

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-2116-CIV-MORENO/DUBÉ

FOSTER CHILDREN BONNIE L.,
by and through her next friend
Donald Hadsock, et. al.,

Plaintiffs,

v.

JEB BUSH, as Governor of the
State of Florida, et. al.,

Defendants.

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CLARENCE HADDOCK
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REPORT AND RECOMMENDATION

THIS CAUSE is before this Court on the Motion to Dismiss filed by the Defendants (D.E. #93) and the Motion to Dismiss filed by Defendant Governor Jeb Bush (D.E. #94) pursuant to an Order of Reference entered by the Honorable Federico A. Moreno, United States District Judge. This Court has reviewed the motions, the file in this cause and has heard argument of counsel.

I. DISCUSSION

A. The Allegations of the Amended Complaint

The complex 116 page, 226 paragraph Amended Complaint filed in this cause seeks declaratory and injunction relief pursuant to 42 U.S.C. §1983 based on various alleged violations of the rights of the Plaintiffs who are children in the Defendants' custody. According to the Amended Complaint, the suit challenges the Defendants' "pattern and practice" of not meeting the constitutional and statutory obligations owed to the children and the "deliberate indifference" by the Defendants to the existence of this pattern and practice. (¶3).

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The Amended Complaint asserts causes of action for Substantive Due Process (Count 1); Procedural Due Process (Count 2); Violations of the First, Ninth and Fourteenth Amendments (Count 3); Violation of the Adoption and Safe Families Act (Count 4); Violation of the Early and Periodic Screening, Diagnosis and Treatment provisions of 42 U.S.C. §1396 (Count 5) and Violation of Title VI of the Civil Rights Act of 1964 (Count 6). The Amended Complaint seeks a declaration that the acts of the Defendants are unconstitutional and unlawful; the imposition of a permanent injunction; the appointment of an expert panel to develop and oversee a plan for reform; the appointment of a permanent ombudsman and the award of fees and costs.

(1) The Plaintiffs

The Amended Complaint sets out extensive allegations concerning each of the Plaintiffs, as is set forth below.

Plaintiff Bonnie L. has been in the foster care system since 1986, and has been subject to abuse, including beatings and other torture by her adoptive parents. The Department of Children and Families received several calls reporting the abuse in 1990, 1993, 1994 and 1997. Bonnie was then taken back into foster care, with no further attempts to seek a permanent family. (¶5-6). The Department recently agreed to Bonnie's adoption by her biological mother, but this was not final at the time of the filing of the Amended Complaint. (¶8). According to the Amended Complaint, Bonnie has suffered and continues to suffer irreparable harm. (¶9).

Plaintiffs Rebecca and Reggie B. are described in the Amended Complaint as 13 year old twins residing in District 9. These children were placed in a shelter in 1997, and were adjudicated dependent on June 1, 1998. Reggie was sent to a group home, but suffered drastic deterioration and was then returned to "his previous overcrowded foster home" where further deterioration occurred.

Reggie was asked to leave the home, and spent weeks moving from one shelter and foster home to another. He is presently in a therapeutic group home. (§10-11). The Amended Complaint adds that a relative was available to be a placement resource for the children, but that no prior request was made for her to care for the children. The Plaintiffs allege that if this resource were utilized earlier by the Defendants, Reggie would not have suffered the several emotional problems he presently faces. Reggie also suffers from a cleft palate and other medical needs, which the Plaintiffs allege the "Defendants have failed to address." According to the Amended Complaint, Reggie missed several medical appointments, "which have caused him to "fall through the cracks" at the clinic." (§12-14).

Plaintiffs Laurie and Lillian S, two sisters born in 1991 and 1993, entered the Defendant's custody in 1994, and are presently in foster care. (§ 17). The girls also have several siblings in foster care in different homes, and they are not provided with visitation. According to the Amended Complaint, the siblings were separated "because Defendants failed to recruit a sufficient number of foster homes for large siblings groups, and failed to arrange for visits between the separately placed children." (§18). The Plaintiffs also allege that this method of administration, while racially neutral, has a disparate impact on Black siblings in foster care such as Laurie and Lillian, and makes sibling separation more likely for Black foster children. (§ 18).

The Amended Complaint also alleges that the Defendants placed the girls in an inappropriate foster home which has been the subject of numerous investigations. According to the Plaintiffs, the Department ignored the complaints about placement and kept the girls there for years. However, after the Department adoption worker requested that the foster mother work on issues involving her home and parenting, the foster mother requested the immediate removal of the children. (§ 21). The

children were then suddenly and traumatically moved from the home and the girls mental and emotional health began to deteriorate. Ultimately, Lillie, at age 7, was involuntarily committed to a mental health crisis unit. (¶ 22).

The Amended Complaint asserts that the Department has located an uncle who wishes to adopt the girls, and in fact, he had informed the Department of this fact in 1994, but was told that relatives could not adopt. According to the Plaintiffs, the failure by the Department to achieve a permanent family more quickly was a result of the practice of treating Black and White foster children differently and in their making less efforts to provide services and develop proper placements for Black children than for White children. (¶ 23, 24).

Plaintiff Leslie F. is a 17 year old foster child who is Black and of Haitian descent. Leslie has been freed for adoption since she was 9 years old, but has never been adopted or provided with a permanent home. Her former foster mother adopted Leslie's biological brother, but refused to adopt Leslie and then cut off all contact between Leslie and her brother. Leslie has had over 30, and possibly as many as 50, different foster care placements and according to the Amended Complaint, was told by her caseworker that a stable placement could not be found because no one wanted her. (¶ 27, 28). According to the Plaintiffs, the large number of placements and the failure to find a permanent home for Leslie was a result of the practices of the Defendants in treating children differently based on their race. (¶29, 30).

The Department found a foster home for Leslie in 1999, but a visit by a supervisor revealed insufficient food and other problems. The concerns were raised with a Department licensing supervisor (the person responsible for determining whether foster homes will be licensed and whether they retain their licenses), and the licensing supervisor was asked to speak with the children

in the home to verify the conditions. This supervisor refused to do so and also refused to call the child abuse hotline to report the concerns about children not being fed. The supervisor indicated that she talks to the foster parents, not the children and that she is an advocate for the foster parents and does not call the hotline to report them. (§ 32).

The Amended Complaint also alleges that the Defendants make arbitrary and capricious decisions as to who will remain in care after reaching 18 years of age; that the Defendants have prevented Leslie from participating in proceedings relating to her case plan, and that she is at risk of being denied participation in an Independent Living Program. (§ 36-38).

Plaintiff Sandra M. is a 16 year old who was placed in foster care in 1989. Sandra and her brother were placed in a foster home together for two years, and after their natural parent's rights were terminated, the foster parents requested to adopt the children. However, according to the Amended Complaint, this request was denied by the Defendants "for no legitimate reason." (§ 39). The siblings were then separated, with both being held in foster care. After being placed in several different homes, Sandra was eventually placed with a stable foster parent.

The Defendants then moved Sandra from this home to an adoptive home with her brother and an older sister. This placement lasted only 6 months due to disturbed behavior by the siblings, and Sandra was then returned to the foster home. The foster parent decided to adopt Sandra, then age 8, but problems developed, and Sandra was ultimately returned to the custody of the Defendants. After being placed in a shelter where she was attacked and beaten, Sandra was returned for a time with the adoptive mother, and then placed back in foster care. (§ 41, 42).

Sandra was placed in several foster homes and then in a group home, which subsequently closed. The Defendants then placed Sandra at a crisis unit at a Mental Health Center, where she

remained for one year. Ultimately, she was placed in a residential psychiatric setting, and then in a therapeutic group home. According to the Plaintiffs, the Defendants have never moved to terminate the parental rights of the adoptive parent and the Defendants have the intention for Sandra to remain in foster care until she reaches majority, thus, effectively abandoning any attempt to find her a permanent home. (§§43, 44).

Tanya M. is a 14 year old first placed in foster care in August, 1998. She was placed in several foster homes where she was subject to neglect and dangerous treatment including inadequate feeding which resulted in a harmful weight loss. In another home she was one of 8 children who slept in one bedroom and shared one dresser. (§ 46). The Amended Complaint also sets out allegations concerning Tanya's placement at another overcrowded home, in which the foster mother had advised the Department that Tanya was not acceptable for placement. Despite this warning, Tanya was left at the home after the Department's office had closed, and ultimately, Tanya left and was found by a police officer walking alone at night carrying her possessions in bags and a backpack. (§ 47).

Tanya was sent to another home and was doing well. She was then returned to her biological parents, but the reunification failed, and less than two months after returning, she was assaulted by her father and suffered a broken arm. Tanya was then placed in an overcrowded group shelter, with plans by the Department to place Tanya at a wilderness camp used primarily as a moderate risk delinquency commitment program, even though she is not delinquent and has not committed any violations of law. According to the Amended Complaint, Tanya has run away from the shelter and her whereabouts are not known. (§§ 48, 49, 51). The Plaintiffs also allege that she has never been placed with her three younger siblings who were also removed from the biological parent's home.

and that no proper decision has been made that a joint placement would be detrimental to any of the children. (§ 50).

Jay and Candice D. are brother and sister who were born in 1992 and 1991, respectively. They have been in foster care since February, 1996, with parental rights to these children terminated in June, 1998. The children have resided in a stable environment since April, 1997, and both have bonded to their group home parents. Both children had behavioral problems during the time that their older brother was placed at the group home, but were doing well since his removal. According to the Amended Complaint, the children's therapist as well as the staff at the group home indicated their belief that the children's behavior stabilized because the removal of the older brother gave them an increased sense of security. (§ 53-56).

The children had only three visits from a Department caseworker between April, 1997 and February, 2000. However, on March 20, 2000, the Defendants announced that they intended to remove the children from the group home, place them in an interim placement and then put them in another foster home with the older brother. According to the Plaintiffs, this plan is presently on hold, but the Department has excluded the personnel of the group home from any planning or meetings concerning the children. (§ 57, 58).¹

Plaintiff Matthew I., is two years old, and according to the Amended Complaint, was "neglected in a grossly overcrowded foster home." (§ 61). In October, 1999, Matthew was observed by a worker from an agency that contracts with the Defendants to be very sick, having difficulty breathing and with a bite mark on his arm. The next month, another worker from the agency found

¹ On March 30, 2001, the Defendants filed a Notice of Filing Final Judgment of Adoption for Jay D. and Candice D., which indicated that the children had been adopted and were no longer in the physical or legal custody of the Department. (D.E. #205).

Matthew to be very dirty, with a bruise on his chin, a dirty diaper and long, dirty, finger nails and toe nails. He was also sick and wheezing. The worker took Matthew to a hospital emergency room where he was found to have a 104 degree fever and was diagnosed with bacterial pneumonia. The foster home was noted as emitting a strong odor, with old food on the floor, and a sink overflowing with dirty dishes. (¶ 61-63).

Approximately 2 weeks later, a Department worker found Matthew to be very sick, dirty and with a black eye. The foster mother reported that Matthew and another child had fallen off a couch while fighting. The worker did not report the condition of either the home or Matthew to the hotline. (¶ 64).

Matthew was removed from the home in January, 2000. The new foster mother found him to be very sick and to have difficulty breathing. The child was provided with a nebulizer, but the new foster mother did not know how to use it, and she was not provided with any instructions. Although Matthew did well at this home, he was returned to the prior home after only one week. Later examinations of that home found that Matthew was extremely dirty and that he was consistently sick at his day care center. He was removed from the home after approximately 2 weeks. The Amended Complaint alleges that Matthew has suffered and continues to suffer harm as a result of the Defendants' failure to provide the medical care and living environment required to meet his needs. (¶ 64-65).

Plaintiff Hugh S. is 16 years old, and has been in the custody of the Department since 1996. Hugh was turned into the Department by his father, who claimed that he was not the child's biological father. According to the Plaintiffs, the parental rights of the father were never terminated, and the Department has not located Hugh's natural father or attempted to locate a permanent

substitute family. In fact, Hugh has been subject to multiple placements, including many which have lasted only one night and he has often had inadequate and dirty clothing. (¶67-68).

Leanne G., is a two and one-half year old Black girl placed in a shelter at birth. Leanne was placed in an inadequate foster home, and by 13 months old, she was still not on solid food and was kept in a crib or playpen. (¶ 71). According to the Amended Complaint, the child's foster mother refused to take the child to a doctor between March and September, 1999, and when a Department worker took the child, the worker was unable to provide any information to assist in the treatment. The foster mother refused to attend the appointment. (¶ 72). The Plaintiffs also contend that Leanne has not seen her five siblings in foster care for one year. According to the Plaintiffs, the pattern of practice by the Department has resulted in a disparate impact on Black siblings and decreases the likelihood of permanent placement. (¶ 73-78).

Leanne's sister, Plaintiff Tammy G., is a nine year old Black foster child, who only saw her siblings only once during the year prior to the filing of the Amended Complaint. (¶ 79). Tammy resided in four separate homes in three years, and in one home she was subject to being forced to stand with one leg in the air for considerable periods of time. In another home, Tammy was punished by having the foster mother twist her arm behind her back and twist her nose. According to the Amended Complaint, this abuse was not adequately investigated by the Department, which was consistent with its practice of being more tolerant of child abuse committed by Department agents and providers than that allegedly committed by parents. (¶ 80). Presently, Tammy sleeps with three other children in a room attached to a converted garage, and is not being properly fed. (¶ 81). The Amended Complaint also asserts that Tammy has not achieved a permanent home due to the Defendant's failure to take the necessary steps including developing a sufficient number of

adoptive homes, which is based in part on the practice of treating Black and White foster children differently. (§ 82, 83).

Elaine R. is an 11 year old who has been in foster care since 1993. Her parental rights were terminated in 1997, and Elaine was placed for adoption with a licensed foster family. The father of this foster family had a criminal record for sexually abusing children at the time of the placement, and Elaine was subjected to multiple sexual assaults and abuse for the nearly 12 months she resided in the home. Elaine was ultimately removed, and criminal charges were instituted against the foster father. (§85). According to the Plaintiffs, a suitable adoptive parent has been found, but the Defendants are delaying the adoption, thus denying the opportunity for a permanent family. (§86). The Amended Complaint also alleges that Elaine has been separated for no reason from her siblings who are also in foster care. (§85, 87).

Plaintiff Paul B. is a 16 year old Black child who was placed under Department supervision in 1983 and remained there until entering foster care in 1993 at the age of 10. Paul has had at least 33 placements, including time spent in a shelter facility which was used to house juvenile delinquents and violent offenders. (§ 88). The repeated placements have caused Paul to fall behind in his education; denied him a good permanent family, and leaves him at substantial and imminent risk of being subjected to the continued harms. (§ 90).

Rachel C.. is 13 years old, and was improperly kept in a temporary shelter for over a year where she was housed with girls with significant mental health and delinquency histories. She left the care of the Department for 2 months, but returned to their custody as a foster child and was placed in a shelter. (§ 94).

Plaintiff Cathy W. is 12 years old, and was held in a temporary shelter from May 1999, even

though the Defendants knew that this placement had inadequate supervision and exposed her to danger. In fact, Cathy was involved in several sexual incidents at the shelter. Cathy was subsequently placed in a residential treatment facility. (§ 96, 97).

Larrisa C. was 2 years old in July, 2000, and while in foster care she was placed in a home where she was subjected to repeated abuse including traumatic brain injuries which left her partially paralyzed with impaired vision and speech. According to the Amended Complaint, the Defendants failed to screen the home adequately and to supervise the home once she was placed. (§ 98).

John J., age 12, entered the Defendant's custody in 1989 and has been in multiple foster placements. At one point, John was kept for over a year in an over-crowded foster home where he was subjected to beatings and sadistic abuse. The home had as many as 10 children present, although the Defendant's rules prohibited more than five children. The Amended Complaint also asserts that the Defendants failed to search for a suitable relative placement, although it was discovered years after his entry into custody that an aunt was willing to care for him. (§100, 101).

The final Plaintiffs listed in the Amended Complaint are Melinda and Karina, sisters age 17 and 18 who have been held in foster care since 1986. According to the Amended Complaint, the Defendants misled Melinda into signing a form ending foster care efforts, rather than participating in the subsidized independent living program.(§ 103). The Defendants also deprived Melinda of the opportunity to attend judicial and administrative reviews addressing her status and have failed to provide necessary transportation to attend any proceedings. (§ 109). Karina remains in foster care. Neither child was ever placed for adoption and no alternative form of permanency for either was ever pursued. In fact, no effort was made to terminate the parental rights of the absent father. (§ 103).

The Plaintiffs allege that both girls have been subjected to rape, beatings and neglect in foster care and that Melinda contracted syphilis when she was nine years old. Both have been damaged by improperly administered psychotropic medications and suffer from permanent mental disabilities. (¶ 104). The Amended Complaint also asserts that the harm suffered by the children in not having permanent residences derived in part from the Defendants' practice of treating Black and White foster children differently based on race and on the disparate impact on Black children from other practices. (¶ 105, 106).

(2) The Defendants

The Amended Complaint also addresses the role of the various named Defendants. (¶ 111-116). Governor Jeb Bush is identified as "the person responsible for the proper operation of the foster care and adoption systems and for the hiring and continued employment of Kathleen Kearney, Secretary of DCAF." (¶ 111). According to the Plaintiffs, Bush has responsibility to ensure that the Department operates in accord with federal law; that it protects the civil rights of children, and that the system does not operate "recklessly or with deliberate indifference to the needs, safety, lives and rights of Florida's foster children." (¶ 112). The Amended Complaint alleges that the Defendants knew of the deficiencies in the foster care/adoption system and have failed to take the necessary steps to operate it without violating the federally protected rights of the children. (¶ 115).

(3) The Causes of Action

Allegations relating to each of the six causes of action are set out in the Amended Complaint, both as part of a section entitled "Statement of Facts" (¶ 139-217) and in the "Causes of Action" section (¶ 221-226). The specific allegations asserted in the Amended Complaint as related to each

cause of action are as follows:

(a) Substantive Due Process

The Plaintiffs allege that the actions and inactions of the Defendants deprived them of their basic needs while in government custody and create conditions which are inconsistent with the purpose for which the Plaintiffs were taken into custody. These acts also constitute arbitrary and capricious decision-making and “amount to a pattern, practice and custom of deliberate indifference to the serious and constitutionally protected rights and needs of Plaintiffs and the putative class members.” (§ 221).

According to the Amended Complaint, the Plaintiffs have been deprived of the substantive due process rights conferred on them by the Fourteenth Amendment to the United States Constitution including the failure to meet the basic needs for food, clothing, safe care, shelter, medical care and education; the right to protection from unnecessary harm or injury; the deprivation of liberty; the right to not be retained in state custody longer than necessary to accomplish the goals of custody, and the right to eligibility determinations that are not arbitrary or capricious. (§ 221). The Amended Complaint asserts that these violations have resulted in serious physical, mental and psychological injuries to the children and the loss of their opportunity to develop in line with their inherent abilities. (§ 190). Specifically, the Plaintiffs allege that the Defendants’ pattern and practice result in various failures in providing the necessary care to the children including the following:

(a) failing to screen, oversee and visit foster and pre-adoptive homes and facilities resulting in children being placed in dangerous, abusive, overcrowded and otherwise inappropriate facilities (§ 142);

(b) ignoring or inappropriately responding to complaints or other information identifying

individual homes as abusive or inappropriate (§ 143, 144):

(c) failing to remedy various problems associated with the caseworkers employed by the Defendants including their large caseload, high level of turnover, lack of adequate supervision, training and management and the failure to visit children in their placements with sufficient frequency to ensure the childrens' safety (§ 146, 148):

(d) the failure to develop, and the lack of, a sufficient number and array of placements to allow for the selection of a safe and proper placement for each child (§ 149):

(e) the improper placement of children in temporary shelters or group homes on a long term basis due to the lack of foster homes to accept the children (§ 150):

(f) failure to provide foster homes for large sibling groups and teens which have resulted in the unnecessary separation of siblings and the placement of children in dangerous and inappropriate placements (§ 152):

(g) the pattern and practice of moving children repeatedly from one place of custody to another which has resulted in needless trauma to the children and undermined the child's stability and security. In some cases, the need for multiple moves has been caused by the Defendant's failure to exercise professional judgment which resulted in the placement of a child in a dangerous, abusive or inappropriate home in the first instance (§ 156-157).

(h) the lack of an efficient and competent mechanism or procedure to locate vacant foster care beds and to properly match the children with an appropriate placement which results in the need for the repeated placement of children into new settings (§ 158).

(i) failing to prepare foster parents to deal with the predictable disruptive behavior of children placed in their homes and failing to support the foster parents with services and other

assistance to allow the child to be maintained in the foster home (§ 160);

(j) failing to identify relatives who are competent and willing to provide proper care for children in the Defendants' custody and ignoring or actively discouraging possible relative placements (§ 161, 162);

(k) improperly excluding foster children and responsible adults from the decision making process concerning individual children thus depriving the children of the possibility that the decisions made which are critical to their well-being will be fully informed and competent (§ 163);

(l) failing to provide needed medical care for acute, chronic and congenital conditions or with physician prescribed treatment (§ 164);

(m) wrongfully subjecting children to the administration of psychotropic medications to make it more convenient and easier to care for children in an out of home setting rather than to improve the mental or emotional health of the children (§ 165);

(n) systematically depriving children of access to an education because of the continual moving of the children without monitoring their educational performance and in failing to provide needed educational assistance (§ 166);

(o) failing to provide children with adequate and season appropriate clothing or a timely paid clothing allowance (§ 167);

(p) improperly attempting to reunify foster children with their biological families when doing so remains obviously dangerous to the safety, health or well being of the child (§ 168, 169);

(q) wrongfully retaining children in foster care for longer than is either necessary or appropriate, thus depriving them of an opportunity for a permanent family and making it less likely they will be adopted and more likely that they will be subject to repeated moves and abuse. This also

results in an increase in the foster care population causing further overcrowding and greater risk of harm. (§ 172, 173).

(r) failing to provide the services needed by the biological families of children in out-of-home care, thus delaying reunification even if it is appropriate (§ 175);

(s) failing to look for adequate adoptive homes and/or wrongfully quickly giving up on finding adoptive families for children who cannot be returned to their biological families or placed with a relative (§ 178, 179);

(t) making arbitrary, capricious and fundamentally unfair decisions concerning which individuals will be permitted to remain in foster care following their eighteenth birthday and which individuals will be permitted to participate in the subsidized Independent Living Program (§ 182-187).

(b) Procedural Due Process

In this cause of action, the Plaintiffs contend that the Defendants' actions and inactions deprive them of state-created entitlements without the provision of an adequate and fair procedure including professional review of the failure to provide required visitation or medical consultation: failing to provide the opportunity to submit applications to remain in foster care after reaching 18 years of age or to participate in a subsidized Independent Living Program: failing to allow for the opportunity for an administrative hearing to challenge an adverse decision and notice of process, and the denial of the right to be present and provide meaningful input at judicial review and administrative review proceedings. (§ 192-200, 222). According to the Plaintiffs, the lack of adequate process in connection with the listed benefits deprives the Plaintiffs of due process in violation of the Fourteenth Amendment and constitutes "a pattern, practice and policy of deliberate

indifference to the serious and constitutionally protected needs and rights of Plaintiffs and the putative class members.” (§ 222).

(c) Violation of First, Ninth and Fourteenth Amendments

According to the Plaintiffs, the actions and inactions by the Defendants separate siblings in the Defendant’s custody and deprive the children of frequent and regular visitation. This separation is done without the necessary determination by a professional that keeping the siblings together or allowing visitation would be contrary to the health, safety or welfare of one of the children and has resulted in serious injury to the children. (§ 202-204). The Plaintiffs allege that these actions violate the Fourteenth Amendment, and also deprive the children of their associational and familial rights in violation of the First, Ninth and Fourteenth Amendments. The Amended Complaint also asserts that the children were deprived of constitutionally protected liberty interests without adequate or due process which violated the Fourteenth Amendment and that the Defendants’ conduct amounted to a “pattern, practice and custom of deliberate indifference” to the constitutionally protected needs of the Plaintiffs and the putative class members. (§ 223).

(d) Adoption and Safe Families Act

The Plaintiffs also allege that the Defendants have deprived them of rights afforded by the Adoption and Safe Families Act including the right to have a proceeding initiated to terminate parental rights after 15 months of custody of the most recent 22 months; the right to have Defendants offer the biological family of the child the services necessary for the safe return of the child in order to trigger the right to have a termination of parental rights proceeding initiated and the right of the Defendants to obtain required education and health information. (§ 206-208, 224).

(e) Early and Periodic Screening, Diagnosis and Treatment

According to the Amended Complaint, the Defendants actions and inactions denied the Plaintiffs their rights under the Early and Periodic Screening, Diagnosis and Treatment provision of the Social Security Act to receive periodic general physical health, dental, hearing and eye examinations; to receive all necessary and appropriate childhood vaccinations and boosters, and to receive all follow up services and treatment deemed necessary to treat or address any condition. (¶ 209-210, 225).

(f) Title VI of the Civil Rights Act of 1964

The Amended Complaint alleges that eight of the Plaintiffs (Paul B., Leslie F., Laurie S., Lillie S., Tammy G., Leanne G., Melinda and Karina) and members of the sought subclass were denied their rights under Title VI to be free from discrimination in the administration and provision of benefits of a federal program due to race, color or national origin. (¶ 226).

According to the Amended Complaint, the “Defendants have a pattern and practice of treating Black foster children differently and less advantageously than White foster children, because of their race or color, with respect to access to, receipt of and the quality and value of services and benefits.” (¶ 214). This treatment impacts the number of times foster children are moved from one placement to another; the timing and effort with which Defendants pursue permanent families for the children and the identification and placement of the child with an appropriate permanent family. (¶ 214). Additionally, the Plaintiffs allege that the Defendants employ racially neutral criteria and methods of administration that discriminate against Black foster children including the efforts to recruit foster and adoptive families, the efforts to move children quickly to permanency, the process of selecting an appropriate foster family or facility and the recruitment and training of staff. (¶ 216).

B. The Applicable Standard

For purposes of a motion to dismiss, the complaint must be construed in a light most favorable to the non-moving party and the court must take the allegations contained in the complaint as true. See, Harris v. Procter & Gamble Cellulose Co., 73 F.3d 321 (11th Cir. 1996). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the pleader can prove no set of facts in support of the claim which would entitle him to relief. See, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Harris, 73 F.3d at 324.

The analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and any attachments thereto. Franklin v. Minnesota Mutual Life Insurance Company, 97 F.Supp.2d 1324, 1326 (S.D. Fla. 2000). Dismissal of a complaint is appropriate on the basis of a dispositive issue of law if no construction of the factual allegations will support the cause of action. See, Marshall County Board of Education v. Marshall County Gas District, 992 F.2d 1171, 1174 (11th Cir. 1993).

C. The Defendant's Motion to Dismiss (D.E. #93)

The Defendants raise several multiple bases for the dismissal of each count of the Amended Complaint, as will be addressed below.

(1) Compliance with the Pleading Requirements of the Federal Rules of Civil Procedure

The Defendants contend that the Amended Complaint constitutes a "shotgun" pleading based on the numerous allegations contained in each claim which are irrelevant to the causes of action. The Plaintiffs respond that the Amended Complaint ties the specific factual allegations concerning the individual children to the claims asserted.

The allegations of the Amended Complaint, as set out above, assert specific acts taken by the Defendants which impacted on the care or custody of specific children and tie these actions to

specific asserted violations. While there may have been alternative methods of setting out the claims in a more efficient manner, this Court cannot find that the Amended Complaint is so deficient so as to require further amendment prior to allowing this cause to proceed. Accordingly, it is the recommendation of this Court that the Motion to Dismiss on this basis be DENIED.

(2) Eleventh Amendment Immunity

The Defendants assert that Eleventh Amendment immunity applies in this cause since the state dependency courts are able to address the issues raised in this case, thus making the immunity exceptions contained in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.714 (1908) inapplicable. The Plaintiffs argue that there is no Eleventh Amendment bar since the relief sought here is prospective and the alleged illegal practices are continuous and ongoing.

An exception to the Eleventh Amendment bar exists if the Plaintiff is seeking prospective relief against a state officer for ongoing violations of federal law. See, Ex Parte Young, 209 U.S. at 159-160; Sandoval v. Hagan, 197 F.3d. 484, 492 (11th Cir. 1999); Ocean v. Kearney, 123 F.Supp.2d 618, 621 (S.D. Fla. 2000). In the present case, the Amended Complaint seeks a declaration that certain acts by the Defendants are unconstitutional and unlawful and asks the Court to enjoin such practices and take remedial action to ensure that the Defendants comply with all such laws in the future. As such, the Ex Parte Young exception applies and there is no basis for dismissal. Accordingly, the Motion to Dismiss based on the Eleventh Amendment should be DENIED.

(3) Rooker-Feldman, Abstention and Comity

The Defendants contend that the claims in this case are barred by the application of the Rooker-Feldman, abstention and comity doctrines which require that the federal courts defer to state

court proceedings. The Plaintiffs counter that Rooker-Feldman is inapplicable since the case does not seek review of a determination by a Florida dependency court or any relief that pertains to a particular child. Additionally, the claims challenge the Defendant's generally applicable practices rather than a court determination in a particular case, and thus, could not be asserted as part of a dependency court proceeding.

The Plaintiffs also contend that there is no basis for abstention since there is no possibility that the relief sought in this case would interfere with any aspect of a state court proceeding or in the decision making process of a state court judge concerning any individual child. Additionally, the Plaintiffs argue that there is no opportunity to raise the federal claims in the dependency court proceedings.

The Rooker-Feldman doctrine, as set forth in Rooker v. Fidelity Trust Company, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed.2d 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) precludes lower federal courts from conducting appellate review of decisions by the state courts. The doctrine applies to claims actually raised in the state court as well as claims not raised but which are "inextricably intertwined" with the judgment of the state court. Powell v. Powell, 80 F.3d 464, 466-467 (11th Cir. 1996), quoting, Feldman, 460 U.S. at 482, n.16, 103 S.Ct. at 1315, n.16.

The federal case and the state court judgment will be seen as intertwined "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Siegel v. LePore, 234 F.3d 1163, 1172 (11th Cir. 2000), quoting, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987)(Marshall, J., concurring). Thus, a claim is inextricably intertwined if approving the claim requires a determination that the decision reached by

the state court was erroneous. Dow Jones & Company, Inc. v. Kaye, 90 F.Supp.2d 1347, 1353 (S.D. Fla. 2000).

Under the abstention doctrine, federal courts should not interfere with ongoing state court proceedings unless the Plaintiff shows bad faith, harassment, or some other unusual situation. Younger v. Harris, 401 U.S. 37, 55, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The doctrine should only be invoked in rare circumstances since federal courts have the obligation to exercise the jurisdiction which is conferred by Congress. See, Kaye, 90 F.Supp.2d at 1353. Additionally, the doctrine should only be applied if the plaintiffs in the federal action had the opportunity to present the federal claims in the state proceedings. See, Moore v. Sims, 442 U.S. 415, 425, 99 S.Ct. 2371, 2378, 60 L.Ed.2d 994 (1979).

In the present case, the relief sought by the Plaintiffs and the allegations of the Amended Complaint as set out above, do not involve an on-going action dealing with a specific child, but rather, seek action to be taken for system-wide problems. There is nothing in the Amended Complaint which seeks to interfere with the power or discretion of the state courts. Additionally, the relief sought in this case is directed to the presence of department wide violations, including federal constitutional violations, which could not be dealt with as part of a dependency proceeding for an individual child. Thus, the showing required for applying either the Rooker-Feldman doctrine or abstention/comity are not present. See, LaShawn A. v. Kelly, 990 F.2d 1319, 1322-1323 (D.C. Cir. 1993). Accordingly, the Motion to Dismiss on this basis should be DENIED.

(4) Early and Periodic Screening, Diagnosis and Treatment

Count V of the Amended Complaint seeks relief based on alleged violations of the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provisions found in 42 U.S.C. § 1396d

(r). These provisions must be included in a state plan for medical assistance. 42 U.S.C. §1396a(a)(10)(A); §1396d(a).

Section 1396d(r) provides for various items and services to be provided to Medicaid recipients, such as screening services, which includes a comprehensive health and developmental history, a comprehensive unclothed physical exam, appropriate immunizations, laboratory tests and health education. 42 U.S.C. § 1396d(r)(1). Additionally, the provision requires vision services, dental services, and hearing services. §1396d(r)(2), (3), (4). The focus of the present Motion to Dismiss is on §1396d(r)(5), which provides as follows:

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

The first argument raised by the Defendants is that the Plaintiffs lack standing to sue under the EPSDT since the Amended Complaint fails to allege (1) that they are receiving Medicaid services; (2) that they are eligible for these services and (3) that specific medical treatment or services are medically necessary and recommended as a result of EPSDT screening. The Plaintiffs respond that the Amended Complaint clearly sets out all of the elements necessary to assert this claim.

The Amended Complaint alleges that the Defendants are required to ensure “that all Florida Medicaid -eligible children up to the age of twenty-one years, including Plaintiffs and the members of the putative class, receive comprehensive physical, developmental and mental health care.” (¶ 209). Additionally, the Plaintiffs state that the Defendants fail to ensure that the required examinations and follow up services are provided, and that as a result, injuries and irreparable harm

have occurred. (§ 210, 219, 225). According to the Amended Complaint, the failures by the Defendants “amounts to a pattern, practice and custom of deliberate indifference to the serious needs and federally protected rights of Plaintiffs and the putative class members.” (§ 225).

The Amended Complaint also alleges that one child has suffered from a cleft palate and other medical needs which have not been addressed by the Defendants; that needed instruction was not provided for a nebulizer needed by another child, and that a third child was not properly treated based on the failure to take the child for medical care and the lack of information needed for treatment after the child was taken. (§ 14, 64, 72).

The allegations contained in the Amended Complaint, which must be taken as true on a Motion to Dismiss, contain all of the elements for the claim asserted as missing by the Defendants. Accordingly, the Motion to Dismiss Count V on this basis should be DENIED.

As a second ground for dismissal, the Defendants contend that there is no private right of action for the claim based on the denial of services required under 42 U.S.C. § 1396d (r)(5). According to the Defendants, this provision, as set forth above, is non-specific and fails to set any standards to measure the state’s compliance. Thus, the administration of this provision is left to the discretion of the state.

The Plaintiffs respond to this argument by asserting that the Amended Complaint alleges the routine failure by the Defendants to comply with any of the five categories found in §1396d(r). Additionally, even as to the challenged provision found in subsection (5), the Plaintiffs contend that the provision simply requires the state to cover all medically necessary treatment for eligible children and that it is neither vague or amorphous.

In order to pursue a claim for liability in a section 1983 action, the Plaintiff must assert the

violation of a federal right, not only a violation of federal law. Doe v. Chiles, 136 F.3d 709, 713 (11th Cir. 1998), quoting, Blessing v. Freestone, 520 U.S. 329, 117 S.Ct. 1353, 1359, 137 L.Ed.2d 569 (1997). The factors to be applied to determine if a federal right is present were also discussed in Blessing, as follows:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is no so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Id. (citations omitted).

If these three factors are shown, a rebuttable presumption arises that the statutory right is enforceable under section 1983. However, dismissal would still be proper if a remedy under § 1983 was specifically foreclosed by Congress either in the statute itself or by creating a comprehensive enforcement procedure incompatible with enforcement by individuals under § 1983. The burden of making such a showing is with the Defendant. Doe, 136 F.3d at 718-719, quoting, Blessing, 117 S.Ct. at 1360, 1362.

In the present case, this Court finds that §1396d(r)(5) satisfies the three-part test set out above. The Amended Complaint clearly alleges that the statute is intended for the benefit of the Plaintiffs in this cause and the requirement of the states to provide such services is clearly mandatory. See, Pittman v. Secretary of Florida Department of Health and Rehabilitative Services, 998 F.2d 887, 891-892 (11th Cir. 1993). Finally, the provision at issue is not so "vague and amorphous" to not allow enforcement since it clearly defines what services are to be provided. See, Miller v. Whitburn, 10 F.3d. 1315 (7th Cir. 1993); Frew v. Gilbert, 109 F.Supp.2d 579 (E.D. Tex.

2000). Accordingly, the Motion to Dismiss on this basis should be DENIED.

The final basis for dismissal of Count V is the Eleventh Amendment. According to the Defendants, the present case is actually one against Florida as a state, and the intricate remedial scheme of the Medicaid Act and its underlying basis via the Spending Clause, render the Ex Parte Young exception inapplicable. The Plaintiffs reject the contention that the claim is barred and point to the fact that only prospective relief is requested and on the nature of the remedial scheme of the Medicaid Act.

As noted earlier, an exception to the Eleventh Amendment immunity bar exists if the Plaintiff is seeking prospective relief against a state officer for ongoing violations of federal law. See, Ex Parte Young, 209 U.S. at 159-160; Sandoval v. Hagan, 197 F.3d 484, 492 (11th Cir. 1999); Ocean v. Kearney, 123 F.Supp.2d 618, 621 (S.D. Fla. 2000). In the present case, the Amended Complaint seeks a declaration that certain acts by the Defendants are unconstitutional and unlawful and asks the Court to enjoin such practices and take remedial action to ensure that the Defendants comply with all such laws in the future. Thus, the Ex Parte Young exception applies and there is no basis for dismissal. See also, Doe v. Chiles, 136 F.3d 709, 719-720 (11th Cir. 1998); Hunter v. Chiles, 944 F.Supp. 914, 917-918 (S.D. Fla. 1996) (rejecting claim that Eleventh Amendment bars suit to enforce provisions of the Medicaid Act).

Based on the foregoing, it is recommended that the Motion to Dismiss as directed to Count V be DENIED.

(5) Adoption and Safe Families Act

The Defendants contend that Count 4, which seeks relief based on the Adoption and Safe Families Act (ASFA), should be dismissed as to all Plaintiffs since there is no private right of action.

or in the alternative, dismissed at least as to some Plaintiffs based on lack of standing. According to the Defendants, the only requirement under the Act is that the state provide periodic judicial or administrative review of a foster child's status. Thus, the obligations sought to be asserted by the Plaintiffs are not "unambiguously imposed" by the statutory provisions, and therefore, no right of private enforcement exists. The Defendants also note that the ASFA provided for phased in enforcement; that a private right of action is clearly authorized for racial discrimination, which shows the Congressional intent to not provide it for length of stay clause and that the provision allows for discretion by the executive and judicial branches of the state. Additionally, the Defendants argue that since the right to any services under the statute relate solely to the return of the child to the original home, relief is not available to those children whose parents have had their parental rights terminated or to any Plaintiff who has reached the age of 18.

In response, the Plaintiffs state that the applicable test for the enforcement of a right pursuant to Section 1983 has been met since the statutory provision and the accompanying regulations show an unambiguous obligation on the state to comply with the requirement that the termination of parental rights be initiated in a timely manner and that medical and education records be provided. The Plaintiffs also contend that the presence of an express right of private action for racial discrimination is not dispositive of a finding that there must be no right here since the provisions were separate acts, legislated at different times to solve different problems. According to the Plaintiffs, the right to private enforcement is shown by the lack of either an express prohibition or the creation of a comprehensive enforcement scheme by Congress at the time the 15/22 provision was enacted.

The Plaintiffs further assert that the requirement to provide all services necessary for the

return to the home is not a separate claim, but rather, additional relief needed to achieve the 15 month parental termination requirement. The Plaintiffs do not contest the lack of standing for the individuals mentioned in the Motion to Dismiss, but argue that it is irrelevant since no challenge has been made to the standing of Plaintiffs Reggie, Rebecca, Hugh and Karina to assert the claim on their own behalf and on behalf of the proposed class.

Pursuant to 42 U.S.C. §671(a)(16), a state plan must contain a "case review system." A case review system is defined by 42 U.S.C. §675(5), as a procedure which assures that various services are provided to foster children, including the following, for which relief is sought in the Amended Complaint:

- (D) a child's health and education record (as described in paragraph (1)(A) is reviewed and updated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care;

- (E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months....the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition) and concurrently, to identify, recruit, process and approve a qualified family for adoption, unless-

- (i) at the option of the State, the child is being cared for by a relative;

- (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

- (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child;

The applicable criteria for determining whether a private right of action exists was set out in

the previous section dealing with a cause of action under the EPSDT. In applying the factors set out in Doe v. Chiles, this Court finds that 42 U.S.C. §675(5)(C) and 42 U.S.C. §671(a)(16) satisfy the three-part test set out above. The Amended Complaint clearly alleges that the provisions are intended for the benefit of the Plaintiffs in this cause and the requirement of the states to provide such services is clearly mandatory. Finally, the provisions at issue are not so “vague and amorphous” to not allow enforcement. See, Ocean v. Kearney, 123 F.Supp.2d 618, 624-625 (S.D. Fla. 2000). Accordingly, the Motion to Dismiss on this basis should be DENIED.

However, this Court agrees with the Defendants that dismissal is proper as to Plaintiffs Bonnie L., Laurie and Lillie S. since the rights of their parents have already been terminated, and as to Melinda since she has reached the age of 18. Accordingly, it is recommended that the Motion to Dismiss as to Count 4 be DENIED in part and GRANTED in part.

(6) Violation of Title VI

The Defendants contend that Count 6 of the Amended Complaint, which seeks relief based on violations of Title VI, should be dismissed based on a lack of standing by the named Plaintiffs. According to the Defendants, the Plaintiffs have failed to allege that they have been personally harmed by many of the alleged bad acts in the Amended Complaint. Additionally, the Defendants argue that any claims against Plaintiff Melinda should be dismissed as barred by the Eleventh Amendment, and that all the claims are subject to dismissal under the Rooker-Feldman doctrine.

In response, the Plaintiffs contend that the Amended Complaint adequately sets out claims for both intentional discrimination and for racially discriminatory disparate treatment. Additionally, the Plaintiffs note that the relief sought by Melinda relates to her claim of eligibility for future, prospective relief, and that Rooker-Feldman is inapplicable.

The allegations of the Amended Complaint, which must be taken as true at this point in the proceedings, are sufficient to state the racial discrimination claims asserted by the Plaintiffs. The allegations also show that the relief requested is only prospective, and thus, there is no Eleventh Amendment bar. Furthermore, as discussed earlier, the Rooker-Feldman doctrine does not constitute a bar to the relief sought since it does not interfere nor it is "inextricably intertwined" with a pending state court case. Accordingly, it is the recommendation of this Court that the Motion to Dismiss Count 6 be DENIED.

(7) Violation of First, Ninth and Fourteenth Amendments

The Defendants contend that Count 3 of the Amended Complaint should be dismissed since there is no basis for a constitutional claim to have siblings either remain with each other in foster care or to ensure that visitation with siblings in other homes is provided.

In response, the Plaintiffs argue that the Defendants' practice and action of placing siblings in separate facilities directly infringes on the children's constitutionally protected interest in continuing their relationship with each other. The Plaintiffs also contend that this protection extends to visitation between siblings.

There is no dispute between the parties in this case that "there is a zone of privacy protecting matters of personal family life insulated from government interference" and that "this right arises variously under the first, ninth and fourteenth amendments, depending on the court looking at the matter." (Motion to Dismiss at 32-33). The issue before this Court is whether the allegations of the Amended Complaint state a claim for a violation of this right.

The Amended Complaint alleges that children are separated and denied visitation without a professional determination that allowing contact would be contrary to the child's interests or

health. Additionally, the Plaintiffs allege that the Defendants acted with "deliberate indifference" to the constitutionally protected needs of the children. (§202-204, 223).

The allegations of the Amended Complaint, read in the light most favorable to the Plaintiffs, state a claim for violation of the constitutional rights of the Plaintiffs by interfering with the right of association with their family members, without regard to the impact on the children. These allegations are sufficient to withstand a motion to dismiss. See, Marisol A. v. Giuliani, 929 F.Supp. 662, 676-677 (S.D. N.Y. 1996); Aristotle P. v. Johnson, 721 F.Supp. 1002 (N.D. Ill. 1989). Accordingly, it is the recommendation of this Court that the Motion to Dismiss as directed to Count 3 be DENIED.

(8) Substantive and Procedural Due Process Violations

The Defendants assert that dismissal is proper for Count 1 (Substantive Due Process) and Count 2 (Procedural Due Process) since the Amended Complaint contains insufficient facts to show that the harms that occurred to the children were the result of deliberate indifference by the Defendants. The Plaintiffs respond that the professional judgment standard is in fact applicable rather than deliberate indifference, but that in any event, either standard is met by the allegations of the Amended Complaint.

As set out above, the provisions of the Amended Complaint relating to Substantive and Procedural Due Process contain great detail concerning the alleged wrongs committed by the Defendants and clearly alleges that the acts were done in an arbitrary and capricious manner with deliberate indifference. The arguments raised by the Defendants for the dismissal of Counts 1 and 2 are refuted by the language of the Amended Complaint itself, and there is no basis for dismissal. Accordingly, it is the recommendation of this Court that the Motion to Dismiss Counts 1 and 2 be

DENIED.

(9) Claim Preclusion Based on Other Actions

In the Motion to Dismiss the Defendants contend that a number of the children named as Plaintiffs were part of a prior suit, Children A-F, Case No. 90-2416-CIV-KEHOE, which was settled in 1995. According to the Defendants, the settlement agreement entered in that case precludes suit for any allegations occurring prior to March, 1995. The Plaintiffs refute this contention, and argue that as to the Plaintiffs who were also members of the A-F class, there would be no claim preclusion for actions or inactions of the Defendants which occurred after July 15, 1995, the date the A-F case was dismissed with prejudice or for claims asserted in this litigation (the First Amendment, Ninth Amendment and Title VI claims) but not asserted in A-F.

While the issue of overlapping claims may impact on the availability and scope of the class action determination, which will be addressed by a separate Report and Recommendation to be issued by this Court, for purposes of a motion to dismiss, this Court finds that the Amended Complaint adequately sets out injuries for each claim asserted that would not be foreclosed by the earlier settlement either because it arose after the settlement or since it is on-going. Furthermore, there is no basis for dismissal due to the pending action in M.E. v. Chiles, 90-1008-CIV-MOORE. Accordingly, it is the recommendation of this Court that the Motion to Dismiss based on claim preclusion be DENIED.

D. The Motion to Dismiss by Governor Bush (D.E. #94)

The Motion to Dismiss filed by Governor Bush adopts the arguments made in the Defendants' Motion to Dismiss and also contends that the dismissal is proper since the Governor may not be held liable for any purported violation in the Amended Complaint.

The Plaintiff is not required to show personal action by defendants individually in order to obtain injunctive relief against state officers in their official capacity. Rather, the only requirement is that the official be responsible for the challenged action. Luckey v. Harris, 860 F.2d 1012, 1015 (11th Cir. 1988). In explaining this standard, the Eleventh Circuit cited to Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and stated:

As the Young court held, it is sufficient that the state officer sued must, "by virtue of his office, ha[ve] some connection" with the unconstitutional act or conduct complained of. [W]hether [this connection] arises out of general law, or is specially created by the act itself, is not material so long as it exists."

Luckey, 860 F.2d at 1015-1016, quoting, Young, 209 U.S. at 157, 28 S.Ct. at 453.

As set out above, the Amended Complaint alleges that the "Defendants" committed various acts or failed to carry out required duties resulting in harm to the Plaintiffs. According to the Plaintiffs, the Governor is included in the term "Defendants." Additionally, the Amended Complaint contains specific allegations concerning the role and responsibility of the Governor. ("¶ 111-116). These allegations, which must be taken as true for the purposes of a motion to dismiss, are sufficient to allow for the case to proceed at this stage as against the Governor. Accordingly, it is the recommendation of this Court that the Motion to Dismiss filed by Governor Jeb Bush (D.E. #94) be DENIED.

II. CONCLUSION AND RECOMMENDATION

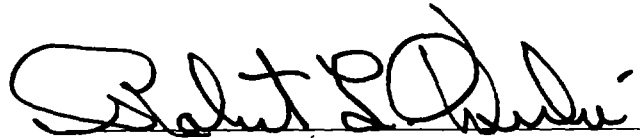
Based on the foregoing, the recommendation of this Court is as follows:

(1) The Motion to Dismiss filed by the Defendants (D.E. #93) should be **DENIED as to Counts 1, 2, 3, 5 and 6 and DENIED in part and GRANTED in part as to Count 4**, as set out above.

(2) The Motion to Dismiss filed by Defendant Governor Jeb Bush (D.E. #94) should be **DENIED**.

Pursuant to Local Magistrate Rule 4(b), the parties have 10 days from service of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. Loconte v. Dugger, 847 F.2d 745 (11th Cir.1988); R.T.C. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND ORDERED this 20th day of April, 2001.

A handwritten signature in black ink, appearing to read "Robert L. Dubé", written over a horizontal line.

ROBERT L. DUBÉ
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Federico A. Moreno
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