 Moreover, if this court holds that the "reasonable efforts"
19 language can be enforced by a class of plaintiffs, then the court
20 will create an avalanche of litigation involving parents and
21 children who do not receive the precise services they desire in
22 Juvenile Court.¹⁹

23
24
25 ¹⁹ Because the term "reasonable efforts" is so open-ended
26 there is no limit to what a class of plaintiffs may request. In
this case it is "housing assistance" but in others it could be
specific counseling or specific alcohol/drug treatment services.

1 3. RCW 13.34 Provides Adequate Due Process
2 Protections For Families.

3 The due process protections afforded by RCW 13.34 have been
4 upheld by courts. In a dependency and termination proceeding a
5 parent is entitled to notice, opportunity for a hearing, and
6 representation by counsel. In re Mosely, 34 Wn. App. 139, 660
7 P.2d 315 (1983), rev. denied 99 Wn.2d 1018; In re Myricks, 85
8 Wn.2d 252, 253-54, 533 P.2d 841 (1975). None of the named
9 plaintiffs' rights were violated in this regard.

10 The references to "reasonable efforts" and "reasonable
11 services" were not intended to create rights to housing
12 assistance. The terms are not precise enough to create an
13 entitlement to any particular service. The plaintiffs who are
14 involved in dependency and termination proceedings are permitted
15 to argue for or against services at their disposition hearings and
16 review hearings. RCW 13.34.130(1) and (5). They also have the
17 right to raise the issue of services at separate hearings. RCW
18 13.34.150.

19 D. **AS A MATTER OF LAW THE NAMED PLAINTIFFS' CLAIM FOR**
20 **DAMAGES MUST BE DENIED.**

21 1. The Doctrine Of Discretionary Immunity Defeats
22 Plaintiffs' Claims For Damages.

23 The legislature abolished the doctrine of sovereign immunity.
24 RCW 4.92.090. In Washington, a narrow exception to this rule
25 exists when discretionary acts at an executive level are
26 undertaken. Chambers-Castanes v. King county, 100 Wn.2d 275, 281,

1 669 P.2d 451 (1983); Evangelical United Brethren Church v. State,
2 67 Wn.2d 246, 407 P.2d 440 (1965).

3 In order to decide whether an act falls within the exception,
4 a court considers four questions:

5 (1) Does the challenged act, omission, or decision
6 necessarily involve a basic governmental policy, program
7 or objective? (2) Is the questioned act, omission, or
8 decision essential to the realization or accomplishment
9 of that policy, program, or objective as opposed to one
10 which would not change the course of direction of the
11 policy, program, or objective? (3) Does the act,
omission, or decision require the exercise of basic
policy evaluation, judgment, and expertise on the part
of the governmental agency involved? (4) Does the
governmental agency involved possess the requisite
constitutional, statutory, or lawful authority and duty
to do or make the challenged act, omission or decision?

12 Id. at 225.

13 In Evangelical, a family sued a correctional facility because
14 a 14-year-old escaped and damaged their home. Evangelical, supra
15 at 247-48. The court examined the applicable statutes and
16 dismissed part of the tort claim based on the doctrine of
17 discretionary immunity. Id. at 259. The court reasoned that the
18 legislature delegated broad authority to the Department of
19 Institutions and relied upon its expertise in maintaining the
20 various institutions. Id. at 256. The agency possessed the
21 discretion to establish different levels of security and the
22 expertise to balance security and therapy while trying to
23 rehabilitate juvenile offenders. Id. at 258-59.

24 The actions of the state in this case are similar to
25 Evangelical and clearly meet the test for discretionary immunity.
26 The Department has been delegated the broad authority to provide

1 child welfare services to the children of Washington State. To
2 achieve this goal, it must choose what services it will provide
3 given the fiscal limitations it faces and weighing the resources
4 available within the Department and the local, federal and state
5 agencies and community groups. The decisions regarding child
6 welfare services are based on the evaluations and expertise of the
7 Department and are essential to the provision of services to the
8 children in the state. The acts of the Department in designing
9 the child welfare plans fall within the discretionary immunity
10 doctrine and the claims of the plaintiffs must be dismissed.

11 2. The Statutes Relied Upon By Plaintiffs Do Not
12 Create A Duty To Provide Housing Assistance.

13 In order to prevail on their state law damage claim,
14 plaintiffs must be able to assert that the Department has a duty
15 to provide housing assistance to the named plaintiffs, that it
16 breached its duty and the breach was the proximate cause of
17 compensable damages. Braegelmann v. Snohomish County, 53 Wn. App.
18 381, 766 P.2d 1137 (1989).

19 The Department has demonstrated that the statutes relied upon
20 by the plaintiffs do not create a duty to provide housing
21 assistance to homeless children. When a statute does not require
22 specific actions then there can be no duty which will give rise to
23 a tort. Melville v. State, 115 Wn.2d 34, 38, 793 P.2d 952 (1990).
24 In Melville, the court affirmed summary judgment in favor of the
25 state because the specific mental health treatment claimed by
26 plaintiff was not required by statute. Id. at 39. The principle

1 that a governmental entity must be aware of the duty the
2 legislature has created is longstanding. In Bradshaw v. Seattle,
3 43 Wn.2d 766, 264 P.2d 265 (1953) a plaintiff sued the city for
4 its failure to place a stop sign at a specific location. Id. at
5 776-77. The court dismissed the claim and held that "the
6 legislature must impose a definite duty upon the local authorities
7 in language specific enough so that they can ascertain when they
8 are and when they are not disobeying its command." Id. at 778.

9 The statutes relied upon by plaintiffs create no
10 ascertainable duty to provide housing assistance to any
11 individuals, and certainly not to the broad class of plaintiffs
12 certified in this case.

13 The plaintiffs' claim also fails because there is no legal
14 causation. Washington law recognizes two elements of proximate
15 cause: cause in fact and legal causation. Hartley v. State, 103
16 Wn.2d 768, 777, 698 P.2d 77 (1985). While cause in fact is
17 usually a jury question, "legal causation on the other hand rests
18 on policy considerations as to how far the consequences of
19 defendant's acts should extend. It involves a determination of
20 whether liability should attach as a matter of law given the
21 existence of cause in fact." Id. at 779.

22 In this case, policy considerations limit the liability of
23 the Department. It is patently unjust to extend liability beyond
24 the provision of the housing assistance claimed. The
25 "homelessness" that plaintiffs may have endured is the consequence
26 of numerous factors unrelated to the Department's actions: for

1 example, external factors such as the affordability of rental
2 housing or personal factors such as the plaintiffs' desire or
3 capacity to search for housing.

4 Thus, any failure by the State to provide assistance is too
5 "remote and insubstantial" to impose liability for the housing
6 situation of the plaintiffs. See Hartley, supra at 784.

7 **3. Plaintiffs' Facts Fail To Support A Claim For**
8 **Negligent Infliction Of Emotional Distress.**

9 Even if the plaintiffs were able to establish a duty on the
10 part of the state, their claim still fails. Because plaintiffs
11 have not alleged any intentional or malicious misconduct on the
12 part of the Department, their claim to damages must be based upon
13 a theory of negligent infliction of emotional distress. In
14 Washington, an action for negligent infliction of emotional
15 distress is "limited to plaintiffs who are actually placed in
16 peril by the defendant's negligent conduct" Cunningham v.
17 Lockard, 48 Wn. App. 38, 44-45, 736 P.2d 305 (1987).

18 In Waller v. State, 64 Wn. App. 318, 337 (1992), the
19 plaintiffs sued the State alleging there was a negligent CPS
20 investigation which established the tort of negligent infliction
21 of emotional distress. This action against the State was
22 dismissed because "[t]he caseworker's negligent conduct did not
23 involve actual peril (physical harm) as that term is commonly
24 understood. Thus, the Wallers did not set forth facts sufficient
25 to preclude summary judgment." Id. at 337.

1 None of the named plaintiffs have been in "actual peril".
2 The Hills lived in a three bedroom, two bath subsidized apartment
3 with supportive services while they were "homeless". Mrs. Sanders
4 has always had an apartment and was never subject to any physical
5 harm as the result of a caseworker's action. Ms. Coughlin was
6 homeless by moving from place to place for several months but
7 never reported this to her caseworker, and there is no allegation
8 that she was in actual peril when she was "homeless".

9 **V. CONCLUSION**

10 The Department has complied with all the statutory
11 requirements for providing child welfare services for the children
12 of this State. The state legislature has indicated its intent
13 that child welfare programs shall be administered by the
14 Department and that the primary focus shall be on children who are
15 abused and neglected. Additionally, the legislature authorized
16 the Department of Community Development to address the most
17 efficient ways to alleviate homelessness. The legislature has
18 never indicated that housing services needed to be or should be a
19 component of child welfare services.

20 The Plaintiffs attempt to completely alter and undermine the
21 years of child welfare work and services that have been provided
22 by the Department based upon the use of a single term, "homeless"
23 children, in the enabling statutes. Their claim ignores the fact
24 that services for abused or neglected children are available to
25 all children, regardless of their housing status.

26

1 Since there is no mandate to make a plan for "homeless"
2 children only, there is no duty the Department can have breached
3 that would give rise to a liability for damages. Even if this
4 court were to find that the Department should provide housing
5 assistance, these plaintiffs have no claim that the Department's
6 alleged failure to provide assistance caused any harm.

7 For the foregoing reasons, the Department is entitled to
8 summary judgment on the remaining claims in this lawsuit.

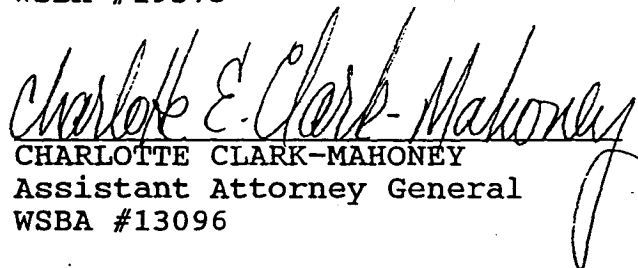
9 DATED this 15th day of September, 1993.

10 Respectfully submitted,

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