IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

M.D., by her next friend Sarah R. Stukenberg, *et al.*, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
	)	**CASE NO. 2:11-cv-00084**
v.	)	
RICK PERRY, in his official capacity as Governor of the State of Texas, *et al.*,	)	
Defendants.	)	

JOINT PRETRIAL ORDER

1. APPEARANCES OF COUNSEL

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b. Defendants

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2. STATEMENT OF THE CASE

a. Plaintiffs' Statement of the Case

Plaintiffs are a certified General Class and three Subclasses of children legally assigned to the Permanent Managing Conservatorship ("PMC") of the Texas Department of Family and Protective Services ("DFPS") for their basic protection and care. The individual Named Plaintiffs brought this case on behalf of the approximately twelve thousand children in PMC who daily suffer unconstitutional harm and the ongoing risk of harm due to longstanding structural deficiencies in DFPS's foster care system. Children in PMC, all of whom already have been in state foster care custody for at least one year, suffer physical and psychological harm flowing from unnecessarily long stays in foster care, delays in or lack of permanency placements that are not suited to meet their needs, frequent moves from one placement to another, disrupted sibling and family relationships, disrupted community connections, and prolonged exposure to unsafe conditions in inadequately monitored foster care settings.

In accordance with the Fifth Circuit's instructions and this Court's order granting class certification, Plaintiffs focus their claims on specifically-identified structural deficiencies long existing within DFPS. With respect to the General Class, Plaintiffs assert that Defendants fail to exercise professional judgment and violate accepted standards of practice in maintaining

excessive caseworker caseloads. With respect to the Licensed Foster Care Subclass, Plaintiffs assert that Defendants fail to exercise professional judgment and violate accepted standards of practice in maintaining inadequate regulatory oversight of licensed foster care providers and an insufficient array of foster care placements across the State. With respect to the Basic Care GRO Subclass, Plaintiffs assert that DFPS fails to exercise professional judgment and violates accepted standards of practice in improperly placing children who are receiving only basic level services, which could be provided in a foster home, into institutional facilities intended for children with elevated needs. With respect to the Foster Group Home Subclass, Plaintiffs assert that Defendants fail to exercise professional judgment and violate accepted standards of practice by permitting the operation of these foster group homes, which are unique to Texas, without essential safeguards necessary to protect children from known risks attendant to congregate care settings. Plaintiffs contend that each of the above structural deficiencies creates a common risk of harm to all members of the General Class or Subclass that is subject to cure with a single injunction benefitting all class members.

Plaintiffs' trial evidence will include: DFPS and federal performance data on pertinent child welfare outcomes; applicable federal and state laws, regulations, and policies, as well as accepted standards promulgated by national child welfare organizations; the testimony (at trial and by deposition) of DFPS officials; and DFPS business records and internal communications. Plaintiffs also intend to present several expert witnesses.

b. Defendants' Statement of the Case

Plaintiffs seek comprehensive institutional reform of the foster care system in Texas through mandatory and prohibitory injunctions that manage the delivery of foster care services at the caseworker staffing and placement decision levels, prohibit the use of valuable placement

options, and essentially punt to a team of unidentified "qualified professionals" the task of coming up with solutions that Plaintiffs and their own team of experts could not devise.

Plaintiffs have accurately characterized the case as a class action; however, Defendants denied and continue to deny the propriety of certification on the grounds that as to each class: 1) individualized issues concerning the class members themselves, their unique placements, their specific caseworkers, diverse characteristics across the state (geographically, culturally and in the delivery of foster care services), and the culpability standard as applied to the unique circumstances of each class claimant defeat commonality and typicality under Fed. R. Civ. P. 23(a), and 2) the remedy the class seeks fails to satisfy Rules 23(b)(2) and 65(d) due to lack of uniformity of injury and lack of specificity.

Plaintiffs' claims, as they describe them in their Statement of the Case, are not cognizable under Fourteenth Amendment substantive due process law. Under the law in the Fifth Circuit, children in foster care in Texas have a right to personal security and reasonably safe living conditions. Defendants do not have a more expansive constitutional duty either "to assure the safety, permanence and well-being" of children in the permanent managing conservatorship of DFPS or to keep those children free from an undefined and open-ended "ongoing risk of harm." Further, culpability under the Fourteenth Amendment in the Fifth Circuit (and almost every other circuit) is determined with reference to deliberate indifference that shocks the conscience and not, as Plaintiffs contend, to whether Defendants "fail to exercise professional judgment and violate accepted standards of practice." If Plaintiffs proceed on the claims they have described, both as to scope of duty and culpability standard, Defendants will be entitled to judgment as a matter of law.

3. JURISDICTION

Because this action is brought pursuant to 42 U.S.C. § 1983, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

4. MOTIONS

Doc. No. 271 – Motion to Exclude Testimony of Dr. Edwin Basham Due to Improper Conduct [Judge Jack indicated she would rule on this motion at trial.]

5. CONTENTIONS OF THE PARTIES

a. Plaintiffs' Contentions

Texas fails to maintain an adequate number of conservatorship caseworkers and supervisors to assure the safety, permanency, and well-being of PMC children in its care. In violation of Plaintiffs' substantive due process right to be free from harm and the unreasonable risk of harm while in state custody, Texas maintains conservatorship worker caseloads exceeding widely accepted professional standards and its own workload analyses. The State is aware of the resulting risk of harm to children, and yet has historically failed to effectively address the issue. As a result, all children in the General Class are subject to an imminent risk of deprivation of adequate care and the right to a safe, secure, and suitable placement due to the State's failure to maintain reasonable caseloads.

Texas maintains a licensing function that has insufficient staffing capacity to conduct adequate oversight of licensed foster care placements and has a quality assurance system incapable of adequately identifying and correcting deficiencies in licensing policy and practices. DFPS's licensing arm, Residential Child Care Licensing, lacks sufficient staffing capacity to meet policy requirements and lacks a quality assurance capability that meets accepted standards for continuous quality improvement. As a result, all children in the Licensed Foster Care Subclass are subject to an imminent risk of deprivation of adequate care and the right to a safe,

secure, and suitable placement due to the State's failure to maintain sufficient oversight and monitoring of its licensed foster care placements.

Texas fails to maintain a sufficient number, geographic distribution, and array of foster care placements. The State admits that its foster care system does not have the right type and number of placements appropriately distributed across the State. Because of the inadequate array of placements, children are placed outside their home communities, placed in placement types not suitable to their needs, separated from their siblings, and moved from place to place far too frequently. All children in the Licensed Foster Care Subclass are subject to an imminent risk of deprivation of adequate care and the rights to a safe, secure, and suitable placement and sibling connection due to the State's failure to maintain a sufficient number, geographic distribution, and array of foster care placements.

Texas places children whose needs could be met in a family-like setting in institutions. Texas routinely uses non-emergency general residential operations to house children who the State itself has determined require only basic child care services. Accepted professional standards and federal law, as well as DFPS's own policies, require children to be placed in the least restrictive, most family-like settings that meet their needs. The practice of utilizing general residential operations to serve children receiving only basic level services places all children in this subclass at risk of physical, psychological, and developmental harm.

Texas operates foster group homes which do not conform to professional standards for group living. Unlike family foster homes, which are limited to six children, foster group homes house seven to 12 children of varying ages who are often strangers to each other, supervised by one or two foster group home "parents" who, unlike in general residential operations and residential treatment centers, are not staffed in shifts but are responsible for all the children in the

foster group home on a 24-hour-per-day, 365-day-per-year basis. All children in the Foster Group Home Subclass are subject to an imminent risk of deprivation of adequate care and the right to a safe, secure, and suitable placement due to the absence of trained professional staff, waking caregivers, and on-staff or on-call medical personnel in foster group homes.

b. Defendants' Contentions

The sole legal basis of Plaintiffs' claims is an alleged violation of substantive due process under the due process clause of the Fourteenth Amendment. To demonstrate a viable substantive due process claim the Plaintiffs must show, among other things, that the state acted in a manner that shocks the conscience. Such a showing is necessary whether the Court applies a deliberate indifference standard, as required in the Fifth Circuit, or an abdication of professional judgment standard, as adopted in a small minority of other circuits. Far from shocking the conscience, DFPS has operated foster care in Texas in a manner that meets or exceeds six of the seven national standards established by the U.S. Department of Health and Human Services (acting through the Children's Bureau of HHS' Administration for Children and Families) with respect to safety and permanency outcomes for children in foster care and missed on the seventh standard only by a small margin (30.5% vs. 31.2%). Plaintiffs are in the untenable position of trying to prove that nearly uniform compliance with federal standards violates substantive due process rights *and* shocks the conscience. On that slender reed, they ask this Court to institute and oversee a complete overhaul of the state's foster care system. Defendants respectfully urge the Court to decline.

Rather than focusing on a properly-framed substantive due process claim, Plaintiffs will try this case as if they had sued for violations of federal statutory law, state law, state regulations, best practices, aspirational goals, and subjective standards unilaterally set by their own expert witnesses, none of which are within the ambit of the Fourteenth Amendment and none of which

are actionable against the state. As to the constitutional claim that they have asserted, Plaintiffs will assume, without legal support, that substantive due process includes rights it does not, such as rights to placement in the least restrictive, most family-like foster care setting, a "suitable" placement, case planning, parental and sibling visitation, a stable placement, an adequate number and array of placements, conservatorship caseworkers, caseworkers to whom a limited number of children are assigned, limited duration of time in state custody, permanence, permanency conferences, infrequent placement moves, well-being, absolute safety, safeguards that prevent the child from deteriorating either physically or psychologically, and foster care services delivered in the manner described by child welfare advocacy groups, leagues, societies and councils. Ignoring the Fifth Circuit's limitation of a foster child's substantive due process right as one to personal security and reasonably safe living conditions, Plaintiffs will also assume, without legal support, that ill-defined and subjective concepts of "harm" outside the scope of that underlying duty are nevertheless actionable under substantive due process law. In so doing, Plaintiffs will attempt to set the hurdle higher than that actually set by the Fourteenth Amendment.

As to their cognizable substantive due process claims, the class representatives for the general class and the three subclasses the Court certified will fail to prove those claims. This failure of proof will follow the same general pattern. Plaintiffs will identify what they claim are systemic shortcomings of the foster care system, speculate as to potential harms they associate therewith (many such harms being subjective, amorphous, non-cognizable, and well outside the scope of personal security and reasonably safe living conditions), offer little or no proof that the shortcomings are indeed system-wide, offer no proof that all members of the class suffer the same injury, and then simply assume without reliable proof that the shortcomings have caused

the alleged harm. Their proof will be wholly silent on the magnitude of any risk of harm they allege and, lacking any analysis of magnitude, they will offer no proof that any such risk is unreasonable. This failure of proof will play out in each of the following particulars: that DFPS' conservatorship caseworker caseloads cause all children in PMC to suffer an unreasonable risk that their right to personal security and reasonably safe living conditions will be denied; inadequate regulatory oversight by DFPS causes all children in PMC who are in licensed facilities to suffer an unreasonable risk that their right to personal security and reasonably safe living conditions will be denied; DFPS' placement array causes all children in PMC who are in licensed facilities to suffer an unreasonable risk that their right to personal security and reasonably safe living conditions will be denied; that DFPS causes all Basic Service Level PMC children placed in a General Residential Operation to suffer an unreasonable risk that their right to personal security and reasonably safe living conditions will be denied; and DFPS causes all children placed in Foster Group Homes to an unreasonable risk that their right to personal security and reasonably safe living conditions will be denied due to lack of a wake staff, inadequate foster parent training, and inadequate access to medical services. Plaintiffs will fail to prove violation of a constitutional duty in each regard. They will further fail to satisfy the applicable culpability standard of deliberate indifference that shocks the conscience or the alternative standard, which Defendants contend does not apply, of abdication of professional responsibility that shocks the conscience.

Plaintiffs' proof will be deficient on remedy as well. Lacking reliable proof of causation of harm as to the alleged systemic shortcomings, their attempt at proof of an effective remedy will likewise fail. Plaintiffs will either fail to offer a well-defined remedy (such as a specific "fix" for the alleged array inadequacy) or they will be unable to prove that the relief they do

define will indeed be effective to remedy the constitutional harm. Further, injunctive relief of any nature is inappropriate because any harm Plaintiffs attempt to prove will be conjectural and hypothetical, not real and imminent.

Finally, and equally dispositive of their claims, Plaintiffs will fail to prove: a) their classes are properly certifiable under Fed. R. Civ. P. 23(a)(2) and (3) and Rule 23(b)(2), and b) that the Named Plaintiffs and all class members have standing.

Defendants' contentions are captured more fully in their proposed findings of fact and conclusions of law.

6. ADMISSIONS OF FACT

1. There are roughly 12,000 children in DFPS's PMC at a given time.

2. DFPS divides Texas into 11 administrative regions with a state headquarters in Austin.

3. CPS regional directors manage child protective services in each administrative region.

4. Each CPS regional director reports to the CPS Director of Field Operations, Colleen McCall. The CPS Director of Field Operations, in turn, reports to the Assistant Commissioner for Child Protective Services, Lisa Black. The CPS Assistant Commissioner reports to the DFPS Commissioner, John Specia.

5. The Child Care Licensing division ("CCL") within DFPS is headed by Assistant Commissioner Paul Morris, who reports directly to DFPS Commissioner Specia. Within CCL are four units: Residential Child Care Licensing ("RCCL"), Day Care Licensing, Policy and Program Operations, and the Performance Management Unit ("PMU").

6. RCCL is headed by Director Jean Shaw, who reports to Assistant Commissioner for CCL Paul Morris.

7. Ms. Shaw currently oversees three Program Managers who are responsible for RCCL practice in distinct geographic areas. RCCL policy is set forth in the Licensing Policy and Procedure Handbook that applies statewide.

8. Tila Johnson is the Program Manager for the East District, which consists of DFPS Areas 4, 5 and 6; Willie Salas is the Program Manager for the South Central District, which consists of DFPS Areas 7, 8, 10, and 11; and Joy Waldrop is the Program Manager for the Northwest District, which consists of DFPS Areas 1, 2, 3, and 9.

9. Leslie Reid is the Division Administrator for the Performance Management Unit.

7. CONTESTED ISSUES OF FACT

a. Plaintiffs' Position

1. Whether DFPS maintains a workforce insufficient to adequately assure the safety, permanency, and well-being of the children in DFPS's custody, thereby departing from accepted professional judgment.

2. Whether DFPS's insufficient workforce harms and places at risk of imminent harm children in DFPS's custody.

3. Whether DFPS maintains a licensing function that lacks (i) sufficient staffing capacity to conduct adequate oversight of licensed foster care placements and (ii) a quality assurance system capable of adequately identifying and correcting deficiencies in licensing policy and practices, thereby departing from accepted professional judgment.

4. Whether DFPS's inadequate licensing function harms and places at risk of imminent harm children in licensed foster care.

5. Whether DFPS maintains an inadequate array of placements and services in a manner that substantially departs from accepted professional judgment.

6. Whether DFPS's inadequate placement array harms and places at risk of imminent harm children in licensed foster care.

7. Whether DFPS uses institutions to house children whose needs could be met in a family-like setting and thus substantially departs from state law, federal law, and accepted professional judgment.

8. Whether DFPS's improper use of institutions for children whose needs could be met in a family-like setting harms and places at risk of imminent harm these children.

9. Whether DFPS places children in foster group homes lacking basic safeguards, thereby substantially departing from professional standards.

10. Whether DFPS's use of foster group homes that substantially depart from professional standards harms and places at risk of imminent harm children placed in them.

b. Defendants' Position

General Class

Whether:

1. Plaintiffs failed to prove that there is a widely accepted professional standard for a conservatorship caseworker caseload, including what it means to be "accepted," which foster care agencies (or other entities that actually serve as managing conservators for children in state custody) have accepted that caseload standard, which have not and whether the former outnumber the latter so much so as to constitute "widely accepted," that acceptance of such standard is necessary in order to adequately serve children, and that there are no other means by which caseloads may be managed in order to adequately serve children in conservatorship.

2. Plaintiffs failed to prove that any such standard creates a maximum, above which the caseload is excessive in the sense that the caseworker will fail to perform some task she would otherwise perform, i.e., but for her excessive caseload, and that such failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of any resulting harm.

3. Plaintiffs have failed to prove what caseload level in Texas would be fairly comparable to the standard that Plaintiffs characterize as widely accepted, taking into account the characteristics of the foster care system in Texas and the various factors to be considered pursuant to that standard.

4. Plaintiffs have failed to prove whether and, if so, the extent to which caseloads in Texas exceed what would be comparable in Texas to what Plaintiffs characterize as the widely accepted professional standard.

5. Plaintiffs have failed to prove that there is a caseworker caseload level in Texas, above which the caseload is excessive in the sense that the caseworker will fail to perform some task he would otherwise perform and that that failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of that harm.

6. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads in Texas and harm to any child in the class and for all children in the class.

7. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

8. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads and the occurrence of abuse or neglect to children in PMC.

9. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads and permanency outcomes for children in PMC.

10. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and harm to each child in the class and to all children in the class.

11. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

12. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and the occurrence of abuse or neglect to children in PMC.

13. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and permanency outcomes for children in PMC.

14. Plaintiffs have failed to prove the magnitude of risk of harm to children in PMC in Texas caused by excessive caseloads in Texas.

15. Plaintiffs have failed to objectively quantify the risk to which children in PMC are currently exposed caused by excessive caseloads in Texas.

16. Plaintiffs have failed to prove that the risk of harm to children in PMC in Texas caused by excessive caseloads in Texas is unreasonable.

17. Plaintiffs have failed to prove that harm caused by excessive caseloads is actually imminent for any child and all children in PMC.

18. Plaintiffs have failed to prove that denial of a PMC child's right to personal security and reasonably safe living conditions caused by excessive caseloads is actually imminent for any child and all children in PMC.

19. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, excessive caseloads have caused harm of any nature to children in PMC in the past.

20. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, excessive caseloads have caused denial of a PMC child's right to personal security and reasonably safe living conditions in the past.

21. Plaintiffs have failed to prove that all children in PMC, on a statewide, regional and county basis, have a caseworker with an excessive caseload.

22. Plaintiffs have failed to prove that all conservatorship caseworkers, on a statewide, regional and county basis, have excessive caseloads, without regard to each caseworker's actual caseload and his or her ability to handle a caseload.

23. Plaintiffs have failed to prove that what is an excessive caseload for one caseworker is also excessive for all other conservatorship caseworkers throughout the state, without regard to the individual caseworkers' experience, education, training, and ability or to the caseload conditions and management practices in the units and regions in which such caseworkers work.

24. Plaintiffs have failed to prove that all children in PMC are subject to the same risk, including magnitude of risk, of being assigned a conservatorship caseworker whose caseload is excessive (and excessive as to that particular caseworker) and that such excessive caseload will cause or likely cause harm to all such children.

25. Plaintiffs have failed to prove that a caseworker who has what Plaintiffs characterize as an excessive caseload presents the same risk, and same degree of risk, to all children assigned to him or to her, without regard to the individual characteristics of the child and the specific circumstances of the child's placement.

26. Plaintiffs have not demonstrated that DFPS' conservatorship caseworker caseloads cause all children in PMC to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

27. The level of personal security a child experiences in PMC, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

28. Whether a PMC child is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

29. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

30. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to caseloads for any and all children in PMC shocks the conscience.

31. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in PMC with respect to conservatorship caseloads.

32. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in PMC with respect to conservatorship caseloads.

33. Far from acting with deliberate indifference, Defendants engage in a broad spectrum of conduct to mitigate a wide variety of risks associated with children in conservatorship, including risks associated with caseworker caseloads.

34. Plaintiffs have failed to prove a level of conservatorship caseload in Texas would not be excessive.

35. Plaintiffs have failed to prove what risk of harm caused by conservatorship caseloads would be reasonable.

36. Plaintiffs have failed to prove that ordering any caseload limits would remedy any harm they have attempted to associate with caseloads.

37. Plaintiffs have failed to prove that ordering a specific caseload limit would remedy any harm they have attempted to associate with caseloads.

38. Plaintiffs have failed to prove what level of caseload limit would result in a reasonable risk of harm.

39. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether conservatorship caseloads result in a reasonable risk of harm to children in PMC, both as to any child in the class and to all children in the entire class.

40. Plaintiffs have failed to prove the specific remedy they seek for the General Class and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the caseworker caseload wrong of which they complain.

Licensed Foster Care Subclass--Oversight

Whether:

41. Plaintiffs have failed to prove that there is a widely accepted professional standard for a licensing inspector or investigator caseload, including what it means to be "accepted," which foster care agencies (or other entities that actually serve as managing conservators for children in state custody) have accepted that caseload standard, which have not and whether the former outnumber the latter so much so as to constitute "widely accepted," that acceptance of such standard is necessary in order to adequately serve children, and that there are no other means by which caseloads may be managed in order to adequately serve children in conservatorship.
42. Plaintiffs failed to prove that any such standard creates a maximum, above which the caseload is excessive in the sense that the licensing inspector or investigator will fail to perform some task she would otherwise perform, i.e., but for her excessive caseload, and that such failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of any resulting harm.

43. Plaintiffs have failed to prove what licensing inspector or investigator caseload level in Texas would be fairly comparable to the standard that Plaintiffs characterize as widely accepted, taking into account the characteristics of the foster care system in Texas and the various factors to be considered pursuant to that standard.

44. Plaintiffs have failed to prove whether and, if so, the extent to which licensing inspector or investigator caseloads in Texas exceed what would be comparable in Texas to what Plaintiffs characterize as the widely accepted professional standard.

45. Plaintiffs have failed to prove that there is a licensing inspector or investigator caseload level in Texas, above which the caseload is excessive in the sense that the licensing inspector or investigator will fail to perform some task he would otherwise perform and that that failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of that harm.

46. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight in Texas and harm to any child in the Licensed Foster Care subclass and for all children in the class.

47. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

48. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight and the occurrence of abuse or neglect to children in placed in licensed foster care.

49. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight and permanency outcomes for all children placed in licensed foster care.

50. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight and harm to any child in the class and to all children in the class.

51. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

52. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight and the occurrence of abuse or neglect to all children placed in licensed foster care.

53. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight and permanency outcomes for all children placed in licensed foster care.

54. Plaintiffs have failed to prove the magnitude of risk of harm to children in licensed foster care caused by inadequate oversight.

55. Plaintiffs have failed to objectively quantify the risk to which all children placed in licensed foster care are currently exposed caused by inadequate oversight.

56. Plaintiffs have failed to prove that the risk of harm to all children placed in licensed foster care caused by inadequate oversight is unreasonable.

57. Plaintiffs have failed to prove that harm caused by inadequate oversight is actually imminent for any child and all children in licensed foster care.

58. Plaintiffs have failed to prove that denial of a child's right to personal security and reasonably safe living conditions caused by inadequate oversight is actually imminent for any child and all children in licensed foster.

59. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, inadequate oversight has caused in the past harm of any nature to children in licensed foster care.

60. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, inadequate oversight has caused in the past denial of a child's right to personal security and reasonably safe living conditions for children placed in licensed foster care.

61. Plaintiffs have failed to prove inadequate oversight on a statewide, regional and county basis, such that all children in the class are in placements for which there is inadequate oversight.

62. Plaintiffs have failed to prove that what is an excessive caseload for one licensing inspector or investigator is also excessive for all other such workers throughout the state, without regard to the individual workers' experience, education, training, and ability or to the caseload conditions and management practices in the units and regions in which such workers work.

63. Plaintiffs have not demonstrated that DFPS' licensed foster care oversight causes all children in licensed foster care placements to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

64. The level of personal security a child experiences in a licensed foster care placement, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

65. Whether a child in a licensed placement is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

66. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

67. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to licensed care oversight for any and all children in licensed placements shocks the conscience.

68. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in licensed placements with respect to licensed care oversight.

69. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in licensed placements.

70. Far from acting with deliberate indifference, Defendants engage in a broad spectrum of conduct to mitigate a wide variety of risks associated with children in conservatorship, including risks associated with licensed foster care inspections and investigations.

71. Plaintiffs have failed to prove a level of licensing inspector and investigator caseloads in Texas would not be excessive.

72. Plaintiffs have failed to prove what risk of harm associated with licensed care oversight would be reasonable.

73. Plaintiffs have failed to prove that ordering any caseload limits for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

74. Plaintiffs have failed to prove that ordering any staffing levels for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

75. Plaintiffs have failed to prove that ordering a specific caseload limit for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

76. Plaintiffs have failed to prove that ordering a specific staffing level for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

77. Plaintiffs have failed to prove what level of caseload limits for licensing inspectors and investigators would result in a reasonable risk of harm.

78. Plaintiffs have failed to prove what level of staffing for licensing inspectors and investigators would result in a reasonable risk of harm.

79. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether licensing inspector and investigator caseloads result in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

80. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether licensing inspector and investigator staffing levels result in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

81. Plaintiffs have failed to prove what resources and processes are necessary to ensure that Defendants have the capacity to monitor and enforce compliance with all licensing standards applicable to licensed foster care placements.

82. Plaintiffs have failed to prove that unidentified professionals to be appointed by the Court are able to assess what resources and processes are necessary to ensure that Defendants have the capacity to monitor and enforce compliance with all licensing standards applicable to licensed foster care placements.

83. Plaintiffs have failed to prove the specific remedy they seek for the subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the oversight inadequacy of which they complain.

Licensed Foster Care Subclass--Array

Whether:

84. Plaintiffs have failed to prove that there is a widely accepted professional standard for a placement array.

85. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and harm to any child in the Licensed Foster Care subclass and for all children in the class.

86. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and a denial of personal security and reasonably safe living conditions for each child in the class and for all children in the class.

87. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and the occurrence of abuse or neglect to children in placed in licensed foster care.

88. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and permanency outcomes for all children placed in licensed foster care.

89. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and harm to any child in the class and to all children in the class.

90. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

91. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and the occurrence of abuse or neglect to all children placed in licensed foster care.

92. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and permanency outcomes for all children placed in licensed foster care.

93. Plaintiffs have failed to prove the magnitude of risk of harm to children in licensed foster care caused by an alleged inadequate placement array.

94. Plaintiffs have failed to objectively quantify the risk to which all children placed in licensed foster care are currently exposed caused by an alleged inadequate placement array.

95. Plaintiffs have failed to prove that the risk of harm to all children placed in licensed foster care caused by the placement array in Texas is unreasonable.

96. Plaintiffs have failed to prove that harm caused by an alleged inadequate placement array is actually imminent for any child and all children in licensed foster care.

97. Plaintiffs have failed to prove that denial of a child's right to personal security and reasonably safe living conditions caused by an alleged inadequate placement array is actually imminent for any child and all children in licensed foster.

98. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, an alleged inadequate placement array has caused in the past harm of any nature to children in licensed foster care.

99. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, an alleged inadequate placement array has caused in the past denial of a child's right to personal security and reasonably safe living conditions for children placed in licensed foster care.

100. Plaintiffs have failed to prove an inadequate placement array on a statewide, regional and county basis.

101. Plaintiffs have not demonstrated that DFPS' placement array causes all children in licensed foster care to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

102. The level of personal security a child experiences in a licensed foster care placement, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

103. Whether a child in a licensed placement is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

104. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

105. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to the placement array for any and all children in licensed placements shocks the conscience.

106. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in licensed placements with respect to the placement array.

107. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in licensed placements.

108. Far from acting with deliberate indifference, Defendants engage in a broad spectrum of conduct to mitigate a wide variety of risks associated with children in conservatorship, including risks associated with placements.

109. Plaintiffs have failed to prove a placement array that would be adequate.

110. Plaintiffs have failed to prove what risk of harm associated with a placement array would be reasonable.

111. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether a placement array results in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

112. Plaintiffs have failed to prove the aggregate need of all children in the subclass for additional placements that will provide the necessary number, geographic distribution, and array of placement options for all children in the subclass.

113. Plaintiffs have failed to prove that unidentified professionals to be appointed by the Court are able to assess the aggregate need of all children in the subclass for additional placements that will provide the necessary number, geographic distribution, and array of placement options for all children in the subclass.

114. Plaintiffs have failed to prove the specific remedy they seek for the subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the oversight inadequacy of which they complain.

Basic in GRO Subclass

Whether:

115. Plaintiffs have failed to prove a correlation between every placement of a Basic service level child in a GRO and harm to the child.

116. Plaintiffs have failed to prove that every placement of a Basic service level child in a GRO denies personal security and reasonably safe living conditions for the child.

117. Plaintiffs have failed to prove a correlation between every placement of a Basic service level child in a GRO and the occurrence of abuse or neglect to the child.

118. Plaintiffs have failed to prove a correlation between every placement of a Basic service level child in a GRO and permanency outcomes.

119. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and harm to the child.

120. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and a denial of personal security and reasonably safe living conditions for the child.

121. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and the occurrence of abuse or neglect to the child.

122. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and permanency outcomes.

123. Plaintiffs have failed to prove the magnitude of risk of harm to every Basic service level child placed in a GRO.

124. Plaintiffs have failed to objectively quantify the risk to which every Basic service level child is subjected by placement in a GRO.

125. Plaintiffs have failed to prove that the risk of harm to every Basic service level child placed in a GRO is unreasonable.

126. Plaintiffs have failed to prove that harm is actually imminent for every Basic service level child placed in a GRO.

127. Plaintiffs have failed to prove that denial of a right to personal security and reasonably safe living conditions is imminent for every Basic service level child placed in a GRO.

128. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a Basic service level child in a GRO in the past caused harm of any nature to the child.

129. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a Basic service level child in a GRO in the past caused a denial of the child's right to personal security and reasonably safe living conditions.

130. Plaintiffs have failed to prove that placement of any Basic service level child in any GRO subjects the child to a risk of harm without regard to the individual characteristics and needs of that particular child.

131. Plaintiffs have failed to prove that placement of any Basic service level child in any GRO subjects the child to a risk of harm without regard to the individual characteristics, qualities and capabilities of the particular GRO where the child is placed.

132. Plaintiffs have not demonstrated that placement of Basic service level children in GROs causes all such children to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

133. The level of personal security a child experiences in a GRO, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

134. Whether a Basic services level child placed in a GRO is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including the particular GRO placement.

135. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

136. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to all placements of Basic services level children in GROs shocks the conscience.

137. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference with respect to all placements of Basic services level children in GROs.

138. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference with respect to all placements of Basic services level children in GROs.

139. Far from acting with deliberate indifference, Defendants engage in a broad spectrum of conduct to mitigate a wide variety of risks associated with children in conservatorship, including risks associated with the placement of Basic service level children in GROs.

Foster Group Home Subclass

Whether:

140. Plaintiffs have failed to prove that there is a widely accepted professional standard applicable to Foster Group Homes as they are operated in Texas.

141. Plaintiffs have failed to prove a correlation between every placement of a child in a Foster Group Home and harm to the child.

142. Plaintiffs have failed to prove that every placement of a child in a Foster Group Home denies personal security and reasonably safe living conditions for the child.

143. Plaintiffs have failed to prove a correlation between every placement of a child in a Foster Group Home and the occurrence of abuse or neglect to the child.

144. Plaintiffs have failed to prove a correlation between every placement of a child in a Foster Group Home and permanency outcomes.

145. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and harm to the child.

146. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and a denial of personal security and reasonably safe living conditions for the child.

147. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and the occurrence of abuse or neglect to the child.

148. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and permanency outcomes.

149. Plaintiffs have failed to prove the magnitude of risk of harm to every child placed in a Foster Group Home.

150. Plaintiffs have failed to objectively quantify the risk to every child placed in a Foster Group Home.

151. Plaintiffs have failed to prove that the risk of harm to every child placed in a Foster Group Home is unreasonable.

152. Plaintiffs have failed to prove that harm is actually imminent for every child placed in a Foster Group Home.

153. Plaintiffs have failed to prove that denial of a right to personal security and reasonably safe living conditions is imminent for every child placed in a Foster Group Home.

154. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a child in a Foster Group Home in the past caused harm of any nature to the child.

155. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a child in a Foster Group Home in the past caused a denial of the child's right to personal security and reasonably safe living conditions.

156. Plaintiffs have failed to prove that every placement of a child in a Foster Group Home subjects the child to a risk of harm without regard to the individual characteristics and needs of that particular child.

157. Plaintiffs have failed to prove that every placement of a child in a Foster Group Home subjects the child to a risk of harm without regard to the individual characteristics, qualities and capabilities of the particular Foster Group Home where the child is placed.

158. Plaintiffs have failed to prove the level of training of all Foster Group Home parents and have failed to prove as to each and to all that such training was inadequate.

159. Plaintiffs have failed to prove the availability of on-call medical personnel at all Foster Group Home and have failed to prove as to each and to all that such availability was inadequate.

160. Plaintiffs have not demonstrated that placement of children in Foster Group Homes causes all such children to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

161. The level of personal security a child experiences in a Foster Group Home, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

162. Whether a child placed in a Foster Group Home is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including but not limited to the particular Foster Group Home, the number of children living there, and the knowledge, experience and training of the caregivers.

163. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

164. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to all placements of children in Foster Group Homes shocks the conscience.

165. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference with respect to all placements of children in Foster Group Homes.

166. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference with respect to all placements of children in Foster Group Homes.

167. Far from acting with deliberate indifference, Defendants engage in a broad spectrum of conduct to mitigate a wide variety of risks associated with children in conservatorship, including risks associated the placement of children in Foster Group Homes.

168. Plaintiffs have failed to prove the specific remedy they seek for this subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the risk of harm of which they complain.

8. AGREED PROPOSITIONS OF LAW

The parties have not reached agreement on any agreed propositions of law.

9. CONTESTED PROPOSITIONS OF LAW

a. Plaintiffs' Position

1. Whether Defendants have violated and continue to violate Plaintiffs' substantive due process right to be free from harm and the unreasonable risk of harm while in state custody (*M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 32 (S.D. Tex. 2013) (holding that "the State exercises control over children in State custody and has a commensurate duty of care to them"), *petition for permission to appeal dismissed*, 547 F. App'x 543 (5th Cir. 2013) (per curiam); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16, 323 (1982); *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998)) by failing to exercise professional judgment in the following respects:

    a. maintaining excessive conservatorship worker caseloads exceeding widely accepted professional standards;
    b. maintaining a placement array that is inadequate in number, geographic spread, and mix to meet the needs of children removed into DFPS foster care custody, and maintaining a licensing function that lacks (i) sufficient staffing capacity to conduct adequate oversight of licensed foster care placements and (ii) a quality assurance system capable of adequately identifying and correcting deficiencies in licensing policy and practices;
    c. utilizing foster group homes that fail to incorporate widely accepted safeguards for the operation of group and congregate care facilities; and
    d. utilizing general residential operations to serve children with basic level needs who can be adequately served in a foster home setting, thereby departing from the accepted standard that children are to be placed in the least restrictive, most family-like setting.

2. Whether the failure to exercise professional judgment as set forth in 1(a)-(d) results in unconstitutional harm and the unreasonable risk of harm to children in the General Class and subclasses.

b. Defendants' Position

1. A child in the permanent managing conservatorship of DFPS has a Fourteenth Amendment substantive due process right to personal security and reasonably safe living conditions. *Hernandez v. Texas Department of Protective & Regulatory Services*, 380 F.3d 872, 880 (5th Cir. 2004).

2. "To demonstrate a viable substantive due process claim, in cases involving government action, the plaintiff must show that the state acted in a manner that 'shocks the conscience.'" *Hernandez,* 380 F.3d at 880, citing *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992); *MD v. Perry*, 294 F.R.D. 7, 34 (S.D.Tex. 2013)("In this case Plaintiffs challenge policies rather than discrete executive actions, so on this test they would need to show that those policies are such that they shock the conscience."). *See, e.g., Doe v. Covington County School District,* 675 F.3d 849, 867-68 (5th Cir. 2012)(en banc)("Conduct sufficient to shock the conscience for substantive due process purposes . . . has been described as conduct that . . . 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' *Lewis,* 523 U.S. at 846-47 & n. 8 . . . As one court has recently summarized, '[t]he burden to show state conduct that shocks the conscience is extremely high, requiring stunning evidence of arbitrariness and caprice that extends beyond mere violations of state law, even violations resulting from bad faith to something more egregious and more extreme.' *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010)(citation and internal quotation marks omitted).")

3. Not all deliberate indifference shocks the conscience. *City of Sacramento,* 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.")

4. Defendants accept Plaintiffs' characterization of the issue of whether Defendants' conduct has violated Plaintiffs' substantive due process rights as a contested proposition of law. Defendants' conduct is a question of fact. Whether that conduct amounts to a violation of a constitutional duty, including whether that conduct meets the applicable culpability standard, are contested propositions of law. Defendants disagree, however, with how Plaintiffs have framed these issues, both as to the scope of the duty and the culpability standard, and Defendants therefore submit their own propositions of law as set forth below.

Scope of the Duty

5. The Fourteenth Amendment substantive due process right of a child in foster care in Texas has not been extended beyond a right to personal security and reasonably safe living conditions announced in *Hernandez v. Texas Department of Protective & Regulatory Services,* 380 F.3d 872 (5th Cir. 2004).

> The United States Supreme Court has not recognized a substantive due process right in a foster care case. The Fifth Circuit has not recognized such a right beyond that described in *Hernandez.* Thus, the Fourteenth Amendment substantive due process right of a child in foster care in the State of Texas does not include rights to any of the following (note—the following list is of rights that do not independently exist under the Fourteenth Amendment and is not in derogation of other undertakings and obligations DFPS undertakes with respect to

> children in its conservatorship): to safeguards that prevent the child from deteriorating either physically or psychologically, to have steps taken to prevent their physical or psychological deterioration, to permanence, to absolute safety, to well-being, to be free from frequent placement moves, to have infrequent placement moves, to a suitable placement, to placement in the least restrictive, most family-like foster care setting, to not be removed a certain distance from their home communities, to case planning, to permanency conferences, to parental and sibling visitation, to a stable placement, to an adequate number and array of placements, to be free from inappropriate placements, to conservatorship caseworkers, to caseworkers to whom a limited number of children are assigned, to limited duration of time in state custody, and to foster care services delivered in the manner described by any child welfare advocacy group, league, society or council.

6. The constitutional right likewise does not include an unlimited "right to be free from an unreasonable risk of harm" in foster care. Neither the United States Supreme Court nor the Fifth Circuit (in *Hernandez* or elsewhere) has recognized such a right. Defendants contend that no such right should be recognized in the present case because:

> "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *accord*, *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990)("Courts must resist the temptation to augment the substantive reach of the Fourteenth Amendment . . . .").
>
> There is no reason in the present case to expand substantive due process to include freedom from an unreasonable risk of undefined, open-ended "harm," such as Plaintiffs seek. If Plaintiffs are indeed exposed to imminent, actionable harm (e.g., denial of a right to personal security and reasonably safe living conditions), their remedy lies in traditional injunctive relief. There would be no need to expand substantive due process and the case can be resolved on existing law. If on the other hand, Plaintiffs cannot prove imminent, actionable harm caused by the Defendants, then substantive due process should not be expanded to reach a more nebulous, open-ended notion of "harm," and to create corresponding, expanded duties to prevent same. In this regard and with specific reference to Plaintiffs' caseworker caseload claim in the present case, the Fifth Circuit cautioned:
>
> > For instance, it is unclear whether the Named Plaintiffs can even advance a due process claim based on a bare finding that Texas has "organized or mismanaged" DFPS improperly. *See Lewis v. Casey*, 518 U.S. 343, 349-50 . . . (1996)("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the

> laws and the Constitution . . . . But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly."

MD v. Perry, 675 F.3d 832, 841 (5th Cir. 2012). Plaintiffs' open-ended notions of harm and corresponding expanded duties run afoul of this very admonition. The court should decline to expand substantive due process to reach what, in effect, is a claim of poor management, not conscience-shocking, actual and imminent harm.

Culpability Standard

7. To demonstrate a viable substantive due process claim, in cases involving government action, Plaintiffs must show that Defendants acted in a manner that shocks the conscience, *MD v. Perry*, 294 F.R.D. 7, 34 (S.D.Tex. 2013)("In this case Plaintiffs challenge policies rather than discrete executive actions, so on this test they would need to show that those policies are such that they shock the conscience."); *Hernandez*, 380 F.3d at 880, *citing County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992); *Doe v. Covington County School District*, 675 F.3d 849 (5th Cir. 2012)(en banc), and amounts to deliberate indifference. *Hernandez*, 380 F.3d at 880.

   Six months after *MD v. Perry*, 675 F.3d 832 (5th Cir. 2012), and based on *Hernandez*, the Fifth Circuit refused to apply a professional judgment standard in a foster care case:

   > "Hall contends that we should apply a professional judgment standard instead of the deliberate indifference standard. This court has concluded that the deliberate indifference standard is the appropriate standard for considering substantive due process claims based on foster children's rights to personal security and reasonably safe living conditions. See *Hernandez*, 380 F.3d at 880. We will not disregard this established precedent. See *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 2012 WL 3239955, at *11 (5th Cir. Aug. 10, 2012)."

   Hall v. Smith, 497 Fed.Appx. 366, 377 n. 16, 2012 WL 4478437, **8 n. 16 (5th Cir., Oct. 12, 2012). *See also*, district court opinion, *Hall v. Dixon*, 2011 WL 767173, *2 (S.D. Tex, Feb 25, 2011):

   > Hall's allegations failed to state a claim for violation of Jasmine's right to safety in state-mandated foster care, the substantive violation Hall alleged under § 1983. In a previous opinion, this court identified deliberate indifference as the applicable standard of care. . . . Hall argued in her motion for reconsideration that the standard of care should be professional judgment, citing *Youngberg v. Romeo*, 457 U.S. 307 . . . (1982). This

> court observed that no court in the Fifth Circuit had adopted the professional judgment standard in this context. See, e.g., *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective and Regulatory Servs.,* . . . 2002 WL 31689710, at *9 (N.D. Tex. Nov. 22, 2002). A nearly unanimous en banc opinion of the Fifth Circuit also casts doubt on the continuing validity of the standard. *Hare v. City of Corinth, Miss*., 74 F.3d 633, 646-47 (5th Cir. 1996)(en banc)."

Thus, Defendants' contested propositions of law as to the **constitutional claim** are:

8. Plaintiffs have not demonstrated that DFPS' conservatorship caseworker caseloads cause all children in PMC to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions.

   Plaintiffs have not demonstrated for any and each of Defendants that such conduct shocks the conscience.

   Plaintiffs have not demonstrated for any and each of Defendants that such conduct amounts to deliberate indifference.

9. Plaintiffs have not demonstrated that inadequate regulatory oversight by DFPS causes all children in PMC who are in licensed facilities to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions.

   Plaintiffs have not demonstrated for any and each of Defendants that such conduct shocks the conscience.

   Plaintiffs have not demonstrated for any and each of Defendants that such conduct amounts to deliberate indifference.

10. Plaintiffs have not demonstrated that DFPS' placement array causes all children in PMC who are in licensed facilities to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions.

    Plaintiffs have not demonstrated for any and each of Defendants that such conduct shocks the conscience.

    Plaintiffs have not demonstrated for any and each of Defendants that such conduct amounts to deliberate indifference.

11. Plaintiffs have not demonstrated that DFPS causes all Basic Service Level PMC children placed in a General Residential Operation to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions.

    Plaintiffs have not demonstrated for any and each of Defendants that such conduct shocks the conscience.

    Plaintiffs have not demonstrated for any and each of Defendants that such conduct amounts to deliberate indifference.

12. Plaintiffs have not demonstrated that DFPS causes all children placed in Foster Group Homes to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions resulting from lack of a wake staff, inadequate foster parent training, and inadequate access to medical services.

    Plaintiffs have not demonstrated for any and each of Defendants that such conduct shocks the conscience.

    Plaintiffs have not demonstrated for any and each of Defendants that such conduct amounts to deliberate indifference.

Defendants' contested propositions of law as to **class certification** are:

13. Plaintiffs have not demonstrated that class certification is proper for the General Class because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

14. Plaintiffs have not demonstrated that class certification is proper for the Licensed Foster Care Subclass because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

15. Plaintiffs have not demonstrated that class certification is proper for the Foster Group Home Subclass because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

16. Plaintiffs have not demonstrated that class certification is proper for the Basic GRO Subclass because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

Defendants' contested propositions of law as to **standing** are:

17. Named Plaintiffs who are representatives of the General Class and all members of the General Class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the standing requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992);

City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 111 (1983); *James v. City of Dallas*, 254 F.3d 551, 553 (5th Cir. 2001).

18. Named Plaintiffs who are representatives of the Licensed Foster Care Subclass and all members of that class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the standing requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 111 (1983); *James v. City of Dallas*, 254 F.3d 551, 553 (5th Cir. 2001).

19. Named Plaintiffs who are representatives of the Foster Group Home Subclass and all members of that class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 111 (1983); *James v. City of Dallas*, 254 F.3d 551, 553 (5th Cir. 2001).

20. Named Plaintiffs who are representatives of the Basic GRO Subclass and all members of that class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the standing requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 111 (1983); *James v. City of Dallas*, 254 F.3d 551, 553 (5th Cir. 2001).

Defendants' contested propositions of law as to **abstention** are:

21. Because the *Middlesex* elements for *Younger* abstention are present here, the Court will abstain from reviewing Plaintiffs' claims. *Middlesex County Ethics Comm. V. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Texas Ass'n of Business v. Earle*, 388 F.3d 515, 519 (5th Cir. 2004).

22. Because the relief Plaintiffs seek will interfere with the ongoing efforts of the State to create policy improving Texas' foster care system, the Court will abstain from reviewing Plaintiffs' claims under the *Burford* abstention doctrine. *Burford v. Sun Oil Co.*, 310 U.S. 315 (1943); *Baran v. Port of Beaumont Navigation Dist. of Jefferson City*, 57 F.3d 436 (5th Cir. 1995).

23. To the extent not covered above, Defendants' contested propositions of law include each issue covered by their proposed conclusions of law.

10. EXHIBITS

Please see Attachment 1 and Attachment 2, collecting two copies of Plaintiffs' exhibit list and Attachment 3 and Attachment 4, collecting two copies of Defendants' exhibit list.

11. WITNESSES

Please see Attachment 5, collecting Plaintiffs' witness list and expert qualifications and Attachment 6, collecting Defendants' witness list and expert qualifications.

The parties may call each of the persons listed on the witness lists attached. If other witnesses to be called at the trial become known, their names, addresses, and subject of their testimony will be reported to opposing counsel in writing as soon as they are known; this does not apply to rebuttal or impeachment witnesses.

12. SETTLEMENT

According to the State, "all settlement efforts have been exhausted, the case cannot be settled, and it will have to be tried." Plaintiffs disagree. The parties' settlement discussions have been limited and inconclusive, and Plaintiffs remain open to a reasonable compromise in the best interests of the Class and Subclasses.

13. TRIAL

a. Plaintiffs' Position

Plaintiffs estimate that they will need 8 or 9 full trial days.

b. Defendants' Position

Defendants estimate that they will need 5 full trial days.

14. ATTACHMENTS

Please see Attachment 7, collecting Plaintiffs' proposed findings of fact; Attachment 8, collecting Defendants' proposed findings of fact; Attachment 9, collecting Plaintiffs'

conclusions of law; Attachment 10, collecting Defendants' conclusions of law; Attachment 11, collecting Plaintiffs' deposition designations; and Attachment 12, collecting Defendants' deposition counter-designations.

Date: _____

_____
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

Approved:

Date: November 14, 2014

/s/ *R. Paul Yetter*
ATTORNEY-IN-CHARGE, PLAINTIFFS

Date: November 14, 2014

/s/ *Thomas A. Albright*
ATTORNEY-IN-CHARGE, DEFENDANTS

ATTACHMENT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

M.D., by her next friend Sarah R. Stukenberg, *et al.*, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
	)	**CASE NO. 2:11-cv-00084**
v.	)	
RICK PERRY, in his official capacity as Governor of the State of Texas, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' PROPOSED FINDINGS OF FACT

A. THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ("DFPS") IN GENERAL

1. When the Child Protective Services ("CPS") division of DFPS determines a child has been maltreated or is at risk and should not remain in his or her home, it removes the child and petitions a court for Temporary Managing Conservatorship ("TMC") over the child.

2. If TMC is granted, DFPS takes custody of the child and attempts to achieve reunification, or, if this is not possible, place the child with a new, permanent family. TMC lasts one year unless a court orders that it be extended another six months.

3. If at the termination of TMC the child has not been reunified or placed in a new family, the child is transferred to the Permanent Managing Conservatorship ("PMC") of the State. The child remains in the State's PMC until he or she is adopted, custody is otherwise transferred, or he or she ages out of the system.

4. Many children coming into the PMC have suffered physical or sexual abuse and are traumatized.

5. According to DFPS policy, DFPS has four different placement options to house children in care: family foster homes, foster group homes, unverified kinship homes, and general residential operations ("GRO"), which include residential treatment centers ("RTC").

6. According to DFPS policy, foster family homes are traditional foster homes and contain fewer than seven children up to the age of 18 years, including biological and adopted children. They are verified and the caregivers receive training and financial support.

7. According to DFPS policy, a foster group home is a licensed operation that provides residential care for seven to 12 children up to the age of 18 years, including biological and adopted children.

8. According to DFPS standards, a GRO is a childcare facility that provides care for more than 12 children for 24 hours a day, including facilities known as children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps. They are licensed by the RCCL, subject to regulations, and receive financial support.

9. According to DFPS policy, an RTC is a type of GRO that exclusively provides care and treatment services for emotional disorders for 13 or more children up to the age of 18 years.

10. Texas also utilizes kinship placements or placements with a relative or someone who has a longstanding and significant relationship with the child or her family.

11. Kinship placements can be either verified or unverified. If they are unverified, they are only eligible for limited monetary assistance and the caregivers are not required to complete the training provided for foster parents.

12. According to DFPS policy, a child assigned to the basic service level may be characterized by transient difficulties and occasional misbehavior, acting out in response to stress, but episodes of acting out are brief, or behavior that is minimally disturbing to others, but the behavior is considered typical for the child's age and can be corrected; or may have developmental delays or mental retardation whose characteristics include minor to moderate difficulties with conceptual, social, and practical adaptive skills.

13. According to DFPS policy, a child assigned to the moderate service level "has problems in one or more areas of functioning." Children assigned to this service level may include a child whose characteristics include frequent non-violent, anti-social acts, occasional physical aggression, minor self-injurious actions, or difficulties that present a moderate risk of harm to self or others; a child who abuses alcohol, drugs, or other consciousness-altering substances whose characteristics include substance abuse to the extent or frequency that the child is at-risk of substantial problems or a historical diagnosis of substance abuse or dependency with a need for regular community support through groups or similar interventions; a child with developmental delays or mental

retardation whose characteristics include moderate to substantial difficulties with conceptual, social, and practical adaptive skills to include daily living and self-care or moderate impairment in communication, cognition, or expressions of affect; or a child with primary medical or habilitative needs, whose characteristics include occasional exacerbations or intermittent interventions in relation to the diagnosed medical condition, limited daily living and self-care skills, ambulatory with assistance or daily access to on-call, skilled caregivers with demonstrated competency.

14. According to DFPS policy, a child assigned to the specialized service level has "severe problems in one or more areas of functioning." Children assigned to this service level may include a child whose characteristics include unpredictable non-violent, anti-social acts, frequent or unpredictable physical aggression, being markedly withdrawn and isolated, major self-injurious actions to include recent suicide attempts, and difficulties that present a significant risk of harm to self or others; a child who abuses alcohol, drugs, or other consciousness-altering substances whose characteristics include severe impairment because of the substance abuse or a primary diagnosis of substance abuse or dependency; a child with developmental delays or mental retardation whose characteristics include severely impaired conceptual, social, and practical adaptive skills to include daily living and self-care, severe impairment in communication, cognition, or expressions of affect, lack of motivation or the inability to complete self-care activities or participate in social activities, inability to respond appropriately to an emergency, or multiple physical disabilities including sensory impairments.

15. According to DFPS policy, a child assigned to the intense service level "has severe problems in one or more areas of functioning that present an imminent and critical danger of harm to self or others." Children assigned to this service level may include a child whose characteristics include extreme physical aggression that causes harm, recurring major self-injurious actions to include serious suicide attempts, other difficulties that present a critical risk of harm to self or others, or severely impaired reality testing, communication skills, cognitive, affect, or personal hygiene; a child who abuses alcohol, drugs, or other consciousness-altering substances whose characteristics include a primary diagnosis of substance dependency in addition to being extremely aggressive or self-destructive to the point of causing harm; a child with developmental delays or mental retardation whose characteristics include impairments so severe in conceptual, social, and practical adaptive skills that the child's ability to actively participate in the program is limited and requires constant one-to-one supervision for the safety of self or others or a consistent inability to cooperate in self-care while requiring constant one-to-one supervision for the safety of self or others; or a child with primary medical or habilitative needs that present an imminent and critical medical risk whose characteristics include frequent acute exacerbations and chronic, intensive interventions in relation to the diagnosed medical

condition, inability to perform daily living or self-care skills, or medical supervision, 24-hour on-site, to sustain life support.

B. CLASS DEFINITIONS

16. The General Class consists of all children now, or in the future, in the Permanent Managing Conservatorship ("PMC") of the State of Texas.

17. The Licensed Foster Care Subclass consists of all members of the General Class who are now or will be in a licensed or verified foster care placement, excluding verified kinship placements.

18. The Foster Group Home Subclass consists of all members of the General Class who are now or will be in a foster group home.

19. The Basic Care GRO Subclass consists of all members of the General Class who are now or will be in a GRO and who are now or will be receiving solely non-emergency, basic child care services.

C. GENERAL CLASS

20. By the State's own admission, high caseloads are an ongoing problem that impacts all children in care, including those in the proposed General Class.

21. By the State's own admission, the failure to reduce caseloads impairs the State's ability to keep children in custody safe and causes the quality of casework to suffer.

22. By the State's own admission, bringing caseloads down improves services to children.

23. Caseloads of conservatorship workers have been rising since 2009.

24. As Commissioner John Specia admits, average caseloads can be misleading because new caseworkers handle very few cases for the first six months, yet they are included in the averages.

25. As former Assistant Commissioner Audrey Deckinga testified, reducing caseloads was recommended by at least two advisory committees, one in 1996 and one in 2010.

26. As former Assistant Commissioner Audrey Deckinga testified, high caseloads may cause the quality of casework to suffer.

27. As former Assistant Commissioner Audrey Deckinga testified, high caseloads can be a factor that increases turnover.

28. As former Assistant Commissioner Audrey Deckinga testified, lower caseloads can greatly improve child safety.

29. External advisory bodies and policy organizations, including the State's own expert, Jane Burstain, in her former role as senior policy analyst with the Center for Public Policy Priorities, have found that caseloads need to be reduced to make workloads manageable and to enable workers to focus on helping and providing services to the children.

30. As Chair of the DFPS Advisory Council Christina Martin agreed, high caseloads can make it more difficult for caseworkers to do the work necessary for timely permanency for children in foster care, with the result that children might spend more time in foster care at greater cost to the state.

31. Employee exit surveys of staff who departed between March and May 2013 reveal workers leaving because of unmanageable workloads statewide.

32. The Sunset Advisory Commission May 2014 Staff Report found that caseworkers commonly mentioned lowering caseloads when asked what DPFS could do to improve retention.

33. The Stephen Group found that because of workload demands of administrative tasks, data entry, and travel requirements, no more than 26% of a caseworker's time is actually being spent working with families and children.

34. By the State's own admission, entry-level direct delivery positions, like conservatorship positions, experience the highest rate of turnover within the agency.

35. By the State's own admission, the State has had a long-standing concern regarding its inability to recruit and retain high quality talent.

36. As Commissioner John Specia testified, the turnover rate within DFPS is "too high." As Commissioner John Specia agreed, turnover for new hires in the agency is "very high."

37. As state regional leadership testified, the number of children coming into custody is increasing, the conservatorship vacancy rates are high, and conservatorship workers leave their jobs because of workload issues.

38. By the State's own admission, turnover rates for caseworkers are on the rise and lead to higher caseloads, less experienced caseworkers and supervisors, and impact quality casework and ultimately safety for children.

39. By the State's own admission, turnover rates for caseworkers remain unacceptably high, with about 29% of new caseworkers leaving within their first year.

40. The Sunset Advisory Commission May 2014 Staff Report found that the negative impacts of caseworker turnover were delayed investigations, lack of continuity in

providing services to families and children, lack of consistent and timely visits to children in state custody, and added workload for remaining workers, causing further turnover, and significant costs to the State in recruitment and training costs, as well as lost productivity.

41. Commissioner John Specia agreed with the findings of the Sunset Commission regarding the negative impact of caseworker turnover.

42. State administrative data as of the second quarter of SFY 2014 reveals that entry-level DFPS workers had an annualized turnover rate of 39% and substitute care caseworkers overall had an annualized turnover rate of 20.1%. The annualized turnover rate for CVS workers in SFY 2013 was 22.9%.

43. The Sunset Advisory Commission May 2014 Staff Report found that DFPS has approximately $72 million in annual turnover costs.

44. The Sunset Advisory Commission May 2014 Staff Report found that the State has higher vacancy rates, which are related to higher caseloads and higher turnover and that together they create a vicious cycle.

45. The Sunset Advisory Commission May 2014 Staff Report found that the State has difficulty reducing vacancy rates because each month DFPS hires over 200 new caseworkers while losing over 100, and one in six caseworkers leave within the first six months of employment.

46. The Sunset Advisory Commission May 2014 Staff Report found that the State's inability to retain workers keeps the State from using all allocated positions to reduce caseloads and ultimately impacts the State's ability to effectively carry out its mission of protecting children.

47. The Stephen Group found that 43% of new workers leave within the first two years, and estimated that DFPS could save $25 million per year if they reduced the turnover rate to 10% to 15%.

48. The Stephen Group found that CPS' extraordinary amount of turnover is greatest amongst the caseworker staff, and that this creates a negative environment that reduces productivity and feeds more turnover.

49. The Stephen Group found that "[t]he legislature allowed Child Protective Services to hire 1,000 new caseworkers . . . but these served only to replace those lost through attrition."

50. As the state admits, "[r]etention and turnover issues have impacted the ability of CPS to achieve full staffing during FY 2014."

51. As Commissioner Specia testified, it is "an issue" that DFPS has had a significant problem lowering caseloads, despite the fact that the agency has been hiring new caseworkers, because of the number of people leaving the agency.

52. According to the Child Welfare League of America's ("CWLA") professional standards (specifically, CWLA Standard 3.48), caseworkers in family foster care should have caseloads that range from 12 to 15 children, depending on level of services required to meet the children's needs, in order to be able to fulfill their responsibilities.

53. The Council on Accreditation ("COA") recommends caseloads of 8 to 15 children depending on the severity of children and families' needs.

54. Texas state law defines "professional caseload standards" to include caseload standards established by the CWLA.

55. As Commissioner John Specia testified, he did not know the average daily caseload within DFPS on the day of his deposition.

56. Texas has not established any guidelines regarding maximum or optimum caseloads.

57. As Commissioner John Specia testified, he does not think there is any need to set a caseload standard.

58. As former Assistant Commissioner Audrey Deckinga testified, DFPS counts caseloads by stages, not by children.

59. As former Assistant Commissioner Audrey Deckinga testified, DFPS lacks maximum caseload limits for caseworkers.

60. By the State's own admission, the State does not set caseload maximums or limits beyond which caseworkers cannot be assigned additional cases.

61. As Director of Field Colleen McCall testified, she does not look to professional standards regarding foster care caseloads in managing the workloads of her staff.

62. As Director of Field Colleen McCall testified, her staff work quite a bit of overtime, yet she does not analyze how much in order to see if their workloads prevent them from performing critical job responsibilities.

63. As Director of Field Colleen McCall testified, she does not review data on caseload ranges, and when her caseworkers have caseloads higher than 50, she just expects local supervisors to find ways to make sure all the tasks are getting done.

64. As Director of Field Colleen McCall testified, she does not expect regional leadership to review overtime data.

65. As the state admits, largely because of turnover, overtime costs increased by 65% from FY 2012 to FY 2013 and the cost of increased overtime contributed to a budget shortfall.

66. By the State's own admission, conservatorship caseworkers are responsible for visiting the child; ensuring that the child is safe; ensuring that the child's placement is appropriate; coordinating and following court orders; coordinating medical visits, dental visits and sibling visits; following the visitation plan of the court; updating educational information; updating placement log information; creating, reviewing, and updating the child's plan of service; and permanency planning for the child.

67. As state regional leadership testified, conservatorship workers are responsible for ensuring the safety, well-being and permanency of children assigned to them, including ensuring that children are placed in the most family-like setting that is suitable to their needs; ensuring that the children's medical, dental, and psychological needs are met; visiting their assigned children; ensuring visits take place between siblings not placed together, and between children and their biological parents; ensuring that those children achieve permanency, and that their needs are met in their placement.

68. The Sunset Advisory Commission May 2014 Staff Report found that Child Protective Services caseworkers are "the backbone of the State's effort to protect children," and that they "make life-and-death decisions every day."

69. The Sunset Advisory Commission May 2014 Staff Report found that Child Protective Services caseworkers contend with difficult working conditions, high workloads, and low pay.

70. By the State's own admission, this study does not capture increased areas of conservatorship responsibilities that have been added since 2010.

71. The Sunset Advisory Commission May 2014 Staff Report found that the State bases its target caseload and caseworker performance requirements on a workload time study from 2004, which does not reflect the current workload due to legislative and policy changes.

72. The Casey Family Programs April 2014 audit of DFPS found that the single most important improvement any system can make is to ensure it has a well-trained workforce with workloads that meet national standards.

73. As the State admits, the increase in caseload per worker since SFY 2009 has made it "difficult for Conservatorship caseworkers to help children in the state's conservatorship return home or be adopted timely.

74. The Sunset Advisory Commission May 2014 Staff Report found that more than 55% of CPS caseworkers responding to Sunset's survey indicated they do not have adequate time during the workday to successfully do their job. More than half responded that they did not think the agency's expectations for their job performance are reasonable.

75. The 2010 Texas Appleseed report "Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts and Legal System," commissioned by the Supreme Court of Texas Permanency Judicial Commission for Children, Youth, and Families, found that caseworker turnover makes it easy for the child's needs to go overlooked and for essential services and support for the child to fall through the cracks.

76. Judges interviewed for the 2010 Texas Appleseed report "Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts and Legal System," commissioned by the Supreme Court of Texas Permanency Judicial Commission for Children, Youth, and Families, "almost invariably" acknowledged that "the high turnover of CPS caseworkers means that the CPS representative in court at a given [permanency] hearing is rarely sufficiently knowledgeable about the child to conduct a productive hearing."

77. Interviews conducted for the 2010 Texas Appleseed report "Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts and Legal System," commissioned by the Supreme Court of Texas Permanency Judicial Commission for Children, Youth, and Families, revealed specific complaints about "overworked caseworkers [that] addressed every facet of their job[s]," including failure to file court reports on time, delays in adoptions and TPRs, perfunctory monthly home visits, and "lack of substantive contact" with children that "limits the depth of any relationship and understanding caseworkers may develop with their foster children."

78. As the state admits, additional workers are needed to help the agency continue to make monthly face-to-face contact with children.

79. DFPS has a process of using so-called "I See You" workers for children placed outside their home region.

80. The Stephen Group found that the very limited time that staff spends with families and children not only means that families are poorly served, but also undermines morale, which results in higher turnover.

81. DFPS policy requires that it must update the service plan for PMC children with a basic service level at least every six months.

82. DFPS policy requires that it must update the service plan for a PMC child with a moderate, specialized, or intense service level at least every three months.

83. As state regional leadership testified, reviewing and updating case plans is vital for the children because it ensures that services are being provided to meet the needs of the children; to ensure progress towards permanency is being made; and to promote the children's safety, permanency, and well-being.

84. As state regional leadership testified, they did not know that policy requires case plans to be reviewed and updated more frequently for children with elevated needs, and they do not track their regions' compliance with policy.

85. As Assistant Commissioner for CPS Lisa Black testified, case planning is important for permanence, and it is important for case plans to be developed and reviewed in a timely manner.

86. As Director of Field Colleen McCall stated in a 2012 memo to the Commissioner, the failure to timely update case plans was because of high caseloads.

87. As state regional leadership testified, permanency planning meetings are essential for ensuring that an appropriate permanency goal is assigned and progress toward permanency is being made.

88. As state regional leadership testified, they did not know when permanency planning meetings were required and they do not track data on their regions' performance with respect to permanency planning meetings.

89. Unless a child is in a placement that DFPS intends to be permanent, DFPS policy states that it should hold a permanency conference for the child within three months of being granted PMC over the child.

90. The Child Welfare League of America ("CWLA") Standard 0.13 provides that foster care is meant to be temporary, and permanency plans should be made concurrently.

91. Federal DHHS guidelines provide that substitute care should be temporary, with a primary goal of reunification, and if that is not possible, the child welfare system must find another appropriate long-term placement.

92. According to DFPS policy, "Another Planned Permanent Living Arrangement (APPLA) is the least preferred permanency goal. APPLA should be the youth's primary permanency goal only when a youth is 16 and above and where there is a compelling justification for why none of the other goals are in the youth's best interest."

93. As state regional leadership testified, the visits between children and their parents are very important to solidifying their bond, are a critical piece of permanency planning, and can make reunification more likely.

94. As Director of Field Colleen McCall testified, visits with parents can increase the chances that a child will be reunified.

95. DFPS Policy requires visitation between children with a reunification goal and their parents while the children are in TMC but does not require it for children in PMC.

96. DFPS policy provides that reunification is the preferred permanency option whenever possible and makes clear that it is the permanency goal to be explored before all others.

97. As state regional leadership testified, they were unaware of the specifics of DFPS policy regarding sibling visitation.

98. DFPS policy requires that for siblings in custody that are placed apart from each other, visits should occur at least once a month unless visits are not in the best interests of the children.

99. Casey Family Programs' April 2014 Assessment of Foster Care Lengths of Stay and Permanency Outcomes in Harris County, Texas, A Report to the Texas Department of Family and Protective Services found that "[n]umerous transitions in caseworker assignments disrupt momentum toward permanency by forcing children/youth and their families to 'start over' repeatedly with new caseworkers. Data provided by DFPS indicate a turnover rate of 26.1% among DFPS-CPS caseworkers during 2013, with a position vacancy rate of 9.7% (more than 75 vacant positions) at year's end."

100. According to Casey Family Programs' April 2014 Assessment of Foster Care Lengths of Stay and Permanency Outcomes in Harris County, Texas, A Report to the Texas Department of Family and Protective Services, the project team requested data on workforce-related items "[b]ecause caseloads, workforce turnover and other workforce factors hold potential to significantly affect the quality of casework and case outcomes, including lengths of stay in care and timely transitions to permanency for Harris County children and youth . . . ."

101. In a document responding to the Sunset Commission Report findings, Texas CASA recommended that DFPS "use every resource and technique available to expedite appropriate, permanent placements for children and youth in PMC," including more frequent permanency conferences.

102. As the State admits, youth who grow up in foster care without permanent families and community connections are more likely to live in poverty, be unemployed, become

homeless, have untreated serious medical and mental health issues, and become involved in the criminal justice system.

103. As the State admits, more must be done to reduce the length of time before a child is reunified or goes to a permanent family.

104. State administrative data reveals that, as of the end of June 30, 2014, 2,709 PMC children, or 23.12% of all PMC children, had been in conservatorship for four or more years.

105. State administrative data reveals that according to DFPS data, for PMC children who emancipated in FY 2014 as of February 7, 2014, the median length of service was 53.5 months, or approximately four and a half years.

106. State administrative data reveals that at the end of May 2014, 61.59% of the children in the State's PMC, or 7,184 children, had a permanency goal of adoption but were still waiting for an adoptive home.

107. As leadership admitted, caseloads impact the poor performance on adoption because the work involved in finalizing adoption is time-sensitive and requires having the time to build a relationship with potential adoptive parents and having the time to review studies for families that are interested.

108. As Director of Field Colleen McCall testified, high caseloads can be an element that impedes children's placements into permanent families because they cause caseworkers to have less time to fulfill their duties. As CPS Director of Permanency and Conservatorship Debra Emerson agreed, in some cases caseworker burnout and turnover can impede children's placements into permanent families.

109. According to the 2010 Texas Appleseed report "Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts and Legal System," commissioned by the Supreme Court of Texas Permanency Judicial Commission for Children, Youth, and Families:

- Too many children get stuck in the foster care system, spending over three years in long-term foster care (PMC) without a permanent home.
- "Research shows that children who spend three or more years in long-term foster care," defined as PMC, are more likely to age out of the foster care system at 18, unprepared for adult living.
- Within Texas there is a lack of urgency to find permanent homes for children in PMC, and this lack of urgency is the most pressing problem.

- Judges interviewed reported that CPS caseworkers and others were often unprepared for six-month permanency hearings for PMC children, contributing to a lack of "real progress" towards permanency.

- Judges interviewed reported that placement review hearings are too often acting only as a status update on the child as opposed to a means of ensuring that all necessary steps are being taken to move the child into a safe, permanent home.

- Studies have shown that caseworker turnover correlates to a reduced likelihood of a child's being placed in a safe, permanent home.

- Once a child enters PMC, the attention paid to the child's case diminishes drastically. There is often a sense that the 'clock stops ticking' when the child enters PMC.

- CPS' crushing workload and the high level of burnout and turnover makes it impossible for workers to take responsibility for how the children on their caseloads are faring, and as a result, the critical needs of a child often fall through the cracks of the system.

110. Pursuant to federal law and agency policy, DFPS must place each child in a safe setting that is the least restrictive (most family-like) and most appropriate setting available, in close proximity to the home of the child's parents when the child's permanency goal is reunification, consistent with the best interest and special needs of the child.

111. The Texas Administrative Code requires that children be placed in the least restrictive, most family-like setting available, and in proximity to the biological parents' home when the goal is reunification.

112. The CWLA Standard 2.29 requires that children be placed in foster family homes that best meet the child's specific needs and that are as close to home and community resources as possible.

113. As cited in a DFPS document, in 2010, inadequate efforts were being made to identify appropriate placements for children; to limit placement moves; and to adequately assess, train, and support foster and adoptive families.

114. State administrative data reveals that, as of June 30, 2014, 28.85% of the children in the State's PMC, or 3,381 children, had been moved through five or more placements while in custody.

115. As reflected in a 2010 DFPS document, children who age out of foster care have had, on average, 10 placement moves.

116. State administrative data reveals that the average number of placements for all PMC children was 3.9 placements.

117. State administrative data reveals that, as of June 30, 2014, the 1,132 PMC children placed in residential treatment facilities had an average of 7.5 placements, and the 124 PMC children in emergency shelter placements had an average of 7.8 placements.

118. State administrative data reveals that almost eight percent of the children in the State's PMC, or 884 children, had been in ten or more placements.

119. In a document responding to the Sunset Commission Report findings, Texas CASA noted that placement instability has negative impacts on "numerous indicators of child well-being, particularly educational progress."

D. LICENSED FOSTER CARE SUBCLASS

a. Insufficient Licensing Monitoring and Oversight

120. The CCL, of which Residential Child Care Licensing ("RCCL") is a part, has four general responsibilities, according to DFPS Policy. First, it must regulate "all child-care operations and child-placing agencies to protect the health, safety, and well-being of children in care." Second, it must "[e]stablish and monitor operations and agencies for compliance with licensing standards, rules, and law." Third, it keeps parents and the public informed about child care and the histories of various facilities and their compliance with minimum standards of care. Fourth, it provides technical assistance to providers to help them meet licensing standards, rules, and laws Residential Child Care Licensing ("RCCL") is responsible for regulating all residential childcare operations and child-placing agencies.

121. Each Program Manager oversees a number of supervisory units. Most are made up either solely of investigators, overseen by an Investigation Supervisor, who are responsible for conducting Abuse / Neglect Investigations, or inspectors, overseen by a Monitoring Supervisor, who are responsible for conducting most inspection and monitoring activities, as well as non-Abuse/Neglect Investigations. Some are "generalist" units, which contain a mix of investigators and inspectors.

122. Each of the three Program Managers also oversees a Training/Program Improvement Specialist, a Certification Specialist, and a Risk Analyst.

123. As of August 31, 2013, 60 percent of the children in substitute care in 2013—a total of 16,676 children—were in residential placements licensed by RCCL, and RCCL was responsible for overseeing a total of 10,285 licensed operations.

124. PMU was headed by Division Administrator William Wright from September 2013 to September 2014.

125. The PMU Division Administrator position reports to the Assistant Commissioner for CCL, Paul Morris.

126. DFPS policy states that licensing staff in Texas investigate complaints of maltreatment and reports of licensing violations.

127. The Licensing Policy and Procedure Handbook defines reports of Abuse or Neglect as reports alleging that "a child in care of an operation was harmed or may be harmed by an act or omission by a person working under the auspices of a child care operation. Such harm must meet the definitions of abuse or neglect, as described in the Texas Family Code and Texas Administrative Code."

128. The Licensing Policy and Procedure Handbook defines reports of non-Abuse or Neglect as reports alleging that "statute, administrative rules, or minimum standards have been or are in violation. No allegation of abuse or neglect is involved."

129. According to deposition testimony, Non-Abuse / Neglect Investigations are also referred to as "Standards Investigations."

130. The Licensing Policy and Procedure Handbook requires that all intake reports are evaluated to determine the type of investigation and priority.

131. The Licensing Policy and Procedure Handbook provides that Abuse / Neglect Investigations should be classified as Priority 1 if the report concerns the death of a child, or an immediate threat of serious physical or emotional harm or death of a child caused by abuse or neglect. Non-Abuse / Neglect Investigations should be classified as Priority 1 if the report concerns a violation of the law or minimum standards that pose an immediate risk of serious harm to children in care.

132. The Licensing Policy and Procedure Handbook provides that Abuse / Neglect Investigations should be classified as Priority 2 if the report concerns an allegation of abuse or neglect and the child is currently safe, or the child is not at immediate risk of serious physical or emotional harm as a result of the abuse or neglect. Non-Abuse / Neglect Investigations should be classified as Priority 2 if the report does not contain an allegation of abuse or neglect, but does concern (a) inappropriate discipline; (b) inappropriate physical restraint; (c) a serious injury; (d) a serious accidental injury or medical incident; (e) a significant supervision problem; (g) a person is present at the operation whose criminal or Central Registry history poses a risk of harm to a child; or (h) an alleged illegal operation with a history of operating illegally, was previously listed, licensed, or registered and closed voluntarily or by adverse action, is caring for

more than 12 children. The term serious indicates that the alleged violation has resulted or may result in impairment to the child's overall health or well-being.

133. The Licensing Policy and Procedure Handbook provides that an investigation should be classified as a Priority 3 if it concerns if a non-abuse or neglect report that concerns (a) an illegal operation with no other allegations; (b) a violation of law, administrative rules, or minimum standards that poses a low risk of harm to children and an inspection is required; (c) a sex offender's address within proximity to the operation; or (d) any injury or medical incident that does not rise to the level of a Priority 2 investigation.

134. The Licensing Policy and Procedure Handbook requires that Priority 1 and 2 investigations must be completed within 30 days and Priority 3 investigations must be completed within 60 days. An investigation is "complete" when it is submitted to the supervisor for approval. The policy further requires that a supervisor or secondary approver review the Abuse/Neglect investigation no later than 15 days after it is submitted, and either review or reject the investigation. An investigation is "closed" when it is approved by the supervisor or secondary approver. DFPS performance targets call for compliance with these time frames in at least 95 percent of cases.

135. The Licensing Policy and Procedure Handbook requires that if the time frames for completing an investigation cannot be met, an investigator must obtain supervisory approval to extend the time frames.

136. The Licensing Policy and Procedure Handbook requires that when RCCL investigates an allegation of abuse or neglect, the investigator "begins assessing the risk to children at the beginning of the investigation and continues to assess risk throughout the duration of the investigation." The policy defines a risk assessment as a staffing between the investigator and the inspector to review the operation's characteristics, compliance history, and investigation history. The purpose of such a risk assessment is, in part, to "determine the overall safety of children and the likelihood of abuse or neglect in the home or operation."

137. The Licensing Policy and Procedure Handbook requires that an investigator assess the immediate safety of children involved in an investigation, as well as the safety of other children being cared for by the operation. If the investigator identifies a threat to a child's safety, he or she must take steps to ensure the child's safety by requesting that the operation implement a safety plan.

138. The Licensing Policy and Procedure Handbook sets forth the Enforcement Actions that Licensing may take with regard to an operation based on the risk presented to children in care. These actions, in rough order of severity, include: follow-up without inspection; follow-up with inspection; provider plan of action; warning letter and follow-up with inspection; expedited monitoring inspection; monetary, or

administrative, penalties; evaluation; and probation. More severe enforcement actions, known as "adverse actions," include adverse amendments, which involve imposing additional restrictions or conditions on an operation; involuntary suspension; and revocation of an operation's permit.

139. The Licensing Policy and Procedure Handbook requires that in cases of alleged abuse and neglect, all alleged victims and all children directly involved in the incident must be observed and interviewed, and when possible, the investigator should do this in person. The investigator must interview alleged victims as soon as possible, but no later than five days after receiving the intake report for a Priority 1 (P1) investigation and seven days after receiving the intake report for a Priority 2 (P2) investigation. If the intake report indicates that the alleged victim has serious injuries, the investigator must observe the child sooner.

140. The Licensing Policy and Procedure Handbook requires that the investigator must interview, whenever possible: all alleged perpetrators, if the investigation is about abuse or neglect; all adults directly involved in the incident; other adults who may have witnessed the incident; other adults who may have knowledge of the incident; other adults who may be able to provide information regarding the type of care and supervision provided at the operation; other adults who may be able to provide information regarding the behaviors, level of functioning, and emotional state of any children involved in the investigation; and other adults who may be able to provide information regarding the child's previous involvement in abuse or neglect investigations.

141. The Licensing Policy and Procedure Handbook requires that for Priority 1 or Priority 2 investigations, an investigator must conduct an unannounced inspection no later than 15 days after the intake report was received, for Priority 3 the unannounced inspection must be conducted no later than 30 days after the intake report was received.

142. DFPS is required by law to review and analyze intake reports that include allegations associated with a higher risk of harm to children.

143. Accepted standards in the field recognize that one key structural component of high-performance organizations is the development of a staffing plan that takes into account effective workloads and supervisory/managerial span of control.

144. DFPS has not established target workloads for RCCL inspectors or investigators, and no one within RCCL monitors aggregate RCCL workload data.

145. Although time measurement studies related to RCCL were conducted in 2004 and 2006, RCCL does not utilize any data concerning the amount of time necessary for its inspectors and investigators to satisfy all responsibilities.

146. With the exception of informal discussions amongst RCCL staff, there is no system for flagging workloads that are too high.

147. The aggregate data available demonstrates that RCCL is understaffed. While DFPS has budgeted for approximately 110 to 115 RCCL caseworkers (investigators and inspectors) between September and March of 2014, the average number of filled RCCL caseworker positions was 88.5.

148. Since 2011, the number of filled RCCL caseworker positions has steadily declined from an average of 123.4 in Full Time Equivalents in FY 2011 to an average of 89 Full Time Equivalents in the first seven months of FY 2014.

149. A 2014 RCCL budget request notes that an increase in the number of serious incidents in residential child care operations has resulted in an increase in investigations for both inspectors and investigators.

150. Standards promulgated by the Child Welfare League of America provide that every agency should conduct a workload analysis to determine the appropriate workload standards for its child protective services staff. Absent such an analysis, Initial Assessment (investigation) caseloads should involve 12 active cases per month. Standards promulgated by the Council on Accreditation provide that, generally, caseloads should not exceed 15 investigations.

151. State data shows the average monthly caseload per RCCL investigator was 18.0 in the period between September 2013 and March 2014.

152. State data also shows that the rate of turnover among RCCL caseworkers increased from 8.5% in FY 2011 to 11.6% in FY 2013.

153. As RCCL managers acknowledge, vacancies can impact workloads and the program has experienced high turnover among staff and long vacancy rates.

154. Accepted standards in the field recognize that a key structural component of high-performance organizations is a formal continuous quality improvement system with clear performance benchmarks that are monitored systemically through planned information gathering methods and necessary follow-up actions.

155. The Performance Management Unit ("PMU") is intended to fulfill the requirement set forth in 42.0211(C) of the Texas Human Resource Code that the child care licensing division has a performance management unit with duties that include conducting quality assurance reviews of randomly selected monitoring and investigation reports to ensure compliance with all relevant laws, rules, and agency policies.

156. When PMU conducts an assessment, it does not have the authority to mandate that recommendations or corrective actions be implemented.

157. Historically, PMU has not had any formal system for tracking whether the findings of its performance assessments are meaningfully addressed.

158. During the pendency of this proceeding, PMU deteriorated. From approximately January to September of 2013, PMU operated without a Division Administrator. PMU staff members were reassigned to temporary supervisors who sat in other CCL units and performed different functions.

159. As William Wright, then-Division Administrator for PMU, testified in July 2014, over the last two years, the number of targeted casereadings performed by PMU declined from about six to eight per year to about four per year.

160. PMU used to summarize the results of targeted casereadings and risk analyses in an annual CCL Data & Trend Assessment Report, which compiled and addressed the findings and recommendations made throughout the year.

161. PMU no longer produces this report. No CCL Data & Trend Assessment was published in 2013, and no such report will be prepared in 2014.

162. The PMU recommendation tracking log is not shared with anyone outside of PMU.

163. PMU has no authority to mandate that its recommendations be implemented or to mandate any other form of follow-up.

164. There is no formal process in place within RCCL to identify issues to be referred to PMU.

165. There is no formal process within RCCL for considering PMU recommendations and whether to implement them.

166. There is no designated person within CCL who determines whether to implement PMU recommendations.

167. There are no formal RCCL reports or documentation associated with the implementation of PMU recommendations.

168. PMU issued three targeted casereading reports pertaining to RCCL in the past 12 months: a January 2014 report related to Unable to Determine dispositions, and two 2013 reports related to assigning priority intakes.

169. As RCCL Director Darla Jean Shaw testified, she distributed the two 2013 reports to her Program Managers but did not issue specific directives, and did not ask for any

specific feedback to ensure that the recommendations were implemented. RCCL Program Managers did not recall receiving these reports.

170. DFPS has failed to establish clear performance benchmarks and information gathering methods necessary to ensure the quality of RCCL practice in numerous areas – including the quality of inspections and technical assistance.

171. DFPS fails to collect aggregate data on the level of compliance with numerous RCCL policy requirements intended to ensure the safety of children in care.

172. RCCL is not able to track how frequently abuse or neglect investigations are rejected by supervisors and secondary approvers.

173. DFPS does not track instances of child-on-child abuse in the aggregate.

174. As William Wright testified, the issue of child-on-child abuse has been off the PMU radar during his tenure with the unit.

175. As RCCL Director Darla Jean Shaw testified, RCCL has a system for coordinating with CPS when an abuse/neglect investigation is opened in relation to alleged child on child abuse. However, this system does not apply to child-on-child intakes classified as non abuse/neglect.

176. RCCL Director Darla Jean Shaw is not aware of any system within RCCL specifically designed to ensure that serious incident reports involving child-on-child abuse are properly classified as an abuse/neglect investigation or a Non-Abuse/Neglect investigation.

177. The requirement that a supervisor or secondary reviewer approve an Abuse/Neglect investigation prior to closure is intended in part to ensure the accuracy of the initial disposition. RCCL managers admit that it is important that this determination is made quickly.

178. RCCL managers admit that they do not take steps to ensure Abuse/Neglect investigations are rejected or approved within 15 days and that they are not aware of the current rate of compliance with this policy requirement.

179. Aggregate data produced by DFPS shows that RCCL fails to complete and close Abuse/Neglect investigations within the time frames required by policy. During the period from July 1, 2013 to June 30, 2014, 78.1% of Priority 1 investigations and 82.8% of Priority 2 investigations were completed timely—meaning that they were submitted by the investigator for supervisory review within 30 days of the date the investigation was received, unless there was an extension involved in the case. Only

77% of Priority 1 and 2 Abuse/Neglect investigations were timely approved by the supervisor.

180. Additional DFPS data shows that the percent of Abuse/Neglect investigations that are closed timely has declined since FY 2010.

181. Reviews performed by PMU and RCCL in the first half of 2014 concluded that a significant percentage of RCCL investigations resulted in an inappropriate disposition.

182. A 2014 PMU review of physical abuse investigations found that more than half of investigations conducted during the period studied received a disposition of "Unable to Determine" (UTD). Of those, 64.6% were incorrect. In many of those cases, there was not an adequate investigation prior to the UTD disposition. Additional investigations had received erroneous "Reason to Believe" or "Ruled Out" dispositions.

183. Currently, the only identified way to evaluate compliance with the requirement that safety is immediately assessed in Abuse/Neglect investigations is the casereading process. RCCL supervisors are expected to conduct these casereadings for 20 cases per worker per year in order to provide feedback to the worker. RCCL managers admit that the casereadings are not regularly used to identify training needs or larger trends or patterns with regard to RCCL practice.

184. In a May 2014 Report, the Sunset Advisory Commission found that the State's traditional approach to enforcing child care licensing regulations has been to pursue non-monetary sanctions before imposing administrative penalties.

185. The Sunset Advisory Commission found that this approach dampens enforcement efforts in favor of an extensive collaborative approach and that the relaxed regulatory environment can be seen in a high incidence of repeat violations.

186. The Sunset Advisory Commission found that DFPS has taken only four adverse actions against residential child care facilities in the last five years. CCL has never used its administrative penalty authority against a residential operation.

187. The Sunset Advisory Commission found that in FY 2013, 31% of residential operations had repeat violations of the minimum standards or law. Most repeat violations occurred on the highest-risk standards, mostly associated with criminal history check requirements.

188. The Sunset Advisory Commission found that two of the most commonly violated standards in residential operations in FY 2013 were that a residential care operation failed to request a name-based criminal history check every 24 months for persons required to get background checks and that a residential operation failed to request a

name-based criminal history check for persons 14 or older who frequent the operations while children are in care. Both violations are considered "high risk."

189. DFPS acknowledges that failing to conduct required background checks might allow people with those particular undesirable criminal histories or central registry matches to have access to children in care.

190. As DFPS acknowledges, background checks have a critical role in reducing harm to children in care.

191. In a September 2013 Report, DFPS admitted that some childcare operations do not submit background checks timely or fail to submit checks on all persons who need them, and that this failure to comply with requirements poses a significant risk to children in the care of the operation and carries the potential for significant federal financial penalties.

192. Further, PMU reports show that, since at least 2011, RCCL investigators often failed to document that the operation was evaluated for compliance with all background check-related rules.

193. As RCCL Director Darla Jean Shaw testified, she did not know whether the number of deficiencies cited by RCCL for violations of background checks have increased, decreased, or held steady from year to year.

194. As of August 2014, RCCL had not developed any regular aggregate data report tracking compliance in relation to background checks.

b. Inadequate Placement Array

195. The Child Welfare League of America's Standards for Residential Services state, "[t]he goal of any residential care provider is to maintain the child for the shortest appropriate time frame, and successfully discharge the child to a less restrictive setting or level of care."

196. According to the Jim Casey Youth Opportunities Initiative, child welfare systems should place children in the most family-like setting possible.

197. According to established professional standards and federal policy, children should be placed with their siblings unless doing so is inadvisable due to a therapeutic or safety concern.

198. National child welfare organizations have urged states to take a data-based approach to placement array development that first analyzes the needs of children in care and then develops strategies to recruit and match placements.

199. DFPS policy provides that all children must be placed in the least restrictive, most family-like environment suitable to their needs.

200. DFPS policy provides that foster group homes ("FGHs") and residential group care facilities are more restrictive placements than foster family homes.

201. DFPS policy provides that siblings in care must be placed together unless doing so is not in one or both siblings' best interests.

202. DFPS has a policy for what to do when no placement is available, specifying that children are to be placed in a hotel or are to sleep overnight in a DFPS office.

203. As DFPS has admitted, there have been placement array problems since at least 2008, including placing children out of region to access RTC services and lacking placements for sibling groups. DFPS has recognized specific problems with the state's placement array in documents submitted to the state legislature and the federal government.

204. As DFPS has admitted, the needs of children in foster care do not always match the number, type, and location of available placement options, making it difficult to find appropriate placements for children.

205. As DFPS has admitted, there is an imbalance in the geographic distribution of foster care services and providers, and the current foster care system does not encourage providers to establish services where they are needed.

206. As DFPS has admitted, the geographic imbalance in placement and service distribution is problematic for caseworkers, children, and providers.

207. As Commissioner John Specia admits, he does not know how much progress has been made to date on increasing the number and variety of services and placements.

208. As admitted by the DFPS Commissioner, Assistant Commissioner, Chair of the Advisory Council, and other state-office-level leaders, there have been shortages of specific placement types and services, including basic foster homes, services in rural areas, and placements for children with higher-level needs.

209. As Director of Placement Gail Gonzalez admits, there is a need to increase placement capacity in order to reduce the number of children placed out of their home regions. As Ms. Gonzalez admits, DFPS only addresses this need by communicating the need to community partners and private providers. As Ms. Gonzalez further admits, this communication is not enough to "keep children close to home with the capacity that they need."

210. The Sunset Advisory Commission identified placement array shortcomings—including lack of placements and services in communities, placement instability, lack of capacity

to meet all children's needs, and varying quality among providers—as long-standing, well-known concerns. DFPS fails to adequately assess placement and service needs at the statewide and regional levels.

211. As DFPS admits, it does not set specific recruitment targets.

212. DFPS's regional recruitment plans address only basic-level DFPS foster homes and are inadequate in design and implementation.

213. DFPS does not have a data-driven recruitment process for therapeutic Child Placing Agency ("CPA") foster homes or residential placements.

214. DFPS fails to appropriately recruit placements to remedy known defects in the state's placement array.

215. DFPS fails to recruit a sufficient number of adoptive placements to meet the needs of all children who require such placements.

216. As DFPS leadership admits, placing children in their home communities leads to better outcomes for children, including improved well-being and more timely permanency.

217. DFPS has recognized that a lack of community resources results in the placement of children outside their home communities, an increased number of changes in placement, separation from siblings and family, lack of educational continuity, and a fractured support system.

218. DFPS acknowledges that over time, the state's geographic imbalance in services results in children originating from resource-rich areas of the state being placed out of region because all available resources are being used by children originating from other areas.

219. As DFPS admits, when children move outside their home communities, they often leave behind siblings, peers, families, schools, churches, and other support networks.

220. As regional DFPS leadership admits, placing a child outside his or her home county or region may cause emotional harm and trauma to the child.

221. As regional DFPS leadership admits, DFPS needs to improve the percentage of children placed in their home counties and regions.

222. As regional DFPS leadership admits, DFPS does not establish targets for out-of-county and out-of-region placements.

223. As Commissioner John Specia admits, too many children are placed outside of their home communities due to capacity issues.

224. As Commissioner John Specia admits, placing children in their home communities has an impact on visitation and reunification and improves case monitoring.

225. As Commissioner John Specia admits, placing children in their home communities can contribute to permanency.

226. As DFPS admits, placing children in their home communities helps facilitate visitation by biological parents, CPS caseworkers, CASAs, and attorneys ad litem and reduces travel costs.

227. As DFPS admits, placing children in their home communities helps maintain their educational continuity, and placements out of county or out of region can disrupt a child's education.

228. As of June 30, 2014, 6,394 children, or 54.6% of all children in the State's PMC, were placed outside of their home counties, and 3,119 children, or 26.6% of children in the State's PMC, were placed outside of their large, multi-county DFPS regions.

229. As DFPS has admitted, children who are moved outside their home communities are often separated from siblings and other family.

230. Only half of the State's sibling groups in PMC were intact with all members in the same placement, and more than a quarter of the sibling groups were entirely separated with no siblings placed together as of March 31, 2011.

231. As of July 2014, 35.3% of sibling groups in PMC and TMC were not intact with all members in the same placement, and 16.6% of siblings groups with children in care did not have any of the siblings placed together.

232. As Texas's Adoption Review Committee has recognized, inappropriate sibling placement decisions hinder and delay a child's path to a permanent family.

233. Child welfare research has shown that placing siblings together contributes to positive outcomes, including a higher likelihood of reunification.

234. As DFPS Director of Field Colleen McCall admits, over the last year in every region of the state, children have had to sleep in DFPS offices because DFPS did not have placements available for those children. Several of these children had just been discharged from psychiatric hospitals and had very high mental health needs that the DFPS staff felt unable to handle. As Regional DFPS leadership admits, such office placements are inappropriate.

235. DFPS has recognized a problem with children, including high-needs children, needing to sleep in DFPS offices due to a lack of available placements since 2008.

236. As regional leadership admits, proper placement matching is important for children in foster care in order to increase stability.

237. As regional leadership admits, the ability to properly match children to placements can be limited by the placement array and that there is a shortage of well-matched placements for children with certain needs.

238. As regional leadership admits, having more placement options increases the likelihood of making a good initial placement match for a child.

239. As regional leadership admits, a poorly-matched foster care placement may harm a child.

240. In 2012, Texas placed 7.7% of children aged 12 or younger in a congregate setting during the year they entered state custody, a percentage higher than all but eight other states, the District of Columbia, and Puerto Rico.

241. As of June 30, 2014, 152 PMC children with a moderate service level and 30 PMC children with a basic service level were placed in residential treatment centers in violation of DFPS policy.

242. According to the Jim Casey Youth Opportunities Initiative, congregate care settings are not conducive to supporting youth in engaging activities that help them 'practice' for adulthood or to helping young people build social capital.

243. DFPS regional leaders do not review data on the number of basic-level children placed in congregate care placements.

244. DFPS leaves children in psychiatric and medical hospitals for longer than medically necessary due to a lack of available placements for those children.

245. As DFPS admits, there are an insufficient number of residential providers that offer a full continuum of services, with the result that children must move placements when their service needs change.

246. The Public-Private Partnership ("PPP") found that because services are fragmented and placements are specialized by service level in Texas, many children must move multiple times in order to get the services they need. The PPP further found that these moves are not well-coordinated, with the result that sometimes important information is not conveyed and progress the child has made may be lost.

247. As regional leadership admits, a high number of moves can have a negative impact on children in care.

248. As regional leadership admits, placement moves can be traumatic and emotionally harmful for children. As DFPS Director of Field Colleen McCall admits, any move is difficult for a child and children are better off with fewer as opposed to more placements.

249. An insufficient array of placement options contributes to placement instability by forcing children into placements that are inappropriate for them and more likely to disrupt.

250. Each move that a foster child experiences interrupts normal development and adds psychological trauma, with long-term implications for the child's ability to develop healthy interpersonal relationships, good self-esteem, and even a conscience.

251. Placement instability is associated with negative developmental outcomes for foster children, including behavioral and emotional problems.

252. As Commissioner John Specia admits, too many placement moves can result in harm to children.

253. Federal data indicates that placement in congregate care can influence the likelihood of adoption. Federal data shows that in FY 2012, 56% of children adopted from foster care were adopted by their foster parents.

254. As the state recognized in a 2010 Program Improvement Plan, placement outside the home community can be an obstacle that impedes a child's permanency.

255. As DFPS admits, extended stays in state custody can be problematic for children and expensive for the state.

256. As Commissioner John Specia admits, too many children age out of foster care.

257. As Commissioner John Specia admits, growing up in care and aging out of the system is a terrible result for a child that will contribute to serious problems for the child.

258. The Stephen Group noted that the limited number of foster homes in the Texas system may lead to inappropriate practice in certification and placement matches that can leave children vulnerable to further maltreatment.

259. A response by Texas CASA to the Sunset Commission Report acknowledged problems with child placement, including children being placed far from their home communities, children enduring multiple placement moves, children languishing in PMC, and children being placed in inappropriate placement. The response also acknowledged that these problems damage children and add to their trauma.

E. FOSTER GROUP HOME SUBCLASS

260. A foster group home is a verified foster care placement that provides residential care for between seven and 12 children up to the age of 18.

261. As of April 30, 2014, there were 1,495 foster children living in FGHs.

262. Of the 1,495 foster children living in FGHs as of April 30, 2014, 831 were in the PMC of DFPS.

263. Of the 1,495 foster children living in FGHs as of April 30, 2014, 48% were placed in FGHs housing seven or more children (not including the caregivers' biological or adopted children).

264. As of April 30, 2014, the average FGH capacity in Texas was almost nine children.

265. On any given day, between 9% and 11% of all PMC children are in FGHs.

266. According DFPS policy, Texas shifted to a family-based model of foster group home care in 2007. Specifically, foster group homes verified after January 1, 2007 must be the primary residence of foster parents.

267. According to DFPS policy, child placing agencies may verify foster group homes to house fewer than 12 children.

268. According to DFPS policy, one caregiver in a foster group home can supervise as many as eight children, though that limit decreases if there is one child under the age of five in the foster group home (one caregiver for up to five children), if more than two children are receiving treatment services (one caregiver for up to four children), or if one child has primary medical needs (one caregiver for up to four children).

269. According to DFPS policy, a "foster group home that is the primary residence of at least one caregiver may be out of ratio during waking hours for short periods as long as the care and supervision needs of the children continue to be met."

270. According to DFPS policy, "[f]or a foster group home that is the primary residence of at least one caregiver, if three caregivers are required to meet the child/caregiver ratio, there must be at least two caregivers with the children during waking hours."

271. According to DFPS policy, Texas does not require that at least one caregiver remains awake at all times in a foster group home.

272. According to DFPS policy, Texas requires no additional educational requirements for foster group home caregivers beyond a GED, a high school diploma, or an illustration of similar knowledge.

273. According to DFPS policy, the number of children allowed does include biological and adopted children in the family: "[a] foster group home may care for up to 12 children, including any biological and adopted children of the caregivers who live in the foster home and any children receiving foster or respite childcare."

274. DFPS does not itself maintain data on the biological or adopted children of caregivers living in foster group homes with foster children.

275. As Defendants admit, outside of investigations and inspections, DFPS does not regularly monitor FGHs' compliance with staffing ratios and capacity limitations.

276. As Defendants admit, it is easier to closely supervise fewer children and young children, and children with higher service needs require a high level of supervision and care giving.

277. As Defendants admit, inadequate supervision could lead to an FGH parent potentially hurting a child or not being able to meet all of a child's needs.

278. Caregivers in FGHs are not in compliance with the training requirements established by the Council on Accreditation for congregate care caregivers, which call for training beyond what is required for family foster homes.

279. As Defendants admit, while DFPS requires only that FGH foster parents have a high school diploma or GED, a CPA may determine that FGH foster parents do not need a high school diploma or GED and may verify an FGH with foster parents who have neither.

280. As Defendants admit, the qualifications required of FGH foster parents and foster family home (which house six or fewer children) foster parents are the same.

281. As Defendants admit, DFPS does not prohibit FGH foster parents from holding jobs, including full-time jobs, jobs that involve travel, and jobs that involve work on nights and weekends.

282. As Defendants admit, DFPS does not track the percentage of FGH foster parents who work outside the home, and DPFS does not require CPAs to track this information in any systemic way.

283. FGHs do not comply with standards established by the Child Welfare League of America requiring that on-call or on-site medical and behavioral health personnel be available at all times at all group care facilities.

284. FGHs do not comply with standards established by the Council on Accreditation requiring that on-call or on-site medical and behavioral health personnel be available at all times at all group care facilities.

285. FGHs do not comply with Child Welfare League of America standards requiring at least one awake caregiver at all times in a group care setting.

286. FGHs do not comply with Council on Accreditation standards requiring at least one awake caregiver at all times in a group care setting.

287. Twenty-four hour supervision in a foster care placement improves child safety.

288. As Defendants admit, DFPS does not have a process for ensuring that FGHs meet standards published by the Child Welfare League of America.

289. Darla Jean Shaw, testifying as a 30(b)(6) witness for DFPS on FGHs, stated that the Council on Accreditation publishes standards regarding foster group homes, but she could not identify any such standards.

290. COA does not issue standards specific to foster group homes.

291. Texas's placement of children in FGHs that fail to conform to accepted child welfare professional standards causes harm and the risk of harm to such children.

292. As Defendants admit, DFPS does not track how many incidents of child-on-child sexual or physical interaction occur in FGHs.

293. DFPS does not monitor the number of adopted or biological children in FGHs.

F. BASIC CARE GENERAL RESIDENTIAL OPERATION SUBCLASS

294. General Residential Operations ("GRO") are foster care placements that can house 13 or more children.

295. Some GROs contract with DFPS to house over 100 children.

296. Federal law mandates that a child in foster care should be placed in the least restrictive, most family-like setting suitable to the child's needs.

297. Accepted child welfare professional standards provide that a child in foster care should be placed in the least restrictive, most family-like setting suitable to the child's needs.

298. Texas policy provides that a child in foster care should be placed in the least restrictive most family-like setting suitable to the child's needs.

299. As Defendants admit, family placements are the most desirable placements for foster children because such placements produce good outcomes for children.

300. Texas policy states that GROs are considered to be more restrictive placements than foster family homes.

301. Texas policy discourages the use of restrictive, non-family placement settings like GROs.

302. According to DFPS policy, non-emergency, basic child care services are defined as services "that meet a child's basic need for shelter, nutrition, clothing, nurture, socialization and interpersonal skills, care for personal health and hygiene, supervision, education, and service planning."

303. Children in foster care in Texas who need only basic child care services are inappropriately placed in GROs.

304. GRO placements often contain children of varying ages and service levels.

305. As of June 30, 2014, 356 PMC children were placed in non-emergency GROs and receiving only basic child care services.

306. As DFPS regional leadership admits, there is no specific reason to place a foster child in a GRO rather than in a foster family or group home, unless no family or group home placements are available.

307. Placing children who need only basic child care services in GROs causes harm and the risk of harm to such children.

308. In SFY 2013, there were 84 children aged 12 and under placed in a General Residential Operation and 299 children aged 12 and under placed in an RTC in Texas.

309. As of June 30, 2014, 356 PMC children were placed in non-emergency GROs and receiving only basic child care services.

ATTACHMENT 8

DEFENDANTS' PROPOSED FINDINGS OF FACT

CFSR Round 3 Statewide Indicators and Texas' Compliance with National Standards.

1. The Children's Bureau (CB) of the Administration for Children and Families (ACF), a part of the United States Health and Human Services Department (HHS), implemented the Child and Family Services Reviews (CFSRs) in 2001 in response to a mandate in the Social Security Amendments of 1994. The legislation required HHS to issue regulations for the review of state child and family services programs under titles IV-B and IV-E of the Social Security Act.

2. The CB uses the required reviews to determine whether such programs are in substantial conformity with title IV-B and IV-E plan requirements. The review process grew out of extensive consultation with interested groups, individuals, and experts in the field of child welfare and related areas.

3. The CFSRs enable the CB to: (1) ensure conformity with federal child welfare requirements; (2) determine what is actually happening to children and families as they are engaged in child welfare services; and (3) assist states in enhancing their capacity to help children and families achieve positive outcomes.

4. The CB uses national standards for state performance on statewide data indicators to determine whether a state is in substantial conformity with two outcomes, dealing with safety and permanency—two key issues in the present case.

5. Statewide data indicators are aggregate measures, and the CB calculates them using administrative data available from a state's submissions to the Adoption and Foster Care Analysis and Reporting System (AFCARS), the National Child Abuse and Neglect Data System (NCANDS), or a CB-approved alternate source for safety-related data.

6. In an April 23, 2014, Federal Register notice (79 FR 22604), the CB proposed statewide data indicators and an approach to national standards for the third round of CFSRs that differed from that used for the second round of reviews. The notice provided a detailed review of the consultation with the field and information considered in developing the third round of the CFSRs. The CB reviewed research literature, consulted with an expert panel, considered the availability and quality of data available, and conducted statistical testing to examine relationships between available data and outcomes. During the 30-day public comment period following the notice, the CB received responses from state and local child welfare agencies, national and local advocacy and human services organizations, researchers, and other interested persons. CB reviewed and considered this input before making final decisions regarding the statewide data indicators and the methodology.

7. The CB final plan, announced October 10, 2014, is to use two statewide data indicators to measure maltreatment in foster care and recurrence of maltreatment in evaluating Safety Outcome 1: Children are, first and foremost, protected from abuse and neglect. The CB will use statewide data indicators to measure achievement of permanency in 12 months for

children entering foster care, permanency in 12 months for children in foster care for 12 months to 23 months, permanency in 12 months for children in foster care for 24 months or more, re- entry to foster care in 12 months, and placement stability. The CB will use these five permanency indicators in evaluating Permanency Outcome 1: Children have permanency and stability in their living situations. Thus there are seven statewide indicators, two of which pertain to safety and five of which pertain to permanency. In that order, the seven statewide indicators may be described as follows:

- *Maltreatment in foster care*

  This indicator is described as: Of all children in foster care during a 12-month period, what is the rate of victimization per day of foster care?

  The CB includes this indicator to measure whether the state child welfare agency ensures that children do not experience abuse or neglect while in the state's foster care system. The indicator holds states accountable for keeping children safe from harm while under the responsibility of the state, no matter who perpetrates the maltreatment while the child is in foster care.

- *Recurrence of maltreatment*

  This indicator is described as: Of all children who were victims of a substantiated or indicated maltreatment report during a 12-month reporting period, what percent were victims of another substantiated or indicated maltreatment report within 12 months of their initial report?

  The CB includes this indicator to measure whether the agency was successful in preventing subsequent maltreatment of a child if the child was the subject of a substantiated or indicated report of maltreatment.

- *Permanency in 12 months for children entering foster care*

  This indicator is described as: Of all children who enter foster care in a 12-month period, what percent are discharged to permanency within 12 months of entering foster care?

  Permanency, for the purposes of this indicator and the other permanency-in-12-months indicators, includes discharges from foster care to reunification with the child's parents or primary caregivers, living with a relative, guardianship, or adoption.

  The CB includes this indicator to measure whether the agency reunifies or places children in safe and permanent homes as soon as possible after removal.

- *Permanency in 12 months for children in foster care 12 to 23 months*

This indicator is described as: Of all children in foster care on the first day of a 12-month period who had been in foster care (in that episode) between 12 and 23 months, what percent discharged from foster care to permanency within 12 months of the first day of the period?

The CB includes this indicator to measure whether the agency reunifies or places children in safe and permanent homes timely if permanency was not achieved in the first 12 to 23 months of foster care.

- *Permanency in 12 months for children in foster care for 24 months or longer*

  This indicator is described as: Of all children in foster care on the first day of a 12-month period who had been in foster care (in that episode) for 24 months or more, what percent discharged to permanency within 12 months of the first day?

  The CB includes this indicator to measure whether the agency continues to ensure permanency for children who have been in foster care for longer periods of time.

- *Re-entry to foster care in 12 months*

  This indicator is described as: Of all children who enter foster care in a 12-month period who were discharged within 12 months to reunification, living with a relative, or guardianship, what percent re-enter foster care within 12 months of their discharge?

  The CB includes this indicator to measure whether the agency's programs and practice are effective in supporting reunification and other permanency goals so that children do not return to foster care.

- *Placement stability*

  This indicator is described as: Of all children who enter foster care in a 12-month period, what is the rate of placement moves per day of foster care?

  The CB includes this indicator to measure whether the agency ensures that children who the agency removes from their homes experience stability while they are in foster care.

8. For each of these seven indicators, the CB has national standards. In setting national standards, the CB, in its words, attempted to balance the need for standards that were "ambitious and yet feasible." In the CB's view, the national observed performance is a reasonable benchmark and would appropriately challenge states to improve their performance.

9. In assessing state performance, the CB chose to use a multi-level modeling approach appropriate for each indicator because it is a widely accepted statistical method that enables fair evaluation of relative performance among states with different case mixes. The result of this modeling is a performance value that is a more accurate and fair representation of each state's performance than can be obtained with simply using the state's observed performance.

10. The CB also chose to make risk adjustments. One was to adjust on the child's age for each indicator. Adjusting on age allows the CB to control statistically for the fact that children of different ages have different likelihoods of experiencing the outcome, regardless of the quality of care a state provides. Another was to adjust on foster care entry rate. The CB uses entry rate to account for the fact that states with lower entry rates tend to have children at greater risk for poor outcomes.

11. Simultaneously with adoption of the seven statewide indicators, the CB provided to the public its CFSR Round 3 Statewide Data Indicators-Workbook. The Workbook provided detailed, state-by-state performance on the CFSR 3 statewide data indicators, comparisons against the National Standards, and baseline and improvement goals for states whose initial results indicate the need for a Program Improvement Plan. The Workbook also reported on data quality indicators, on all of which Texas complied.

12. Of the seven statewide indicators, Texas scored either higher or no different than the national standard on six and missed the seventh by only a small margin. More particularly, Texas performed as follows:

- *Maltreatment in foster care*—no different than the national standard, no need for a Program Improvement Plan (PIP), 22nd among all states.
- *Recurrence of maltreatment*—met national standard, no need for a PIP, 15th among all states.
- *Permanency in 12 months for children entering foster care*--met national standard, no need for a PIP, 25th among all states.
- *Permanency in 12 months for children in foster care 12 to 23 months*—met national standard, no need for a PIP, 6th among all states.
- *Permanency in 12 months for children in foster care for 24 months or longer*--not met national standard, need for a PIP (50 more adoptions above 2170 would have avoided a PIP), 33rd among all states.
- *Re-entry to foster care in 12 months*--met national standard, no need for a PIP, 4th among all states.
- *Placement stability*—met national standard, no need for a PIP, 24th among all states.

13. Texas conservatorship caseworkers carry caseloads that include children that are in both PMC and TMC. The array of placements in Texas serves children who are in both PMC and TMC.

14. This level of compliance with national standards contradicts any notion that conservatorship workers in Texas, who handle both PMC and TMC children, are so overworked that they cannot get their jobs done or that the array of placements in Texas, that serves both PMC and TMC children, is so inadequate that permanency outcomes are unacceptably low.

15. This level of compliance with national standards contradicts any notion that conservatorship caseworkers in Texas are overworked to an extent that shocks the conscience.

16. This level of compliance with national standards contradicts any notion that the placement array in Texas is so inadequate as to shock the conscience.

17. This level of compliance with national standards is not the product of deliberate indifference, but instead reflects the many efforts DFPS undertakes to protect children in care and to move them to permanency as quickly as possible.

18. This level of compliance with national standards reflects exercise, not total abdication, of professional judgment.

CFSR Round 2

19. As a part of the prior Round 2, the CFSR examined the state's child welfare system for conformity with title IV-B and IV-E requirements and the achievement of certain positive outcomes for children and families with regard to safety, permanency and well-being. ACF set very high standards of performance for CFSR. Because child welfare agencies work with the country's most vulnerable children and families, only the highest standards of performance were acceptable.

20. At the conclusion of Round 2 of the CFSR, Texas entered into a PIP to address concerns raised in the review. By letter dated May 16, 2012 to DFPS Commissioner Baldwin (and a similar letter to the Governor), ACF congratulated Texas on its completion of the PIP. Texas was the third state in Region VI to have successfully completed all provisions of the PIP.

21. ACF determined that Texas had completed all of the action steps and achieved all of the data and program goals within the PIP that were negotiated between ACF and DFPS. Therefore, all applicable penalties based on their initial determination of non-conformity were rescinded.

Prior Statewide Outcomes, Composites and Other Data

22. Also before the Court are compilations of state performance indicators that pre-date the recently adopted Round 3 seven statewide indicators with national standards. These compilations thus do not include the multilevel modeling and risk adjustment refinements the CB added in the new, Round 3 statewide indicators. The compilations are nevertheless useful for purposes of comparative performance.

23. The compilations compare the performance of Texas to other states across 15 different measures, 13 of which were developed as a part of the CFSR and are reported annually to Congress. These 13 include nine Outcome Measures (1.1, 2.1, 3.1, 3.3, 3.4, 4.1, 4.2, 5.2, and 7.1) and four permanency-related Composite Scores. The compilations also reflect the percentage of children receiving monthly visits and the percentage of children receiving monthly visits in the home. All of the data reflected in these comparisons is available on line at the site for ACF.

24. More specifically as to monthly face-to-face meetings, for fiscal year 2012, Texas, at 94%, surpassed the national standard of 90%. At 81% for visits in the home, Texas greatly exceeded the national standard of 50%. By letter dated April 27, 2012, to DFPS Commissioner Baldwin, ACF's Children's Bureau congratulated DFPS for its performance in ensuring monthly caseworker visits with children in foster care.

25. Texas, at 91% for FY 2011, was recognized for being among 15 states to have achieved the goal that year, while also demonstrating that more than 50 percent of such visits occurred in the residence of the child. With respect to Texas' improvement from 54% in FY 2007, the Children's Bureau observed that the demonstrated improvement was clearly the result of hard work performed by many capable individuals throughout the state.

26. The compilations also permit comparisons to be drawn to states that are accredited by the Council on Accreditation (COA), have had in place attempted remedies resulting from institutional reform litigation, or have prevailed in recent trials over the efficacy of their foster care systems.

27. Measured against the collective, actual performance of foster care systems across the country, Texas adequately serves the needs of foster children in its care. There is nothing shockingly or egregiously low about its performance overall or as to any measure the federal government deems important.

28. Nothing about Texas' performance on these measures--compared to national standards or averages and compared to the performance of other states--reflects a conservatorship caseworker workforce that is so overworked or a placement array that is so inadequate as to shock the conscience or be the product of deliberate indifference. That level of performance also bespeaks professional judgment, not the total absence of same.

Other National Comparisons

29. Also before the Court is FYE September 30, 2012, data comparing Texas to national averages. Across each of the ages of 12 to 17 years, children in foster care are younger in Texas than in the nation on average. Home-setting placements in Texas are only slightly lower than the national average (76.2% versus 79%), use of foster group homes is the same (at 6%), and Texas places children in institutions at a slightly higher rate (10% versus 9%). Compared to the nation, Texas does not have a disproportionate number of older children placed in non-home like settings and does not make a disproportionate use of group homes or institutions.

30. Also, Texas has significantly fewer children than the national average for whom long term foster care is a goal (3.1% vs. 5%) and Texas' use of emancipation as a goal is lower than the national average (4.4% versus 5%).

31. Median length of stay in foster care in Texas is less than the national average (12.3 months vs. 13.1 months) when looking at children in care as of FYE 2012. However, looking at exits during the fiscal year, the numbers flip, with Texas at a median time in care of 15.9 months and the national average at 13.4 months.

32. For children who exited care during FY 2012, reunifications and adoptions exceed the national average and exits to emancipation are lower than the national average (7.5% vs. 10%).

33. Nothing about this level of performance by Texas, compared to national averages, shocks the conscience, reflects deliberate indifference or represents a total lack of professional judgment.

General Class—Conservatorship Caseworker Caseloads

34. Plaintiffs failed to prove that there is a widely accepted professional standard for a conservatorship caseworker caseload, including what it means to be "accepted," which foster care agencies (or other entities that actually serve as managing conservators for children in state custody) have accepted that caseload standard, which have not and whether the former outnumber the latter so much so as to constitute "widely accepted," that acceptance of such standard is necessary in order to adequately serve children, and that there are no other means by which caseloads may be managed in order to adequately serve children in conservatorship.

35. Plaintiffs failed to prove that any such standard creates a maximum, above which the caseload is excessive in the sense that the caseworker will fail to perform some task she would otherwise perform (i.e., but for her excessive caseload), and that such failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of any resulting harm.

36. Plaintiffs have failed to prove what caseload level in Texas would be fairly comparable to the standard that Plaintiffs characterize as widely accepted, taking into account the characteristics of the foster care system in Texas and the various factors to be considered pursuant to that standard.

37. The Child Welfare League of America's (CWLA) "standards of excellence" are designed to be used as ideals or goals for practice in the field of child welfare services. The represent practices considered to be most desirable. They carry no implication of control or regulation.

38. CWLA's recommended caseload size for social workers does not apply to conservatorship caseworkers in Texas.

39. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the complexity of the needs of the child and family should be considered. Plaintiffs failed to offer such proof.

40. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the level of competency of the social worker, including skills and experience, should be considered. Plaintiffs failed to offer such proof.

41. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the specific functions assigned to the worker and concomitant time requirements for each should be considered. Plaintiffs failed to offer such proof.

42. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the geographic area served and the time required for travel for service provision should be considered. Plaintiffs failed to offer such proof for any and for all of DFPS' regions throughout the state.

43. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the availability of services and resources required by clients should be considered. Plaintiffs failed to offer such proof.

44. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the number of other agencies involved in providing services to the cases within the caseload should be considered. Plaintiffs failed to offer such proof.

45. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the time required for case documentation and court-related activities should be considered. Plaintiffs failed to offer such proof.

46. If one were to attempt to apply CWLA's aspirational goal for an appropriate caseload size, the time needed for agency activities such as meetings, professional development, and administrative functions should be considered. Plaintiffs failed to offer such proof.

47. The Council on Accreditation (COA) also makes recommendations about manageable workloads. Texas is not accredited by the COA and has not sought to be accredited. Only a small percentage of states have been accredited.

48. The COA standards that Plaintiffs suggest the Court consider (and there are two—PA-FC 19.06, originally proffered and PA-FKC 19.07 more recently proffered) are not binding on Texas.

49. The COA recommendations themselves do not contain a maximum caseload size or range. COA's PA-FKC 19.07, upon which Plaintiffs currently rely, does not purport to set a maximum. The standard itself is silent on a maximum. Only in the interpretation does a recommendation appear and it is attributed to unidentified "nationally recognized caseload guidelines." COA's PA-FC 19.06, on which Plaintiffs previously relied, also does not set a maximum in the standard itself. Rather, an interpretation recites "Generally, caseloads do not exceed 18 children or 8 children with special therapeutic needs. However, there are circumstances under which caseloads may exceed these limits. . . . . Caseloads may also be higher when agencies are faced with temporary vacancies on staff." A Note to the standard further qualifies: "The specific caseload sizes stated in the interpretation are only a suggestion of what might be appropriate."

50. If one were to attempt to apply COA PA-FKC 19.07 to establish a conservatorship caseload maximum size, the qualifications, competencies, and experiences of the worker including the level of supervision needed should be assessed. Plaintiffs failed to offer proof of such an assessment.

51. If one were to attempt to apply COA PA-FKC 19.07 to establish a conservatorship caseload maximum size, the work and time required to accomplish assigned tasks and meet practice requirements, including those associated with individual caseloads and other organizational responsibilities should be assessed. Plaintiffs failed to offer proof of such an assessment.

52. If one were to attempt to apply COA PA-FKC 19.07 to establish a conservatorship caseload maximum size, the service elements provided by other team members or collaborating providers should be assessed. Plaintiffs failed to offer proof of such an assessment.

53. If one were to attempt to apply COA PA-FKC 19.07 to establish a conservatorship caseload maximum size, the service volume, accounting for the complexity and status of each case should be assessed. Plaintiffs failed to offer proof of such an assessment.

54. If one were to attempt to apply COA PA-FC 19.06 to establish a conservatorship caseload maximum size, the qualifications and competencies of the worker and the case status and complexity are to be considered. Plaintiffs failed to offer proof of such an assessment.

55. As admonished by COA PA-FKC 19.07, taking into account the work of I See You workers, who are team members who provide frontline service elements, and the work of members of Centralized Placement Units (CPUs), who are also team members who provide

frontline service elements, and recognizing that overtime hours for conservatorship caseworkers are the functional equivalents of full time equivalent (FTE) workers, the average caseload in Texas is 17.6 cases per worker, which is within the range recommended by the interpretation of COA PA-FC 19.06. Caseloads in Texas do not depart substantially from what Plaintiffs contend should be a maximum standard. Were a professional standard even to apply in Texas, the average caseload in Texas is consistent with any such standard.

56. The adequacy of the conservatorship caseworker workforce is amply demonstrated by Texas' performance on the CFSR Round 3 seven statewide indicators, found above, as well as Texas' performance on meeting monthly face to face contact requirements.

57. This court previously observed that whether or not caseworkers can carry out the tasks of safeguarding and monitoring children in their care is key evidence as to whether they are overburdened or not. The court finds that DFPS's performance level on the safety in care statewide data indicator, DFPS's performance level on face-to-face contacts, and the location of those contacts is key evidence that the conservatorship workforce is not overburdened.

58. Plaintiffs have failed to prove whether and, if so, the extent to which caseloads in Texas exceed what would be comparable in Texas to what Plaintiffs characterize as the widely accepted professional standard.

59. Plaintiffs have failed to prove that there is a caseworker caseload level in Texas, above which the caseload is excessive in the sense that the caseworker will fail to perform some task he would otherwise perform and that that failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of that harm.

60. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads in Texas and harm to any child in the class and for all children in the class.

61. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

62. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads and the occurrence of abuse or neglect to children in PMC.

63. Plaintiffs have failed to prove a correlation between what they characterize as excessive caseloads and permanency outcomes for children in PMC.

64. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and harm to each child in the class and to all children in the class.

65. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

66. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and the occurrence of abuse or neglect to children in PMC.

67. Plaintiffs have failed to prove a causal relationship between what they characterize as excessive caseloads in Texas and permanency outcomes for children in PMC.

68. A causal relationship between excessive caseloads and any harm of any nature, a denial of personal security and reasonably safe living conditions, abuse and neglect, or permanency outcomes cannot be reasonably inferred in light of the following facts:

69. Plaintiffs failed to prove even a correlation between these conditions. Despite access to data on tens of thousands of children who are in or have passed through foster care in Texas, Plaintiffs have failed to prove any harm caused to any child by the fact that any caseworker had a caseload that was claimed to be too high.

70. Plaintiffs failed to prove that any substantiated incidences of abuse and neglect were caused by the fact that any caseworker had a caseload that was claimed to be too high.

71. Having failed to prove any historical causation across such a broad spectrum of children, any inference of prospective causation, much less imminent causation, would be unreasonable.

72. Despite access to data on tens of thousands of children who are in or have passed through foster care in Texas and the availability of reliable methods of statistical analysis, Plaintiffs performed no such analysis and provided no reliable results in support of causation.

73. Plaintiffs have provided no peer reviewed scientific studies to establish such causation in Texas.

74. Plaintiffs failed to disprove or rule out other possible causes of the harm or risk of harm to which they contend the class members are subjected by excessive caseloads.

75. Plaintiffs have failed to prove that any potential risk of causation associated with conservatorship caseworker caseloads is not mitigated by the involvement of other people who are involved in the lives of foster children and look out for their safety and well-being, such as foster parents, CPA inspectors and staff, I See You workers, CPU workers, CASAs, ad litems, kinship caseworkers, FAD caseworkers, RCCL inspectors and investigators, subject matter experts (SMEs), education specialists,

therapists, counselors, STAR Health doctors, medical professionals, developmental disability specialists, child safety specialists, and courts.

76. In a very hands-on fashion, management, particularly at the supervisor and program director levels, manage caseloads among conservatorship caseworkers to ensure that such workers get help when needed.

77. Anecdotal testimony about isolated instances does not establish widespread applicability.

78. Testimony about what "can," "could" or "might" happen is speculative and does not form the basis for any reasonable inference.

79. The Texas conservatorship workforce, with its existing caseloads, has achieved compliance with national standards for both safety-related statewide indicators and for four of the five national standards for permanency.

80. The Court further finds that the facts found below with respect to mitigation of risks associated with caseloads also make an inference of causation unreasonable.

81. Plaintiffs have failed to prove the magnitude of risk of harm to children in PMC in Texas caused by excessive caseloads in Texas.

82. For example, despite the availability of data and scientific analytical means, Plaintiffs have failed to prove that a child whose caseworker carries 40 stages is at any greater risk of experiencing abuse and neglect than a child whose caseworker carries 20 or even 10 stages.

83. Plaintiffs have failed to objectively quantify the magnitude of the risk to which children in PMC are currently exposed caused by excessive caseloads in Texas.

84. For example, despite the availability of data and scientific analytical means, Plaintiffs have failed to prove the degree by which the risk of abuse and neglect to a child whose caseworker carries 40 stages is greater than the corresponding risk to a child whose caseworker carries 20 stages or even 10 stages.

85. Having failed to prove either the fact of risk or the magnitude of risk, Plaintiffs have failed to prove that any such risk of harm to children in PMC in Texas caused by excessive caseloads is unreasonable.

86. Plaintiffs have failed to prove that harm caused by excessive caseloads is actually imminent for any child and all children in PMC.

87. Plaintiffs have failed to prove that denial of a PMC child's right to personal security and reasonably safe living conditions caused by excessive caseloads is actually imminent for any child and all children in PMC.

88. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, excessive caseloads have caused harm of any nature to children in PMC in the past.

89. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, excessive caseloads have caused denial of a PMC child's right to personal security and reasonably safe living conditions in the past.

90. Plaintiffs have failed to prove that all children in PMC, on a statewide, regional and county basis, have a caseworker with an excessive caseload. To the contrary, conservatorship caseworkers across all regions in the state carry different caseloads and receive different levels of help from different sources in handling those caseloads.

91. Plaintiffs have failed to prove that all conservatorship caseworkers, on a statewide, regional and county basis, have excessive caseloads, without regard to each caseworker's actual caseload and his or her ability to handle a caseload.

92. The extent to which caseworkers are overworked cannot be answered in the aggregate; it may only be answered for each caseworker.

93. Plaintiffs have failed to prove that what is an excessive caseload for one caseworker is also excessive for all other conservatorship caseworkers throughout the state, without regard to the individual caseworkers' experience, education, training, and ability or to the caseload conditions and management practices in the units and regions in which such caseworkers work.

94. Plaintiffs have failed to prove that all children in PMC are subject to the same risk, including magnitude of risk, of being assigned a conservatorship caseworker whose caseload is excessive (and excessive as to that particular caseworker) and that such excessive caseload will cause or likely cause harm to all such children.

95. Plaintiffs have failed to prove that a caseworker who has what Plaintiffs characterize as an excessive caseload presents the same risk, and same degree of risk, to all children assigned to him or to her, without regard to the individual characteristics of the child and the specific circumstances of the child's placement.

96. Plaintiffs have not demonstrated that DFPS' conservatorship caseworker caseloads cause all children in PMC to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

97. The level of personal security a child experiences in PMC, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

98. Whether a PMC child is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

99. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

100. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to caseloads for any and all children in PMC shocks the conscience.

101. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in PMC with respect to conservatorship caseloads.

102. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in PMC with respect to conservatorship caseloads.

103. Far from acting with deliberate indifference, DFPS engages in a broad spectrum of conduct to mitigate a wide variety of risks associated children in conservatorship, including risks associated caseworker caseloads.

104. A critical means to mitigate risks associated with a conservatorship caseworker workforce that might be overworked is to make sure that the children in care get their monthly face to face meetings and that an appropriate number of those meetings occur in the home. As the Court found above, for fiscal year 2012, Texas accomplished a 94% rate for monthly face to face contacts, which surpassed the national standard of 90%. At 81% for visits in the child's residence, Texas also greatly exceeded the national standard of 50%. Further, Texas, at 91% for FY 2011, was recognized for being among 15 states to have achieved the goal that year.

105. Another means to mitigate risks associated with a conservatorship caseworker workforce that might be overworked is to structure the delivery of foster care services in such a manner as to create redundant measures that assure child safety. While having primary responsibility, the conservatorship caseworker is just one among many who have periodic interaction with a child to monitor the child's personal security and reasonably safe living conditions. For children in unverified kinship homes, there are also kinship workers, who work with the family and assure safe living conditions. For children in foster homes operated by CPAs there are CPA staff who investigate homes and assure safe conditions. For children in homes operated by DFPS, there are FAD workers who investigate homes and assure safe conditions. For all licensed placements, there are RCCL inspectors who assure compliance with minimum safety standards. DFPS Contracts personnel play an active role in assuring safe living conditions as a part of the contracting and contract renewal processes. FITS meetings, as found by the Court below, create safety redundancy by promoting coordinated efforts among CPS, RCCL and Contracts in dealing with placements where corrective actions are appropriate. All children in conservatorship have

daily interaction with foster caregivers who are trained to be attentive to the child's safety and well-being. All children also have frequent interaction with some combination of CASAs, ad litems, teachers, therapists and court personnel. Child safety is never left to one person alone.

106. DFPS' delivery of services to children in its conservatorship includes an array of specialists who assist the caseworker in serving children's needs. Direct delivery staff such as CPU personnel, I See You workers, kinship caseworkers and Master Conservatorship workers assist with critical tasks, while other staff such as educational and medical specialists provide particularized guidance and assistance with meeting children's needs.

107. DFPS regional leadership utilizes workload sharing at the unit level, mid-level, and between regions to ensure children's needs are met. Specialized tenured staff, known as Master Conservatorship workers, are available for immediate deployment to specific locations as needed.

108. DFPS has a number of targeted metrics, among them the Data Placemat, which provide ready access to pertinent data at all levels to track and ensure children's needs are being met.

109. DFPS has special, targeted pay exceptions where there are market demands. This assists in recruiting and maintaining caseworkers in challenged areas of the state.

110. DFPS modified its hiring process to strengthen the agency's ability to hire staff who will be successful; the agency altered its career ladder and certification processes to improve retention across the state.

111. DFPS engaged an outside professional consulting firm, The Stephen Group, to perform a comprehensive operational review of DFPS' Child Protective Services. In partial response to that study and in response to the Sunset Advisory Commission's 2014 report on DFPS, DFPS devised and is implementing a comprehensive project that it titled "Transformation."

112. As a part of Transformation, DFPS has deployed a mentoring program designed to support caseworkers.

113. As part of its Transformation project, DFPS has further enhanced targeted recruitment and retention practices.

114. DFPS is in the process of developing a standardized practice model to enhance and strengthen casework.

115. DFPS historically has provided comprehensive training for all stages of caseworkers, including conservatorship caseworkers. The training DFPS offers caseworkers is a continually evolving process and is regularly fine-tuned to address trends and practices. A trauma-informed approach has been incorporated into training, to increase caseworker

understanding of the impact of trauma on children and families as well as to decrease the impact of secondary trauma to caseworkers due to the nature of child welfare work.

116. DFPS caseworkers are aided in their efforts to secure permanency for children through multiple avenues, including a family group decision-making approach to case planning and the use of permanency roundtables.

117. DFPS caseworkers are supported in efforts to locate permanent homes for individual children by tools such as the Texas Adoption Resource Exchange (TARE), Heart Galleries, and focused community adoption activities. Success in the efforts has resulted in Texas leading the nation in receiving Adoption Incentive awards, rewarding the state for increasing rates of consummated adoptions for hard to place children.

118. DFPS caseworkers have a number of programs to assist youth, including preparation for adult living programs, post-emancipation services, and college tuition and fee waivers.

119. DFPS caseworkers are supported by mobile technology tools, such as smart phones and tablet personal computers.

120. DFPS caseworkers are supported by a range of community stakeholders, including local Child Welfare Boards in more than 200 counties who provide resources to children in conservatorship and CPS staff, as well as counties who fund additional staff and services beyond those allocated by the legislature.

121. DFPS has comprehensive statewide policy to ensure safety, permanency and well-being of children and families. The policy, including relevant state and federal law excerpts, is available on the agency public website for staff, stakeholders and the general public to access.

122. Such conduct does not amount to deliberate indifference or a total lack of professional judgment. Rather, it demonstrates professionalism and regard for the rights of children in foster care.

123. Plaintiffs have failed to prove a level of conservatorship caseload in Texas that would not be excessive.

124. Plaintiffs have failed to prove what risk of harm caused by conservatorship caseloads would be reasonable.

125. Plaintiffs have failed to prove that ordering any caseload limits would remedy any harm they have attempted to associate with caseloads.

126. Plaintiffs have failed to prove that ordering a specific caseload limit would remedy any harm they have attempted to associate with caseloads.

127. Plaintiffs have failed to prove what level of caseload limit would result in a reasonable risk of harm.

128. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether conservatorship caseloads result in a reasonable risk of harm to children in PMC, both as to any child in the class and to all children in the entire class.

129. Plaintiffs have failed to prove the specific remedy they seek for the General Class and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the caseworker caseload wrong of which they complain.

Licensed Foster Care Subclass--Oversight

130. Plaintiffs have failed to prove that there is a widely accepted professional standard for a licensing inspector or investigator caseload, including what it means to be "accepted," which foster care agencies (or other entities that actually serve as managing conservators for children in state custody) have accepted that caseload standard, which have not and whether the former outnumber the latter so much so as to constitute "widely accepted," that acceptance of such standard is necessary in order to adequately serve children, and that there are no other means by which caseloads may be managed in order to adequately serve children in conservatorship.

131. Plaintiffs failed to prove that any such standard creates a maximum, above which the caseload is excessive in the sense that the licensing inspector or investigator will fail to perform some task she would otherwise perform, i.e., but for her excessive caseload, and that such failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of any resulting harm.

132. Plaintiffs have failed to prove what licensing inspector or investigator caseload level in Texas would be fairly comparable to the standard that Plaintiffs characterize as widely accepted, taking into account the characteristics of the foster care system in Texas and the various factors to be considered pursuant to that standard.

133. The Child Welfare League of America's (CWLA) "standards of excellence" are designed to be used as ideals or goals for practice in the field of child welfare services. They represent practices considered to be most desirable. They carry no implication of control or regulation.

134. CWLA's recommended caseload size for social workers does not apply to licensing inspectors or investigators in Texas.

135. Plaintiffs have failed to prove whether and, if so, the extent to which licensing inspector or investigator caseloads in Texas exceed what would be comparable in Texas to what Plaintiffs characterize as the widely accepted professional standard.

136. Plaintiffs have failed to prove that there is a licensing inspector or investigator caseload level in Texas, above which the caseload is excessive in the sense that the licensing inspector or investigator will fail to perform some task he would otherwise perform and that that failure to perform, in turn, will likely cause harm to a child, including the magnitude of that likelihood and the nature of that harm.

137. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight due to staffing in Texas and harm to any child in the Licensed Foster Care subclass and for all children in the class.

138. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight due to staffing and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

139. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight due to staffing and the occurrence of abuse or neglect to children placed in licensed foster care.

140. Plaintiffs have failed to prove a correlation between what they characterize as inadequate oversight due to staffing and permanency outcomes for all children placed in licensed foster care.

141. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight due to staffing and harm to any child in the class and to all children in the class.

142. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight due to staffing and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

143. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight due to staffing and the occurrence of abuse or neglect to all children placed in licensed foster care.

144. Plaintiffs have failed to prove a causal relationship between what they characterize as inadequate oversight due to staffing and permanency outcomes for all children placed in licensed foster care.

145. A causal relationship between inadequate oversight due to staffing and any harm of any nature, a denial of personal security and reasonably safe living conditions, abuse and neglect, or permanency outcomes cannot be reasonably inferred in light of the following facts:

146. Plaintiffs failed to prove even a correlation between these conditions.

147. Despite access to data on tens of thousands of children who are in or have passed through licensed foster care in Texas, Plaintiffs have failed to prove any harm caused to any child by the fact that any licensing inspector or investigator had a caseload that was claimed to be too high.

148. Plaintiffs failed to prove that any substantiated incidences of abuse and neglect were caused by the fact that any licensing inspector or investigator had a caseload that was claimed to be too high.

149. Having failed to prove any historical causation across such a broad spectrum of children, any inference of prospective causation, much less imminent causation, would be unreasonable.

150. Despite access to data on tens of thousands of children who are in or have passed through licensed foster care in Texas and the availability of reliable methods of statistical analysis, Plaintiffs performed no such analysis and provided no reliable results in support of causation.

151. Plaintiffs have provided no peer reviewed scientific studies to establish such causation in Texas.

152. Plaintiffs failed to disprove or rule out other possible causes of the harm or risk of harm to which they contend the class members are subjected by licensing inspector or investigator excessive caseloads.

153. Plaintiffs have failed to prove that any potential risk of causation associated with licensing inspector or investigator caseloads is not mitigated by the involvement of other people who are involved in the lives of foster children and look out for their safety and well-being, such as conservatorship caseworkers, foster parents, CPA inspectors and staff, I See You workers, CASAs, ad litems, kinship caseworkers, and FAD caseworkers.

154. In a very hands-on fashion, supervisors manage the caseloads of licensing inspectors and investigators to ensure that such workers get help when needed.

155. Anecdotal testimony about isolated instances does not establish widespread applicability.

156. Testimony about what "can," "could" or "might" happen is speculative and does not form the basis for any reasonable inference.

157. Texas' compliance with national standards for safety-related statewide indicators contradicts the contention that licensing inspector or investigator caseloads cause harm or unreasonable risk of harm to children in licensed foster care.

158. The Court further finds that the facts found below with respect to mitigation of risks associated with inadequate oversight also make an inference of causation unreasonable.

159. Plaintiffs have failed to prove the magnitude of risk of harm to children in licensed foster care caused by inadequate oversight due to staffing.

160. Plaintiffs have failed to objectively quantify the risk to which all children placed in licensed foster care are currently exposed caused by inadequate oversight due to staffing.

161. Having failed to prove either the fact of risk or the magnitude of risk of harm, Plaintiffs have failed to prove that the risk of harm to all children placed in licensed foster care caused by inadequate oversight due to staffing is unreasonable.

162. Plaintiffs have failed to prove that harm caused by inadequate oversight due to staffing is actually imminent for any child and all children in licensed foster care.

163. Plaintiffs have failed to prove that denial of a child's right to personal security and reasonably safe living conditions caused by inadequate oversight due to staffing is actually imminent for any child and all children in licensed foster.

164. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, inadequate oversight due to staffing has caused in the past harm of any nature to children in licensed foster care.

165. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, inadequate oversight due to staffing has caused in the past denial of a child's right to personal security and reasonably safe living conditions for children placed in licensed foster care.

166. Plaintiffs have failed to prove inadequate oversight due to staffing on a statewide, regional and county basis, such that all children in the class are in placements for which there is inadequate oversight.

167. Plaintiffs have failed to prove that what is an excessive caseload for one licensing inspector or investigator is also excessive for all other such workers throughout the state, without regard to the individual workers' experience, education, training, and ability or to the caseload conditions and management practices in the units and regions in which such workers work.

168. The extent to which licensing inspectors and investigators are overworked cannot be answered in the aggregate; it may only be answered for each such worker.

169. Plaintiffs have not demonstrated that DFPS' licensed foster care inspection and investigation staffing causes all children in licensed foster care placements to suffer an

unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

170. The level of personal security a child experiences in a licensed foster care placement, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

171. Whether a child in a licensed placement is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

172. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

173. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to licensed care inspection and investigation staffing for any and all children in licensed placements shocks the conscience.

174. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in licensed placements with respect to licensed care inspection and investigation.

175. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in licensed placements with respect to licensed care inspection and staffing.

176. Far from acting with deliberate indifference, DFPS engages in a broad spectrum of conduct to mitigate a wide variety of risks associated children in conservatorship, including risks associated with licensed foster care inspections and investigations.

177. DFPS engages in routine and periodic inspections of children's placements, whether through the RCCL program or the CPS program.

178. DFPS performs periodic licensing checks and engages in a thorough check of a placement and the people involved before placing a child. The agency strengthened foster care safety rules by adding requirements for additional collateral interviews, additional review of law enforcement agency calls, and verification of identity and background checks for emergency caregivers.

179. DFPS regularly holds critical case meetings led by the Commissioner, which address immediate needs, including safety and placement.

180. The three divisions of DFPS responsible for child safety - CPS, RCCL, and Contracts - regularly convene Facility Intervention Team Staffing (FITS) meetings in which particular placements and child safety are discussed.

181. In response to a critical safety need, DFPS, led by its Commissioner, developed a robust and aggressive statewide safety plan to aid in the protection of children. This plan involved agency actions, residential provider actions, and legislative oversight.

182. DFPS has created an Office of Child Safety to better protect children. DFPS uses specialized Child Safety Specialists for consultation regarding child safety issues.

183. DFPS has begun to use predictive analytics across various areas of the agency to better serve children's safety.

184. Texas has developed a structured decision making tool to better promote child safety.

185. Texas has specialized Foster and Adoptive (FAD) home staff, including licensed child care administrators, for homes where CPS serves as child placing agency.

186. DFPS has a sophisticated call center operating 24 hours a day, 7 days a week for consistent handling of reports of abuse or neglect, reports of serious incidents, or emergency access to CPS staff.

187. Such conduct does not amount to deliberate indifference or a total lack of professional judgment. Rather, it demonstrates professionalism and regard for the rights of children in foster care.

188. Plaintiffs have failed to prove a level of licensing inspectors and investigators caseloads in Texas that would not be excessive.

189. Plaintiffs have failed to prove what risk of harm associated with licensed care oversight would be reasonable.

190. Plaintiffs have failed to prove that ordering any caseload limits for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

191. Plaintiffs have failed to prove that ordering any staffing levels for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

192. Plaintiffs have failed to prove that ordering a specific caseload limit for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

193. Plaintiffs have failed to prove that ordering a specific staffing level for licensing inspectors and investigators would remedy any harm they have attempted to associate with inadequate oversight.

194. Plaintiffs have failed to prove what level of caseload limits for licensing inspectors and investigators would result in a reasonable risk of harm.

195. Plaintiffs have failed to prove what level of staffing for licensing inspectors and investigators would result in a reasonable risk of harm.

196. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether licensing inspector and investigator caseloads result in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

197. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether licensing inspector and investigator staffing levels result in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

198. Plaintiffs have failed to prove what resources and processes are necessary to ensure that Defendants have the capacity to monitor and enforce compliance with all licensing standards applicable to licensed foster care placements.

199. Plaintiffs have failed to prove that unidentified professionals to be appointed by the Court are able to assess what resources and processes are necessary to ensure that Defendants have the capacity to monitor and enforce compliance with all licensing standards applicable to licensed foster care placements.

200. Plaintiffs have failed to prove the specific remedy they seek for the subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the oversight inadequacy of which they complain.

201. Plaintiffs have failed to prove that there is a widely accepted professional standard in the field that requires DFPS to have a formal continuous quality improvement (CQI) system with clear performance benchmarks that are monitored systematically through planned information gathering methods and necessary follow-up actions (a "CQI with rigid requirements"), including what it means to be "accepted," which foster care agencies (or other entities that actually serve as managing conservators for children in state custody) have accepted that CQI with rigid requirements standard, which have not, and whether the former outnumber the latter so much so as to constitute "widely accepted," that acceptance of such standard is necessary in order to adequately serve children, and that there are no other means by which quality control may be conducted in order to adequately serve children in conservatorship.

202. Plaintiffs' claim with respect to a CQI with rigid requirements, especially in light of Plaintiffs' failure to prove harm associated therewith, as found below, is nothing more than a claim that Texas has organized or mismanaged DFPS improperly and does not advance a due process claim. In that regard, the Court finds this claim to fall squarely within the admonition of the Fifth Circuit in this case found at fn. 3, 675 F.3d at 841. The Court will nevertheless make further fact findings with respect thereto that demonstrate the claim lacks factual merit.

203. Plaintiffs have failed to prove that Texas lacks a continuous quality improvement system.

204. Plaintiffs have failed to prove that to be adequate in Texas, a continuous quality improvement system must have clear performance benchmarks that are monitored systematically through planned information gathering methods and necessary follow-up actions.

205. Plaintiffs have failed to prove a correlation between what they characterize as lack of a CQI with rigid requirements in Texas and harm to any child in the Licensed Foster Care subclass and for all children in the class.

206. Plaintiffs have failed to prove a correlation between what they characterize as lack of a CQI with rigid requirements in Texas and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

207. Plaintiffs have failed to prove a correlation between what they characterize as lack of a CQI with rigid requirements in Texas and the occurrence of abuse or neglect to children in placed in licensed foster care.

208. Plaintiffs have failed to prove a correlation between what they characterize as lack of a CQI with rigid requirements in Texas and permanency outcomes for all children placed in licensed foster care.

209. Plaintiffs have failed to prove a causal relationship between what they characterize as lack of a CQI with rigid requirements in Texas and harm to any child in the class and to all children in the class.

210. Plaintiffs have failed to prove a causal relationship between what they characterize as lack of a CQI with rigid requirements in Texas and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

211. Plaintiffs have failed to prove a causal relationship between what they characterize as lack of a CQI with rigid requirements in Texas and the occurrence of abuse or neglect to all children placed in licensed foster care.

212. Plaintiffs have failed to prove a causal relationship between what they characterize as lack of a CQI with rigid requirements in Texas and permanency outcomes for all children placed in licensed foster care.

213. A causal relationship between what Plaintiffs characterize as lack of a CQI with rigid requirements in Texas and any of harm of any nature, a denial of personal security and reasonably safe living conditions, abuse and neglect, or permanency outcomes cannot be reasonably inferred in light of the following facts:

214. Plaintiffs failed to prove even a correlation between these conditions.

215. Despite access to data on tens of thousands of children who are in or have passed through licensed foster care in Texas, Plaintiffs have failed to prove any harm caused to any child by the lack of a CQI with rigid requirements in Texas.

216. Plaintiffs failed to prove that any substantiated incidences of abuse and neglect were caused by a lack of a CQI with rigid requirements in Texas.

217. Having failed to prove any historical causation across such a broad spectrum of children, any inference of prospective causation, much less imminent causation, would be unreasonable.

218. Despite access to data on tens of thousands of children who are in or have passed through licensed foster care in Texas and the availability of reliable methods of statistical analysis, Plaintiffs performed no such analysis and provided no reliable results in support of causation.

219. Plaintiffs have provided no peer reviewed scientific studies to establish such causation in Texas.

220. Plaintiffs failed to disprove or rule out other possible causes of the harm or risk of harm to which they contend the class members are subjected by a lack of a CQI with rigid requirements.

221. Plaintiffs have failed to prove that any potential risk of causation associated with a lack of a CQI with rigid requirements is not mitigated by the involvement of other people who are involved in the lives of foster children and look out for their safety and well-being, such as conservatorship caseworkers, foster parents, CPA inspectors and staff, I See You workers, CPU workers, CASAs, ad litems, kinship caseworkers, FAD caseworkers, RCCL inspectors and investigators, subject matter experts (SMEs), education specialists, therapists, counselors, STAR Health doctors, medical professionals, developmental disability specialists, child safety specialists, and courts.

222. Anecdotal testimony about isolated instances does not establish widespread applicability.

223. Testimony about what "can," "could" or "might" happen is speculative and does not form the basis for any reasonable inference.

224. Texas' compliance with national standards for safety-related and permanency statewide indicators contradicts the contention that lack of a CQI with rigid requirements causes harm or unreasonable risk of harm to children in licensed foster care.

225. The Court further finds that the facts found below with respect to mitigation of risks associated with a lack of a CQI with rigid requirements also make an inference of causation unreasonable.

226. Plaintiffs have failed to prove the magnitude of risk of harm to children in licensed foster care caused by a claimed lack of a CQI with rigid requirements in Texas.

227. Plaintiffs have failed to objectively quantify the risk to which all children placed in licensed foster care are currently exposed caused by a claimed lack of a CQI with rigid requirements.

228. Plaintiffs have failed to prove that the risk of harm to all children placed in licensed foster care are caused by a claimed lack of a CQI with rigid requirements in Texas is unreasonable.

229. Plaintiffs have failed to prove that harm caused by a claimed lack of a CQI with rigid requirements in Texas is actually imminent for any child and all children in licensed foster care.

230. Plaintiffs have failed to prove that denial of a child's right to personal security and reasonably safe living conditions caused by a claimed lack of a CQI with rigid requirements in Texas is actually imminent for any child and all children in licensed foster.

231. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, lack of a CQI with rigid requirements in Texas has caused in the past harm of any nature to children in licensed foster care.

232. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, lack of a CQI with rigid requirements in Texas has caused in the past denial of a child's right to personal security and reasonably safe living conditions for children placed in licensed foster care.

233. The level of personal security a child experiences in a licensed foster care placement, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

234. Whether a child in a licensed placement is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

235. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

236. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to a claimed lack of a CQI with rigid requirements in Texas for any and all children in licensed placements shocks the conscience.

237. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in licensed placements with respect to a claimed lack of a CQI with rigid requirements in Texas.

238. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in licensed placements with respect to a claimed lack of a CQI with rigid requirements in Texas.

239. Far from acting with deliberate indifference, DFPS engages in a broad spectrum of conduct to mitigate a wide variety of risks associated children in conservatorship, including risks associated continuous quality improvement.

240. DFPS is provided strong guidance, leadership, and oversight through the active role taken by the Texas Legislature.

241. The Texas Legislature requires detailed reporting and accountability from DFPS, including regular reporting regarding performance measures related to outcomes and outputs for all programs within the agency as well as Rider reports (Rider 11 Reports include staff-related outcomes and Rider 29 Reports address Foster Care Redesign outcomes, for example).

242. The Texas Legislature is supportive of DFPS, its needs, and its mission to serve and protect children. This includes providing necessary funding to accomplish its task.

243. The Texas Legislature provides active oversight efforts, through the Sunset Advisory Commission, which provided reasoned and detailed recommendations to strengthen the agency and its efforts to serve children, a House Select Committee on Child Protection, and two ongoing oversight committees, the Senate Health and Human Services and House Human Services committees.

244. DFPS has embraced outside expert assistance to improve its practice. This includes engaging The Stephen Group and Casey Family Programs to perform reviews and studies to help DFPS better serve children. DFPS has routinely relied upon the federal network of National Resource Centers for technical assistance.

245. DFPS puts into practice the suggestions of outside consultants and experts as evidenced by the Transformation project, using external technical assistance and project management to ensure effective communication to staff, stakeholders and legislators regarding implementation.

246. DFPS is creative in its efforts to serve children, including seeking and receiving a Title IV-E Waiver in Harris County for a new approach to service delivery and a federal Diligent Recruitment Grant in which DFPS and CASA have partnered in Arlington and east Texas for targeted child specific adoption recruitment and enhancing kinship adoption.

247. Texas partners with community members and stakeholders, including the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families (Children's Commission), to improve and better serve children's needs.

248. DFPS has a Statewide Automated Child Welfare Information System (SACWIS) known as IMPACT that is federally approved. The information contained within this case management system is accessible to CPS staff, with external access by Court Appointed Special Advocates. Data from IMPACT are used to populate the data warehouse, where agency staff at all levels can access weekly and monthly data to monitor activity and outcomes.

249. The DFPS Contract Oversight and Support, Internal Audits, Residential Contracts and Residential Child Care Licensing divisions use risk-based audit protocols to ensure appropriate monitoring of services and providers.

250. DFPS has a continuous quality improvement system that measures whether goals are being accomplished and utilizes data to monitor progress. Dedicated resources to this function are the Performance Management Unit within the Child Care Licensing Division and the Systems Improvement Division (which also contains the Analytics and Evaluation Unit) and the Quality and Accountability Division within Child Protective Services.

251. DFPS publishes data in a manner accessible to the general public through its public website, including such regular data as a DFPS Annual Report and comprehensive Data Book, all DFPS presentations made to the legislature, agency Legislative Appropriations Requests, federal State Plans, and regional statistical data.

252. Such conduct does not amount to deliberate indifference or a total lack of professional judgment. Rather, it demonstrates professionalism and regard for the rights of children in foster care.

253. Plaintiffs have failed to prove what risk of harm associated with a continuous quality improvement system would be reasonable.

254. Plaintiffs have failed to prove that ordering a CQI with rigid requirements would remedy any harm they have attempted to associate with lack of a CQI with rigid requirements in Texas.

255. Plaintiffs have failed to prove that ordering a CQI with rigid requirements in Texas would remedy any harm they have attempted to associate with lack of a CQI with rigid requirements.

256. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether a court-ordered CQI with rigid requirements in Texas would result in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

257. Plaintiffs have failed to prove the specific remedy they seek for the subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the oversight inadequacy of which they complain.

Licensed Foster Care Subclass—Array

258. Plaintiffs have failed to prove that there is a widely accepted professional standard for a placement array.

259. The true factual nature of Plaintiffs' claim with respect to an inadequate placement array, especially in light of Plaintiffs' failure to prove harm associated therewith, as found below, is nothing more than a claim that Texas has organized or mismanaged DFPS improperly and does not advance a due process claim. In that regard, and like Plaintiffs' claim about how Texas manages continuous quality improvement, the Court finds this claim to fall squarely within the admonition of the Fifth Circuit in this case found at fn. 3, 675 F.3d at 841.

260. The Court further finds the true factual nature of the claim is nothing more than a claim that a child in licensed foster care has a right to an adequate placement or a most family-like placement, which are not substantive due process rights recognized under the Fourteenth Amendment.

261. The Court will nevertheless make further fact findings with respect thereto that demonstrate the claim lacks factual merit.

262. Plaintiffs have failed to prove that Texas has an inadequate placement array. To the contrary, Texas' performance on the CFSR Round 3 statewide indicators, both as to safety and permanency, demonstrates that Texas is doing a satisfactory job of placing foster children in safe placements that facilitate adequate permanency outcomes.

263. Plaintiffs have failed to prove the counties and regions within the state where they contend the placement array is adequate.

264. Given Texas' size, geography, population, and demographic distribution, Plaintiffs have failed to prove that adequacy of array can even be established on a statewide basis.

265. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and harm to any child in the Licensed Foster Care subclass and for all children in the class.

266. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and a denial of personal security and reasonably safe living conditions for each child in the class and for all children in the class.

267. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and the occurrence of abuse or neglect to children in placed in licensed foster care.

268. Plaintiffs have failed to prove a correlation between what they characterize as an inadequate placement array and permanency outcomes for all children placed in licensed foster care.

269. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and harm to any child in the class and to all children in the class.

270. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and a denial of personal security and reasonably safe living conditions for any child in the class and for all children in the class.

271. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and the occurrence of abuse or neglect to all children placed in licensed foster care.

272. Plaintiffs have failed to prove a causal relationship between what they characterize as an inadequate placement array and permanency outcomes for all children placed in licensed foster care.

273. A causal relationship between a claimed inadequate placement array and any of harm of any nature, a denial of personal security and reasonably safe living conditions, abuse and neglect, or permanency outcomes cannot be reasonably inferred in light of the following facts:

    274. Plaintiffs failed to prove even a correlation between these conditions.
    Despite access to data on tens of thousands of children who are in or have passed through foster care in Texas, Plaintiffs have failed to prove any harm caused to any child by an inadequate placement array.

275. Plaintiffs failed to prove that any substantiated incidences of abuse and neglect were caused by an inadequate placement array.

276. Having failed to prove any historical causation across such a broad spectrum of children, any inference of prospective causation, much less imminent causation, would be unreasonable.

277. Despite access to data on tens of thousands of children who are in or have passed through foster care in Texas and the availability of reliable methods of statistical analysis, Plaintiffs performed no such analysis and provided no reliable results in support of causation.

278. Plaintiffs have provided no peer reviewed scientific studies to establish such causation in Texas.

279. Plaintiffs failed to disprove or rule out other possible causes of the harm or risk of harm to which they contend the class members are subjected by an inadequate placement array.

280. Plaintiffs have failed to prove that any potential risk of causation associated with an inadequate placement array is not mitigated by the involvement of other people who are involved in the lives of foster children and look out for their safety and well-being, such as conservatorship caseworkers, CPU workers, CASAs, ad litems, and courts, all of whom are involved in finding the most suitable placement for a child in light of the child's individual needs and the characteristics and capabilities of the placement.

281. Anecdotal testimony about isolated instances does not establish widespread applicability.

282. Testimony about what "can," "could" or "might" happen is speculative and does not form the basis for any reasonable inference.

283. Texas' compliance with national standards for safety-related and permanency-related statewide indicators contradicts an inadequate array causes harm or unreasonable risk of harm to children in licensed foster care.

284. The Court further finds that the facts found below with respect to mitigation of risks associated with an inadequate array also make an inference of causation unreasonable.

285. Plaintiffs have failed to prove the magnitude of risk of harm to children in licensed foster care caused by an alleged inadequate placement array.

286. Plaintiffs have failed to objectively quantify the risk to which all children placed in licensed foster care are currently exposed caused by an alleged inadequate placement array.

287. Plaintiffs have failed to prove that the risk of harm to all children placed in licensed foster care caused by the placement array in Texas is unreasonable.

288. Plaintiffs have failed to prove that harm caused by an alleged inadequate placement array is actually imminent for any child and all children in licensed foster care.

289. Plaintiffs have failed to prove that denial of a child's right to personal security and reasonably safe living conditions caused by an alleged inadequate placement array is actually imminent for any child and all children in licensed foster.

290. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, an alleged inadequate placement array has caused in the past harm of any nature to children in licensed foster care.

291. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, an alleged inadequate placement array has caused in the past denial of a child's right to personal security and reasonably safe living conditions for children placed in licensed foster care.

292. Plaintiffs have failed to prove an inadequate placement array on a statewide, regional and county basis.

293. Plaintiffs have not demonstrated that DFPS' placement array causes all children in licensed foster care to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

294. The level of personal security a child experiences in a licensed foster care placement, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

295. Whether a child in a licensed placement is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including his or her specific placement.

296. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

297. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to the placement array for any and all children in licensed placements shocks the conscience.

298. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference to any and all children in licensed placements with respect to the placement array.

299. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference to any and all children in licensed placements.

300. Far from acting with deliberate indifference, DFPS engages in a broad spectrum of conduct to mitigate a wide variety of risks associated children in conservatorship, including risks associated placements.

301. DFPS employs tenured CPS staff as I See You workers to ensure a child experiences regular face-to-face caseworker contacts if a child's unique needs require placement in a setting outside of their home region.

302. DFPS has developed a comprehensive, practical, and effective approach to service delivery in its Foster Care Redesign program. The approach has incorporated technical assistance by nationally recognized entities such as Chapin Hall and Public Consulting Group.

303. DFPS has a number of effective foster home recruitment efforts, one of which is faith based recruiting, which is designed to engage the community in the care of children.

304. Texas ranks high at a national level in the funds it pays foster parents.

305. When necessary, Texas uses “child specific contracts” to ensure the specific needs of individual children are met.

306. DFPS partners with its service providers to develop and enhance the array of placements available to children. Statewide venues, such as the Committee for Advancing Residential Placements or the Public Private Partnership, review policy and procedures to strengthen residential services.

307. DFPS implemented required and optional elements of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (H.R. 6893), including permanency care assistance, supervised independent living options, extended foster care, and extended adoption and guardianship assistance.

308. As further incentive to expansion of placement resources, the Health and Human Services Commission contracts for a managed health care service delivery model (STAR Health) that provides an electronic health passport, enables monitoring of psychotropic medication usage, and ensures adequate medical and behavioral health services for children in conservatorship.

309. Such conduct does not amount to deliberate indifference or a total lack of professional judgment. Rather, it demonstrates professionalism and regard for the rights of children in foster care.

310. Plaintiffs have failed to prove a placement array that would be adequate on a statewide, region-wide or county-wide basis.

311. Plaintiffs have failed to prove what risk of harm associated with a placement array would be reasonable.

312. Plaintiffs have failed to prove the existence and parameters of any objective means by which to measure whether a placement array results in a reasonable risk of harm to children in licensed foster care, both as to any child in the class and to all children in the entire class.

313. Plaintiffs have failed to prove the aggregate need of all children in the subclass for additional placements that will provide the necessary number, geographic distribution, and array of placement options for all children in the subclass.

314. Plaintiffs have failed to prove that unidentified professionals to be appointed by the Court are able to assess the aggregate need of all children in the subclass for additional placements that will provide the necessary number, geographic distribution, and array of placement options for all children in the subclass.

315. Plaintiffs have failed to prove the specific remedy they seek for the subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the oversight inadequacy of which they complain.

Basic in GRO Subclass

316. Plaintiffs have failed to prove a correlation between every placement of a Basic service level child in a GRO and harm to the child.

317. Plaintiffs have failed to prove that every placement of a Basic service level child in a GRO denies personal security and reasonably safe living conditions for the child.

318. Plaintiffs have failed to prove a correlation between every placement of a Basic service level child in a GRO and the occurrence of abuse or neglect to the child.

319. Plaintiffs have failed to prove a correlation between every placement of a Basic service level child in a GRO and permanency outcomes.

320. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and harm to the child.

321. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and a denial of personal security and reasonably safe living conditions for the child.

322. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and the occurrence of abuse or neglect to the child.

323. Plaintiffs have failed to prove a causal relationship between every placement of a Basic service level child in a GRO and permanency outcomes.

324. A causal relationship between placing any Basic service level child in any GRO and any of harm of any nature, a denial of personal security and reasonably safe living conditions, abuse and neglect, or permanency outcomes cannot be reasonably inferred in light of the following facts:

    325. Plaintiffs failed to prove even a correlation between these conditions.

    326. Despite access to data on all Basic service level children who have been placed in GROs, Plaintiffs have failed to prove any harm caused to any child by the fact of that placement.

    327. Plaintiffs failed to prove that any substantiated incidences of abuse and neglect were caused by the fact that any Basic service level child was placed in a GRO.

    328. Having failed to prove any historical causation across such a broad spectrum of children, any inference of prospective causation, much less imminent causation, would be unreasonable.

    329. Despite access to data to all children in the class and the availability of reliable methods of statistical analysis, Plaintiffs performed no such analysis and provided no reliable results in support of causation.

    330. Plaintiffs have provided no peer reviewed scientific studies to establish such causation in Texas.

    331. Plaintiffs failed to disprove or rule out other possible causes of the harm or risk of harm to which they contend the class members are subjected by being placed in a GRO.

    332. Plaintiffs have failed to prove that any potential risk of causation associated with placement of a Basic service level child in a GRO is not mitigated by the involvement of other people who are involved in the lives of such children and look out for their safety and well-being, such as conservatorship caseworkers, GRO staff, RCCL inspectors and investigators, I See You workers, CASAs, ad litems, and courts.

333. Anecdotal testimony about isolated instances does not establish widespread applicability.

334. Testimony about what "can," "could" or "might" happen is speculative and does not form the basis for any reasonable inference.

335. Texas' compliance with national standards for safety-related and permanency-related statewide indicators contradicts the contention placement of Basic service level children in GROs causes them harm or unreasonable risk of harm.

336. The Court further finds that the facts found below with respect to mitigation of risks associated with placement of a Basic level child in a GRO also make an inference of causation unreasonable.

337. Plaintiffs have failed to prove the magnitude of risk of harm to every Basic service level child placed in a GRO.

338. Plaintiffs have failed to objectively quantify the risk to which every Basic service level child is subjected by placement in a GRO.

339. Having failed to prove the fact of risk or the magnitude of risk, Plaintiffs have failed to prove that the risk of harm to every Basic service level child placed in a GRO is unreasonable.

340. Plaintiffs have failed to prove that harm is actually imminent for every Basic service level child placed in a GRO.

341. Plaintiffs have failed to prove that denial of a right to personal security and reasonably safe living conditions is imminent for every Basic service level child placed in a GRO.

342. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a Basic service level child in a GRO in the past caused harm of any nature to the child.

343. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a Basic service level child in a GRO in the past caused a denial of the child's right to personal security and reasonably safe living conditions.

344. Plaintiffs have failed to prove that placement of any Basic service level child in any GRO subjects the child to a risk of harm without regard to the individual characteristics and needs of that particular child.

345. Plaintiffs have failed to prove that placement of any Basic service level child in a GRO subjects the child to a risk of harm without regard to the type of GRO where the child is placed.

346. Plaintiffs have failed to prove that placement of any Basic service level child in any GRO subjects the child to a risk of harm without regard to the individual characteristics, qualities and capabilities of the particular GRO where the child is placed.

347. Plaintiffs have not demonstrated that placement of Basic service level children in GROs causes all such children to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

348. The level of personal security a child experiences in a GRO, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

349. Whether a Basic service level child placed in a GRO is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including the particular GRO placement.

350. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

351. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to all placements of Basic service level children in GROs shocks the conscience.

352. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference with respect to all placements of Basic service level children in GROs.

353. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference with respect to all placements of Basic service level children in GROs.

354. Far from acting with deliberate indifference, DFPS engages in a broad spectrum of conduct to mitigate a wide variety of risks associated children in conservatorship, including risks associated the placement of Basic service level children in GROs.

355. Some Basic level children prefer to be placed in a GRO setting and do well in such settings.

356. Considering that it is the child's needs that drive the placement, there are instances in which a Basic level child's needs are best served by placement in a GRO.

357. GROs serve an important part of the placement array in Texas, including providing placements for large sibling groups.

358. Such conduct does not amount to deliberate indifference or a total lack of professional judgment. Rather, it demonstrates professionalism and regard for the rights of children in foster care.

Foster Group Home Subclass

359. Plaintiffs have failed to prove that there is a widely accepted COA or CWLA professional standard applicable to Foster Group Homes as they are operated in Texas.

360. The CWLA' standards of excellence and COA standards are designed to be used as ideals or goals for practice in the field of child welfare services. They represent practices considered to be most desirable. They carry no implication of control or regulation.

361. Plaintiffs have failed to prove that there is a widely accepted professional standard calling for Foster Group Homes, as they are operated in Texas, to have a wake staff, on-call or on-site medical and behavioral health personnel, and training and education requirements established by CWLA congregate care caregivers (collectively "wake staff," "on-call medical," and "congregate care training"), including what it means to be "accepted," which foster care agencies (or other entities that actually serve as managing conservators for children in state custody) have accepted that those standards, which have not and whether the former outnumber the latter so much so as to constitute "widely accepted," and that acceptance of such standards is necessary in order to adequately serve children in Foster Group Homes.

362. Plaintiffs have failed to prove that all Foster Group Homes in Texas lack adequate night supervision, adequate access to medical services and adequate caregiver training.

363. Plaintiffs have failed to prove a correlation between every placement of a child in a Foster Group Home and harm to the child caused by lack of a wake staff, on-call medical and congregate care training.

364. Plaintiffs have failed to prove that every placement of a child in a Foster Group Home denies personal security and reasonably safe living conditions for the child caused by lack of a wake staff, on-call medical and congregate care training.

365. Plaintiffs have failed to prove a correlation between every placement of a child in a Foster Group Home and the occurrence of abuse or neglect to the child caused by lack of a wake staff, on-call medical and congregate care training.

366. Plaintiffs have failed to prove a correlation between every placement of a child in a Foster Group Home and permanency outcomes caused by lack of a wake staff, on-call medical and congregate care training.

367. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and harm to the child caused by lack of a wake staff, on-call medical and congregate care training.

368. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and a denial of personal security and reasonably safe living conditions for the child caused by lack of a wake staff, on-call medical and congregate care training.

369. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and the occurrence of abuse or neglect to the child caused by lack of a wake staff, on-call medical and congregate care training.

370. Plaintiffs have failed to prove a causal relationship between every placement of a child in a Foster Group Home and permanency outcomes caused by lack of a wake staff, on-call medical and congregate care training.

371. A causal relationship between lack of any of a wake staff, on-call medical and congregate care training and any of harm of any nature, a denial of personal security and reasonably safe living conditions, abuse and neglect, or permanency outcomes cannot be reasonably inferred in light of the following facts:

    372. Plaintiffs failed to prove even a correlation between these conditions. Despite access to data on thousands of children who are in or have passed through Foster Group Homes in Texas, Plaintiffs have failed to prove any harm caused to any child by lack of a wake staff, on-call medical and congregate care training.

    373. Plaintiffs failed to prove that any substantiated incidences of abuse and neglect were caused by lack of a wake staff, on-call medical and congregate care training.

    374. Having failed to prove any historical causation across such a broad spectrum of children, any inference of prospective causation, much less imminent causation, would be unreasonable.

    375. Despite access to data on thousands of children who are in or have passed through Foster Group Homes in Texas and the availability of reliable methods of statistical analysis, Plaintiffs performed no such analysis and provided no reliable results in support of causation.

    376. Plaintiffs have provided no peer reviewed scientific studies to establish such causation in Texas.

    377. Plaintiffs failed to disprove or rule out other possible causes of the harm or risk of harm to which they contend the class members are subjected by lack of a wake staff, on-call medical and congregate care training.

378. Plaintiffs have failed to prove that any potential risk of causation associated with a lack of a wake staff, on-call medical and congregate care training is not mitigated by the involvement of other people who are involved in the lives of foster children and look out for their safety and well-being, such as conservatorship caseworkers, foster parents (including specialized training they have received), CPU workers, CPA inspectors and staff, I See You workers, CASAs, ad litems, and courts.

379. Anecdotal testimony about isolated instances does not establish widespread applicability.

380. Testimony about what "can," "could" or "might" happen is speculative and does not form the basis for any reasonable inference.

381. Texas' compliance with national standards for safety-related statewide indicators contradicts the contention that lack of a wake staff, on-call medical and congregate care training cause harm or unreasonable risk of harm to children in Foster Group Homes.

382. The Court further finds that the facts found below with respect to mitigation of risks associated with a lack of a wake staff, on-call medical and congregate care also make an inference of causation unreasonable.

383. Plaintiffs have failed to prove the magnitude of risk of harm to every child placed in a Foster Group Home caused by lack of a wake staff, on-call medical and congregate care.

384. Plaintiffs have failed to objectively quantify the risk to every child placed in a Foster Group Home.

385. Plaintiffs have failed to prove that the risk of harm to every child placed in a Foster Group Home is unreasonable.

386. Plaintiffs have failed to prove that harm is actually imminent for every child placed in a Foster Group Home.

387. Plaintiffs have failed to prove that denial of a right to personal security and reasonably safe living conditions is imminent for every child placed in a Foster Group Home.

388. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a child in a Foster Group Home in the past caused harm of any nature to the child.

389. Historically and with regard to imminence, Plaintiffs have failed to prove whether, or to what extent, any placement of a child in a Foster Group Home in the past caused a denial of the child's right to personal security and reasonably safe living conditions.

390. Plaintiffs have failed to prove that every placement of a child in a Foster Group Home subjects the child to a risk of harm without regard to the individual characteristics and needs of that particular child.

391. Plaintiffs have failed to prove that every placement of a child in a Foster Group Home subjects the child to a risk of harm without regard to the individual characteristics, qualities and capabilities of the particular Foster Group Home where the child is placed.

392. Plaintiffs have failed to prove the level of training of all Foster Group Home parents and have failed to prove as to each and to all that such training was inadequate.

393. Plaintiffs have failed to prove the availability of on-call medical personnel at all Foster Group Home and have failed to prove as to each and to all that such availability was inadequate.

394. Plaintiffs have not demonstrated that placement of children in Foster Group Homes causes all such children to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions or any other reason.

395. The level of personal security a child experiences in a Foster Group Home, and thus its reasonableness, can only be determined with reference to the specific characteristics of that child and the circumstances of his or her placement.

396. Whether a child placed in a Foster Group Home is in reasonably safe living circumstances can only be determined with reference to the specific characteristics of that child and the unique characteristics of that child's living conditions, including but not limited to the particular Foster Group Home, the number of children living there, and the knowledge, experience and training of the caregivers.

397. Plaintiffs have failed to prove psychological harm that is common to all class members because variations in the particular circumstances and psychological states of each class member would abound.

398. Plaintiffs have failed to prove that each and all of Defendants' conduct with respect to all placements of children in Foster Group Homes shocks the conscience.

399. Plaintiffs have failed to prove that each and all of Defendants acted with deliberate indifference with respect to all placements of children in Foster Group Homes.

400. Plaintiffs have failed to prove that each and all of Defendants acted with cavalier indifference with respect to all placements of children in Foster Group Homes.

401. Far from acting with deliberate indifference, DFPS engages in a broad spectrum of conduct to mitigate a wide variety of risks associated children in conservatorship, including risks associated with the placement of children in Foster Group Homes.

402. Foster parents in foster group homes receive training that is appropriate to the service level needs of children in their care. If a child with elevated service level needs is placed in a Foster Group Home, he or she will only be placed in a home where the caregivers have a corresponding level of training.

403. The majority of Foster Group Homes have actual occupancy rates that are substantially lower than the maximum levels for which they are certified.

404. Like a traditional foster family home, the vast majority of Foster Group Homes are a traditional home setting with parents who live in the home.

405. Foster Group Homes serve an important part of the DFPS placement array, including providing placements for large sibling groups and children with particularized needs.

406. Children in Foster Group Homes are entitled to medical services through STAR Health, which include 24-hours/day, 7 days per week access to the NurseWise Hotline.

407. Such conduct does not amount to deliberate indifference or a total lack of professional judgment. Rather, it demonstrates professionalism and regard for the rights of children in foster care.

408. Plaintiffs have failed to prove the specific remedy they seek for this subclass and thus they have failed to prove that such a remedy would be specific, final, capable of clear compliance, and, most importantly, effective to remedy the risk of harm of which they complain.

Named Plaintiffs, Class Representatives

409. There have been 20 Named Plaintiffs during the pendency of this suit. Of the 20, 16 have exited from PMC or were omitted by amended complaints: JS, PO, AR, and DI adopted; JV and TH omitted from complaint; SR, MR, JR, and SA were dismissed from PMC to have PMC transferred to a relative; KE, DP, SA, and TC aged out; and, LH and CH were dismissed from PMC to be returned to their mother. Four Named Plaintiffs remain in PMC: HV, AM, ZH, and MD.

410. Plaintiffs' Corrected Fourth Amended Complaint named 15 plaintiffs. Since that filing, seven have been voluntarily dismissed (DI, JR, SR, MR, KE, PO and SS). Of the remaining eight, four have exited PMC: JS to adoption on July 18, 2014; LH and CH dismissed from PMC and returned to their mother on June 14, 2013, and AR to adoption on May 9, 2014.

411. Of the four Named Plaintiffs who remain in PMC: HV was placed in an adoptive home on August 11, 2014; AM is in a residential treatment center; ZH is in a fictive kinship home with a relative who plans to adopt him; and, MD is on runaway status.

412. Of the class representatives named by the Court for the General Class, only HV, AM, ZH and MD are still in PMC.

413. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove that any such child had a caseworker who had an excessive caseload and that the excessive caseload caused harm to the child.

414. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove that the personal security and reasonably safe living conditions of the child will be imminently denied because the child has a caseworker with an excessive caseload.

415. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove that the child will be imminently harmed because the child has a caseworker with an excessive caseload.

416. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove the likelihood, if any, that that such child, in his or her county or region, will be assigned a caseworker who has an excessive caseload and that the excessive caseload will imminently cause harm to child.

417. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove the likelihood, if any, that that such child, in his or her region, will be assigned a caseworker who has an excessive caseload and that the excessive caseload will imminently deny the child's right to personal security and reasonably safe living conditions.

418. Plaintiffs have failed to prove the cause or causes of any harm suffered by any of HV, AM, ZH, and MD while in PMC and that any such harm would not have occurred had he or she had a caseworker with a lower caseload.

419. Of the class representatives named by the Court for the Licensed Foster Care Subclass, only HV, AM, ZH and MD are still in PMC.

420. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove that any such child is currently in an unsafe placement.

421. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove the likelihood, if any, that the child will imminently be placed in an unsafe placement.

422. As to each of HV, AM, ZH, and MD, Plaintiffs have failed to prove that the child, either in his or her current placement or any other placement in which he or she will imminently and likely be placed, is subjected to any unreasonable risk of harm because of an insufficient number of RCCL inspectors or investigators in his or her county or district, an inadequate

continuous quality improvement system, or an inadequate placement array in his or her county or region.

423. Plaintiffs have failed to prove the cause or causes of any harm suffered by any of HV, AM, ZH, and MD while in PMC and that any such harm would not have occurred had DFPS had more RCCL inspectors or investigators, a continuous quality improvement system, or an adequate placement array.

424. HV was the only class representative named by the Court for the Foster Group Home Subclass and while he remains in PMC, he is no longer in a Foster Group Home.

425. Plaintiffs have failed to prove that while HV was in a foster group home, the home lacked access to on-call medical services, lacked proper overnight supervision by the foster parents or that the foster parents were not adequately trained.

426. Plaintiffs have failed to prove that while HV was in a foster group home, the home lacked access to on-call medical services, lacked proper overnight supervision by the foster parents or that the foster parents were not adequately trained, and that as a result of such shortcoming he suffered injury of any kind.

427. Plaintiffs have failed to prove that while HV was in a foster group home, he was subjected to an unreasonable risk of harm due to any quality or characteristic of his placement, including the capabilities of his foster parents, other children in the home, or any physical aspect of the home.

428. LH and CH were the only representatives named by the Court for the Basic Care GRO Subclass and at the time they were made class representatives they had already exited PMC and had been returned to their mother.

429. LH and CH were not in a GRO when the Court certified them as class representatives.

430. Plaintiffs have failed to prove that while they were in a GRO they were subject to an unreasonable risk of harm due to any quality or characteristic of their placement, including the characteristics of the GRO in which they were placed and the other children living there at the time.

Texas Diversity

431. Texas is the second largest state in the nation with more than 27 million people residing in 254 counties. The child population in Texas in FY2013 was 7,159,172 children. There is diversity in how the child population is distributed, with the number of children in each of those counties ranging from a low of only 7 children (Loving County) to a high of 1,185,780 children (Harris County).

432. The child population is growing, with more than 1 million children added in the past decade. Three of the Texas regions (Regions 8, 10 and 11) border the country of Mexico. Two regions (Regions 3 and 6) have urban areas with more than a million children in them. Three regions (Regions 4, 8 and 10) are the home to three federally recognized American Indian Tribes.

433. Children within the state are ethnically diverse. Of the 7,159,172 children, 11.6% are African American, 32.6% are Anglo, 49.4% are Hispanic, and .3% are Native American. The distribution within individual counties does not simply match the statewide distribution, even in the most populous counties. For example, in contrast to the state's 11.6% rate, Harris County has 18% African American children. In contrast to the state's 49.4% rate, Bexar County has 69% Hispanic children.

434. There is a high level of poverty, with 1.77 million children living in poverty in 2010. More than 60% of children removed from their homes come from families with annual incomes of $10,000 or less.

435. The Texas removal rate (removals per 1,000 children in the population) is lower than the national average removal rate, with a Texas removal rate of 2.5 children as compared to the national rate of 3.4. However, within the state, there is great diversity regarding the point prevalence rate of children in DFPS legal responsibility in individual counties. Even amongst the most populous counties, the rate of the annual number of children in DFPS legal responsibility per 1,000 children in the county's child population is diverse. The rate for Texas was 6.5 children per 1,000 children in DFPS legal responsibility within the child population, but large county rates range from a low of 4.3 children in Tarrant County, 5.8 children in Harris County, 6.0 in Dallas and Travis Counties, to 11.5 in Bexar County.

436. There is diversity regarding staffing issues amongst the eleven regions. For example, amongst an average number of 8,755 active CPS staff within 2014, regional active staff numbers range from a low of 236.5 in Region 10 (El Paso Region) to a high of 1,912.5 in Region 3 (Dallas Region). Statewide turnover for CPS within the same time period was 18%, while the regions ranged in turnover rates from a low of 11.8% in Region 2 (Abilene Region) to a high of 23.5% in Region 7 (Austin Region).

ATTACHMENT 9

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

I. Plaintiffs Have Demonstrated That Defendants Are Violating Their Substantive Due Process Rights by Exposing Them to an Unreasonable Risk of Harm While in Foster Care Custody

A. This Court Finds That Plaintiffs Have an Enforceable Substantive Due Process Right To Be Protected from Harm

"No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under the Fourteenth Amendment, "[c]hildren in the State's care have a right to be free from an unreasonable risk of harm," by virtue of the special relationship created when the state takes a child into custody. *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 33, 32 (S.D. Tex. 2013) (holding that "the State exercises control over children in State custody and has a commensurate duty of care to them"), *leave to appeal dismissed*, 547 F. App'x 543 (5th Cir. 2013) (per curiam). The Fifth Circuit has repeatedly acknowledged this right, holding, for example, that "foster children enjoy a substantive due process right 'to personal security and reasonably safe living conditions' based on the special relationship between them and the State." *See M.D.*, 294 F.R.D. at 32 (quoting *Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004)); *see also Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 859 (5th Cir. 2012) (recognizing foster care as one of the "strictly enumerated" situations where the state assumes a duty of care sufficient to create a special relationship).

Accordingly, this Court finds that Plaintiffs within the General Class, Licensed Foster Care Subclass, Foster Group Home Subclass, and Basic Care GRO Subclass are all children in the permanent managing conservatorship of the state and are thus entitled to be free from an unreasonable risk of harm.

B. This Court Finds That the Substantive Due Process Rights Asserted in the Complaint Include Protection from Physical and Emotional Harms

The scope of Plaintiffs' substantive due process rights clearly encompasses the harms alleged in Plaintiffs' Fourth Amended Complaint. "[C]hildren in the State's care have a right to be free from an unreasonable risk of harm that would compromise their personal security or deprive them of reasonably safe living conditions." *M.D.*, 294 F.R.D. at 33 (citing *Hernandez*, 380 F.3d at 880). The scope of substantive due process rights outlined by the Fifth Circuit in *Hernandez* includes "'a right to protection from psychological as well as physical abuse.'" *M.D.*, 294 F.R.D. at 33 (quoting *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006)).[1] Further, Plaintiff Children have a right to "'be free from unreasonable and unnecessary intrusions into their emotional well-being.'" *M.D.*, 294 F.R.D. at 33 (quoting *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997)). Defendants' obligations are as follows: "'[T]he Constitution requires the responsible state officials to take steps to prevent children in state institutions from deteriorating physically and psychologically.'" *M.D.*, 294 F.R.D. at 33 (quoting *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

Finally, this formulation of the scope of Plaintiffs' substantive due process rights is "especially important as children in the PMC are practically guaranteed to have experienced significant trauma before entering the State's care." *M.D.*, 294 F.R.D. at 33. Defendants' constitutional obligation to keep Plaintiff Children free from an unreasonable risk of harm is vital to preventing further trauma.

[1] Defendants have argued that the Fifth Circuit's holding in *Griffith v. Johnston* forecloses Plaintiffs' substantive due process right to be free from the imminent risk of physical or psychological harm. 899 F.2d 1427, 1439 (5th Cir. 1990). *Griffith* is distinguishable from the instant case and does not foreclose Plaintiffs' claims, as the rights asserted by Plaintiffs are "much more limited than those rejected in *Griffith*." *M.D.*, 294 F.R.D. at 33-34.

C. This Court Finds That Plaintiffs' Constitutional Injury Can Be Demonstrated Through Risk of Harm

Plaintiffs "do not need to wait to suffer an actual harm in order to obtain relief." *M.D.*, 294 F.R.D. at 34. "The legal injury is the risk of harm. So, the Fourteenth Amendment right upon which Plaintiffs base their claim can be characterized as a right to be free from an unreasonable risk of harm while in the State's custody." *Id.* The Fifth Circuit recognizes that "children in foster care have 'a constitutional right to personal security and reasonably safe living conditions.'" *Id.* (quoting *Hernandez*, 380 F.3d at 880). "Plaintiffs do not need to wait until they are actually abused or suffer from unsafe living conditions. They have a right to be free of the unreasonable risk of harm, and if they suffer that risk now, they have suffered a legal injury." *Id.* The weight of authority in cases concerning the Substantive Due Process rights of children in foster care is consistent with this rule.[2]

D. This Court Finds That the Professional Judgment Standard Should Be Applied to Plaintiffs' Claims

In order to succeed on a substantive due process claim a plaintiff must meet the substantive due process culpability standard, which, in this context, courts have defined through use of either the "deliberate indifference" standard or the *Youngberg* "absence of professional judgment" standard. *M.D.*, 294 F.R.D. at 34-35. Plaintiffs' claims are properly evaluated pursuant to the absence of professional judgment standard. Supreme Court precedent has established that this is the appropriate standard to apply to the substantive due process claims of innocent dependents like Plaintiff Children, entitled to "more considerate treatment and conditions of confinement" than criminals, whose claims are subject to the alternative deliberate

[2] *See Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 295 (D. Mass. 2011); *D.G. ex rel. Strickland v. Yarbrough*, No. 08-CV-074-GKF-FHM, 2011 WL 6009628, at *16 (N.D. Okla., Dec. 1, 2011); *Braam ex rel. Braam v. Washington*, 150 Wash.2d 689, 699 (Wash. 2003) (en banc).

indifference test. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). Consistent with this important distinction, many circuit courts of appeal have applied the professional judgment standard to claims brought by children in foster care. *See, e.g.*, *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992); *Winston ex rel. Winston v. Children & Youth Servs. of Del. Cnty.*, 948 F.2d 1380, 1391 (3d Cir. 1991); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990). A number of district courts have followed suit. *See, e.g.*, *Kenny A. ex rel. Winn v. Perdue*, Civil Action No. 1:02-cv-1686-MHS, 2004 WL 5503780, at *3 (N.D. Ga. Dec. 13, 2004); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 507 (D.N.J. 2000); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 953-54 (M.D. Tenn. 2000); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991). These decisions align with the Supreme Court's precedent guiding the application of the professional judgment standard.

Since its complementary decisions in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Youngberg*, the Supreme Court's express distinction between the appropriate standard to apply to the constitutional claims of incarcerated people versus those involuntarily confined has been clear. In *Estelle*, the Supreme Court found that the proper standard to apply to the prisoner's claim was a deliberate indifference standard, stating that "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." 429 U.S. at 106; *see generally id.* at 102-06.

In *Youngberg*, the Supreme Court clarified that a different standard applied to the substantive due process claim of an individual who had been involuntarily committed to a state institution, holding that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." 457 U.S. at 321-22. The Supreme Court adopted a

"professional judgment" standard, which "reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints," *id.* at 321, and which requires "the decision by the professional [to be] such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment," *id.* at 323.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court reiterated the importance of applying the *Youngberg* professional judgment standard to constitutional claims brought by individuals who are in the custody of the state through no fault of their own. With respect to those *involuntarily* committed, the Supreme Court stated that *Youngberg*'s professional judgment standard is appropriate to apply because "[t]he combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare." *Id.* at 852 n.12.

There is no Fifth Circuit case law that applies the deliberate indifference standard in the context of a lawsuit brought by a class of children in the foster care custody of the state solely seeking prospective injunctive relief. The court's opinion in *Hernandez* employed the deliberate indifference standard to consider damages claims brought on behalf of a child who had died while in state foster care. 380 F.3d at 880.[3] In contrast, Plaintiff Children seek prospective injunctive relief as a class – not compensatory damages for an individual victim. Consistent with this difference, district courts within the Fifth Circuit have applied the professional judgment standard to suits seeking class-wide equitable relief on behalf of those involuntarily committed to

[3] In the non-precedential, unpublished *per curiam* opinion in *Hall v. Smith*, the Fifth Circuit applied the deliberate indifference standard to claims brought on behalf of a child who died in state foster care custody. 497 F. App'x 366, 374, 377 (5th Cir. 2012). This case is not applicable to Plaintiffs' claims because the court only considered the merits of the damages claim, dismissing the request for equitable relief for lack of standing without addressing which standard applied to the declaratory relief.

the state's legal custody, including children in foster care custody. *See, e.g.*, *Del A. v. Roemer*, 777 F. Supp. 1297, 1318 (E.D. La. 1991) (holding, in class action brought by children in foster care, that constitutional liability may be imposed "when a decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the professional actually did not base the decision on such a judgment"); *Lelsz v. Kavanagh*, 629 F. Supp. 1487, 1494-95 (N.D. Tex. 1986) (dismissing request for modification of consent decree granting prospective injunctive relief on behalf of class of involuntarily committed individuals in state schools and holding that terms of settlement complied with professional judgment standard required by *Youngberg*). The professional judgment "standard has been employed by other courts in the foster care context" where plaintiffs seek purely injunctive remedies. *M.D.*, 294 F.R.D. at 35 (citing *LaShawn A.*, 762 F. Supp. at 996 n.29). Therefore, here, where Plaintiffs are wards of the state who are entirely dependent on Defendants for their care, where there is no legitimate interest in punishing them because they enter foster care through no fault of their own, and where they seek only prospective injunctive relief rather than damages, the Court finds that the professional judgment standard is applicable.

E. This Court Finds That Established Professional Standards Are Relevant When Determining Liability

"[C]ompliance or lack of compliance with a professional standard, if admissible, can be *evidence* for or against finding a constitutional violation." *M.D.*, 294 F.R.D. at 35-36. Many district and circuit courts have held that accepted professional standards, including standards published by the Child Welfare League of America (CWLA) and the Council on Accreditation (COA), can assist the court in determining constitutional liability. *See Doe ex rel. G.S. v. Johnson*, 52 F.3d 1448, 1461-62 (7th Cir. 1995) (holding that CWLA standards were admissible

"to aid the jury in determining the proper standard of care to which [defendants] should be held"); *D.G. ex rel. Strickland v. Yarbrough*, 278 F.R.D. 635, 642, 646 (N.D. Okla. 2011) (considering CWLA and COA standards in decision to certify class of children alleging inadequate monitoring and abuse and neglect in foster care); *Kenny A.*, 2004 WL5503780, at *12; *LaShawn A.*, 762 F. Supp. at 966 (characterizing standards "such as those of the Child Welfare League of America" as "relevant professional standards"). This Court finds professional child welfare standards are relevant to its determination of Defendants' liability. [4]

F. This Court Finds Reasonable Inferences as to Causation Can Be Made Based on the Record at Trial

District courts are permitted to make reasonable inferences as to causation based on evidence presented. *See Heath v. Brown*, 858 F.2d 1092, 1094-95 (5th Cir. 1988) (affirming district court's finding that plaintiffs' federal civil rights suit was a substantial factor in motivating government officials to end unconstitutional behavior where there was "a reasonable inference based upon the total record"). Similarly, in the analogous context of state tort law, the Fifth Circuit has held that "'[c]ausation need not be supported by direct evidence. Circumstantial evidence and reasonable inferences therefrom are a sufficient basis for a finding of causation.'" *Goodner v. Hyundai Motor Co., Ltd.*, 650 F.3d 1034, 1044 (5th Cir. 2011) (quoting *Tompkins v. Cyr*, 202 F.3d 770, 782 (5th Cir. 2000)) (affirming jury trial verdict finding of causation under Texas product liability law). This Court finds that it is permissible to make reasonable inferences based on evidence presented at trial to show that Defendants' policies and

[4] These standards are recognized by Texas law, which requires that the Commissioner of Health and Human Services "ensure" that caseload standards adopted by DFPS "are consistent with existing professional caseload standards." Tex. Gov't Code § 531.048(b)(3) (2011); *see also* Tex. Gov't Code § 531.001(5) (2011) (defining "[p]rofessional caseload standards" as standards "established . . . by management studies . . . or by an authority or association, including the Child Welfare League of America").

practices have and continue to "create[] a risk that rises to the level of an unreasonable risk of harm" threatening class-member children. *M.D.*, 294 F.R.D. at 34 n.6.

G. This Court Finds That Defendants Violate Plaintiffs' Substantive Due Process Rights by Exposing Them to an Unreasonable Risk of Harm

Under either the professional judgment or the deliberate indifference standard, this Court finds that Defendants' conduct amounts to an ongoing violation of Plaintiffs' constitutional rights. There are specific and pervasive failures in Defendants' administration of DFPS that place Plaintiffs at unreasonable and imminent risk of harm and that reflect substantial deviations from accepted standards of professional judgment. *See M.D.*, 294 F.R.D. at 35; *see LaShawn A.*, 762 F. Supp. at 997 (holding, in lawsuit brought by children in foster care seeking prospective injunctive relief, that "[t]he behavior of the defendants also confirms that the decisions made by officials within the [child welfare agency] have not been the result of the exercise of professional judgment" and not "the result of choosing among several professionally acceptable alternatives"). This Court finds that these failures represent a "pattern or practice of agency action or inaction–including a failure to correct a structural deficiency within the agency." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847-48 (5th Cir. 2012).

This Court also finds that Defendants' actions and inactions reflect "conscious disregard of a known and excessive risk" to Plaintiff Children. *M.D.*, 294 F.R.D. at 35.

Specifically, and with regard to the General Class and Subclasses, this Court finds that Defendants have violated and continue to violate Plaintiffs' substantive due process right to be free from harm and the unreasonable risk of harm while in state custody in one or more of the following respects:

(a) By maintaining excessive conservatorship worker caseloads;

(b) By maintaining a placement array that is inadequate in number, geographic spread, and mix to meet the needs of children removed into DFPS foster care custody;

(c) By maintaining an inadequate licensing function, lacking both sufficient staffing capacity to meet policy requirements and a quality assurance capability that meets accepted standards for continuous quality improvement;

(d) By utilizing foster group homes pursuant to RCCL minimum licensing standards that fail to incorporate widely accepted safeguards for the operation of group and congregate care facilities; and

(e) By utilizing general residential operations to serve children with basic level needs who can be adequately served in a foster home setting, thereby departing from the accepted standard that children are to be placed in the least restrictive, most family-like setting.

H. This Court Finds That Defendants' Explanations for DFPS' Poor Performance Do Not Defeat a Finding of Liability

i. The Cost of Implementing Injunctive Relief Is Not a Valid Defense

This Court finds that Defendants cannot avoid their constitutional duties to children in DFPS custody by showing that budgetary restrictions or a particular economic climate render them unable to meet their obligations or make implementation of injunctive relief untenable: "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis, Tenn.*, 373 U.S. 526, 537 (1963); *see also Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974). The Fifth Circuit has recognized that "if the state chooses" to take custody of its citizens, then "it must pay the cost of maintaining" that custody "according to fundamental and well-established concepts of constitutional law." *Newman v. Alabama*, 522 F.2d 71, 80 (5th Cir. 1975) (en banc) (Gewin, J., dissenting). Consistent with this mandate, the Fifth Circuit has

expressly rejected as a defense the state's financial inability to implement injunctive relief directed to remedying a systemic constitutional violation. *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980); *Gates*, 501 F.2d at 1319-20. The Fifth Circuit has expounded that

> [w]here state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature[] have been rejected by the federal courts. . . .
>
> "Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If [the State] is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."

Gates, 501 F.2d at 1319-20 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970)).[5]

Financial limitations simply do not excuse Defendants' failure to maintain a constitutionally adequate foster care system.

[5] The tenet that insufficient funding does not relieve states from constitutional compliance is similarly well established in Supreme Court jurisprudence. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) ("[F]ederal courts [can] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."); *see also Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974).

ATTACHMENT 10

DEFENDANT'S PROPOSED CONCLUSION OF LAW

I. Plaintiffs Have Failed to Advance a Due Process Claim.

With specific reference to Plaintiffs' caseworker caseload claim in the present case, the Fifth Circuit cautioned:

> For instance, it is unclear whether the Named Plaintiffs can even advance a due process claim based on a bare finding that Texas has "organized or mismanaged" DFPS improperly. *See Lewis v. Casey*, 518 U.S. 343, 349-50 . . . (1996)("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution . . . . But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly.)"

MD v. Perry, 675 F.3d 832, 841 (5th Cir. 2012). The Court finds this admonition, both of the Supreme Court in *Lewis*, and as pointedly raised in this case by the Fifth Circuit, to be equally applicable to all claims advanced by the Plaintiffs.

This Court is also mindful of further Supreme Court guidance in *Horne v. Flores*, 557 U.S. 433, 448 (2009), where the Court, albeit in the different context of Fed. R. Civ. P. 60(b)(5) context, observed that:

"[I]nstitutional reform injunctions often raise sensitive federalism concerns," and "Federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important functions."

Against the backdrop of these principles and in the injunction setting of this particular case, it was incumbent on Plaintiffs to bring to the Court substantial and reliable proof of actual, imminent harm. The Court has determined, however, that after extensive discovery over a

prolonged period of time, and after hearing the testimony of a number of witnesses, lay and expert alike, Plaintiffs have failed to present reliable, substantial evidence of imminent harm to the class members, as classes. Plaintiffs' proof of harm is anecdotal at best, certainly not class-wide, and is wholly unsupported by the type of data-driven, statistically and scientifically-sound evidence that the Court made clear it expected to hear. (The Court notes that its lack of standing determinations, set forth, below, are pertinent here, as well.) In short, Plaintiffs' criticisms of foster care in Texas, many of which the Court observes are indeed detailed and thorough, are in effect only claims that DFPS has improperly organized or mismanaged foster care in Texas. While this observation applies to all classes, it is particularly apt with respect to the following claims: (1) whether Texas should restructure management of conservatorship caseworker caseloads around the organizing principle of a defined, mandatory caseload level, as urged by representative of the General Class; (2) whether DFPS should be organized to include a Continuous Quality Improvement program of the nature the representatives of the Licensed Foster Care Subclass seek; (3) whether Texas mismanages its array of placements, including whether unidentified "professionals" should be appointed by the Court to restructure the array and its management (i.e., come in and tell the state how to do a better job of it), as requested by the Licensed Foster Care Subclass; and, (4) whether Texas has properly created and operated Foster Group Homes. The Court determines that such claims fail to rise to the level of substantive due process violations and should be dismissed.

II. Plaintiffs Have Failed to Prove Constitutionally Culpable Conduct.

Shocks the Conscience. "To demonstrate a viable substantive due process claim, in cases involving government action, the plaintiff must show that the state acted in a manner that 'shocks the conscience.'" *Hernandez v. Texas Department of Protective & Regulatory*

Services, 380 F.3d 872, 880 (5th Cir. 2004), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)(the "cognizable level of executive abuse of power" to support a substantive due process claim is one that "shocks the conscience."); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992); *MD v. Perry*, 294 F.R.D. 7, 34 (S.D.Tex. 2013)("In this case Plaintiffs challenge policies rather than discrete executive actions, so on this test they would need to show that those policies are such that they shock the conscience."); *J.R. v. Gloria*, 593 F.3d 73, 79 (1st Cir. 2010); *Rivera v. Rhode Island*, 402 F.3d 27, 35 (1st Cir. 2005)("Even if there exists a special relationship between the state and the individual . . . there is further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation; the state actions must shock the conscience of the court."); *Nicini v. Morra*, 212 F.3d 798, 812 (3rd Cir. 2000)("[A]s *Lewis* makes clear, the relevant inquiry is whether the defendant's conduct "shocks the conscience.'"); Burton v. Richmond, 370 F.3d 723, 729 ("Before official conduct or inaction rises to the level of a substantive due process violation, it must be so egregious or outrageous that it is conscience-shocking.");

The burden of demonstrating conduct that shocks the conscience is high. *See, e.g., Doe v. Covington County School District*, 675 F.3d 849, 867-68 (5th Cir. 2012)(en banc)("Conduct sufficient to shock the conscience for substantive due process purposes has been described . . . as conduct that 'violates the decencies of civilized conduct'; conduct that is so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency'; . . . and conduct that 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' *Lewis*, 523 U.S. at 846-47 & n. 8 . . . As one circuit court has recently summarized, '[t]he burden to show state conduct that shocks the conscience is extremely high, requiring stunning evidence of arbitrariness and caprice that extends beyond mere violations of state law, even

violations resulting from bad faith to something more egregious and more extreme.' *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010)(citation and internal quotation marks omitted).").

The requirement that culpable conduct must shock the conscience is not diminished by various articulations of culpable conduct, whether as deliberate indifference or as abdication of professional judgment. *See, e.g., Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010)(emphasis in original.)("*Lewis* clarified that the shocks-the-conscience test, first articulated in *Rochin v. California*, 342 U.S. 165 . . . (1952), governs *all* substantive due process claims based on executive, as opposed to legislative action.") For example, the Supreme Court has observed that not all deliberate indifference shocks the conscience. *City of Sacramento v. Lewis*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking."); *J.R. v. Gloria*, 593 F.3d at 80 ("deliberately indifferent behavior does not per se shock the conscience"); and, *Estate of Phillips v. District of Columbia*, 455 F.3d 397, 403 (D.C. Cir. 2006)("Deliberate indifference must still be conscience-shocking in order to state a substantive due process claim . . . .").

Similarly, even if the Court were to adopt an abdication of professional judgment standard, which it declines to do, to be actionable such conduct must still shock the conscience. *See, e.g., Schwartz v. Booker*, 702 F.3d 573, 585-86 (10th Cir. 2012)("Whether the state official failed to exercise professional judgment requires more than mere negligence; the official must have abdicated her professional duty sufficient to shock the conscience. *J.W.*[*v. State of Utah*],647 F.3d at 1011. Conduct is shocking to the conscience when the "'degree of outrageousness and [ ] magnitude of potential or actual harm [ ] is truly conscience shocking.'

".”); *Johnson v. Holmes*, 455 F.3d 1133, 1143 (10th Cir. 2006)("Such abdication [of professional judgment] must be sufficient to shock the conscience."); *J.W. v. Utah*, 647 F.3d 1006, 1011 (10th Cir. 2011)(abdication of professional judgment "must be sufficient to shock the shock the conscience."); and, *DG v. Yarbrough*, 2011 WL 6009628 (N.D. Okla., Dec. 1, 2011).

The Court finds that Plaintiffs have failed to prove that Defendants' conduct shocks the conscience with respect to the claims of any of the classes. Plaintiffs have not even attempted to prove shocks-the-conscience behavior by the Governor or the Executive Commissioner of Health and Human Services. As to DFPS, Plaintiffs have presented no egregious or outrageous behavior or stunning evidence of arbitrariness or caprice by DFPS. To the direct contrary, in the most recent CFSR Round 3 evaluation of foster care performance by the federal agency charged with determining compliance with national standards, Texas met or exceeded national standards--characterized as ambitious, yet feasible, reasonable benchmarks--on six of the seven statewide indicators and missed on the seventh by only a small margin. These standards measure the safety of children in foster care and the state's success in moving those children to permanency. Not only has Texas substantially met or exceeded national standards related to the key outcomes the Children's Bureau deems appropriate in measuring the efficacy of a foster care system, Texas' performance vis a vis other states in the nation (both on the CFSR Round 3 indicators, which are risk adjusted and based on multilevel modelling, and on the predecessor measures employed by the Children's Bureau) is frequently higher, sometimes mid-pack, and never egregiously lower. There is simply no way to square this level of performance with a contention that DFPS' conservatorship caseworkers are so overworked or that its array of placements is so inadequate as to shock the conscience. Texas' performance does not shock the conscience and the Court's inquiry need go no further. Further, the Court's discussion below as to why Plaintiffs

have failed to prove either deliberate indifference or, alternatively, abdication of professional judgment precludes a finding of shocks the conscience.

III. Plaintiffs Have Failed to Prove Deliberate Indifference.

The Deliberate Indifference Standard Applies. The deliberate indifference standard applies to a substantive due process claim brought by a child in foster care in Texas. *Hernandez v. Texas Department of Protective & Regulatory Services,* 380 F.3d 872, 880 (5th Cir. 2004). The Court rejects Plaintiffs' argument that a standard based on professional judgment should apply, instead. The Court does so for many reasons.

Six months after *MD v. Perry*, 675 F.3d 832 (5th Cir. 2012), and based on *Hernandez*, the Fifth Circuit rejected an argument that a professional judgment standard should apply in a foster care case. The Fifth Circuit framed and answered the question as follows:

> "Hall contends that we should apply a professional judgment standard instead of the deliberate indifference standard. *This court has concluded that the deliberate indifference standard is the appropriate standard for considering substantive due process claims based on foster children's rights to personal security and reasonably safe living conditions*. See *Hernandez*, 380 F.3d at 880. We will not disregard this established precedent. See *In re Pilgrim's Pride Corp*., 690 F.3d 650, 2012 WL 3239955, at *11 (5th Cir. Aug. 10, 2012)." (Emphasis added.)

Hall v. Smith, 497 Fed.Appx. 366, 377 n. 16, 2012 WL 4478437, **8 n. 16 (5th Cir., Oct. 12, 2012), *cert. denied* 133 S.Ct. 1814 (2013). The Court is mindful that an opinion not designated for publication is not precedent, but the Court does find the case persuasive, based both on its district court treatment and on its ultimate disposition. Starting with the latter, Hall petitioned for certiorari. In her Petition, she presented the following question:

> Whether a state's special custodial, non-penal relationship with its foster children renders the Eighth Amendment deliberate indifference standard of *Estelle v. Gamble* , 429 U.S. 97 (1976), an inappropriate standard for evaluating a claim of violation of a foster child's substantive due process rights under the 14th Amendment to the United States Constitution.

The Supreme Court denied the petition for certiorari.

The district court's rationale in the same case, under the style *Hall v. Dixon*, 2011 WL 767173, *2 (S.D. Tex, Feb 25, 2011), is persuasive.

> Hall's allegations failed to state a claim for violation of Jasmine's right to safety in state-mandated foster care, the substantive violation Hall alleged under § 1983. In a previous opinion, this court identified deliberate indifference as the applicable standard of care. . . . Hall argued in her motion for reconsideration that the standard of care should be professional judgment, citing *Youngberg v. Romeo*, 457 U.S. 307 . . . (1982). This court observed that no court in the Fifth Circuit had adopted the professional judgment standard in this context. See, e.g., *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective and Regulatory Servs.*, . . . 2002 WL 31689710, at *9 (N.D. Tex. Nov. 22, 2002). A nearly unanimous en banc opinion of the Fifth Circuit also casts doubt on the continuing validity of the standard. *Hare v. City of Corinth, Miss*. [*Hare II*], 74 F.3d 633, 646-47 (5th Cir. 1996)(en banc)."

This Court will expand on the significance of the en banc opinion in *Hare II.*

Hare II presented essentially the same question as that presented by Hall in her petition to the Supreme Court and that Plaintiffs present here—whether the nature and needs of the person in custody should determine the applicable standard. Thus Plaintiffs contend that non-prisoner detainees or children in foster care deserve better treatment (i.e., the professional judgment standard) than prisoners (i.e. the deliberate indifference standard). *Hare II* rejected that distinction and held deliberate indifference implies in a non-prisoner detainee setting. The Fifth Circuit first observed:

> The Court in *Youngberg* thus announced a distinct standard to be applied in measuring the State's constitutional duties to mental incompetents, one that differed from both the *Bell* test and the deliberate indifference standard.*647 The *Youngberg* measure flowed from the premise that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Id. at 321– 22, 102 S.Ct. at 2461.

Of critical significance to the issue now before this Court, the Fifth Circuit then observed:

> The Court's later decision in *DeShaney*, however, called into question the constitutional significance of this premise. *DeShaney* clarified that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his

> freedom to act on his own behalf." 489 U.S. at 200, 109 S.Ct. at 1005–06. *In other words, DeShaney suggests that a State's declared intent to confine incompetents for their own benefit, as opposed to its announced purpose to punish convicted criminals, should have no bearing on the nature of the constitutional duty owed to either group.* What matters under *DeShaney* is that "the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *Id.* Since the State restrains the individual liberty of both mental incompetents and convicted inmates in a like manner, the State should incur the same duties to provide for the basic human needs of both groups.

74 F.3d at 646-47 (emphasis added). This language from an en banc opinion of the Fifth Circuit refutes the distinction Plaintiffs ask this Court to draw between prisoners and foster children in order to justify a different culpability standard for the latter. Similarly, in *Henry A. v. Willden*, 678 F, 3d 991m 1000 (9th Cir. 2012) (emphasis added), and with reference to its prior decision, *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833 (9th Cir. 2010), the Ninth Circuit observed: "*Tamas* also clarified that the proper standard for determining whether a foster child's due process rights have been violated is 'deliberate indifference,' *the same standard applied to substantive due process claims by prisoners."* On the issue of the applicable culpability standard, *Hare II, Willden and Tamas* reject the distinction between foster children and prisoners that Plaintiffs attempt to draw. This Court will likewise reject that distinction.

The post-*Hare II* case of *Langford v. Union County Mississippi*, 51 Fed.Appx. 930, 2002 WL 31415376 (5th Cir. 2002), which was not designated for publication, but may be still considered as persuasive authority, is also instructive. *Langford* involved a substantive due process claim of an involuntarily committed, non-prisoner detainee. The situation is analogous to a child involuntarily in foster care. The district court applied a deliberate indifference standard. On appeal, Langford contended the "lesser 'professional judgment standard provided for in *Youngberg v. Romero* . . ." should apply. *4. Because she had not made the argument in the district court, the Fifth Circuit declined to address it. The significance of *Langford* is the

Fifth Circuit's reliance on *Hare II*, which rejected the rationale of *Youngberg*, when it observed that under *Hare II*, it would appear that deliberate indifference is the standard that must be satisfied in a non-prisoner, detainee case. *Hernandez*, to be decided two years later, of course confirmed the applicability of the deliberate indifference standard to the analogous, non-prisoner claim of a child in foster care. *See Hernandez*, 380 F. 3d at 880.

The Court also notes that while the Fifth Circuit has not adopted the state-created danger theory of substantive due process, when it has nevertheless analyzed claims under that theory—claims that do not involve prisoners—it has applied a deliberate indifference standard, not professional judgment. *See* discussion in *Doe v. Covington County School District*, 675 F.3d 849, 864-65 (5th Cir. 2012)(en banc) and *Hernandez*, 380 F.3d at 880, n.1 ("In order to recover under the state-created danger theory, we assume . . . the state actors acted with deliberate indifference"). *See also*, in *Scanlan v. Texas A&M University*, 343 F.3d 533 (5th Cir. 2003)(application of deliberate indifference). Plaintiffs' argument that the identity and needs of the due process claimant, here foster children, control the applicable culpability standard, finds no support in the Fifth Circuit. In that regard, it noteworthy that in *Doe v. Covington*, the Fifth Circuit recently confirmed the underpinning of *Hare II*—the duty owed to a person under state control "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 675 F.3d at 856, *citing DeShaney*, 489 at 200.

Finally, *Youngberg* has been characterized as adopting a gross negligence standard. *See, e.g., Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 790 (2d Cir. 1983)(*Youngberg* "adopted what is essentially a gross negligence standard"). This Court could find no Fifth

Circuit authority that has allowed gross negligence to be sufficient to support a substantive due process claim.

The Court finds Texas' requirement of deliberate indifference to be in accord with a number of well-reasoned authorities: *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010)(deliberate indifference standard applies in foster care case); *Doe v. New York City Department of Social Services*, 649 F.2d 134, 141(2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983)(applying deliberate indifference in foster care case); *Nicini v. Morra*, 212 F.3d 798, 810 (3rd Cir. 2000)("Indeed, in the foster care context, most of the courts of appeals have applied the deliberate indifference standard, although they have defined that standard in different ways."); *Doe v. South Carolina Dept. of Soc. Servs*., 597 F.3d 163, 175 (4th Cir.), *cert. denied*, 131. S. Ct. 392 (2010)(applies deliberate indifference to foster care claim); *Arledge v. Franklin County, Ohio*, 509 F. 3d 258, 263 (6th Cir. 2007)(applying deliberate indifference in a non-prisoner, state custody context); *J.H. v. Johnson*, 346 F.3d 788 (7th Cir. 2003)(deliberate indifference standard applies to foster care case); *Scott v. Benson*, 742 F.3d 335 (8th Cir. 2014)(deliberate indifference standard applied to substantive due process claim of an individual in an involuntary civil commitment); *James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006)(deliberate indifference standard applied to foster care case); *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012)(in a claim for injunctive relief in a foster care setting, the court applies deliberate indifference and observers "[*Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833 (9th Cir. 2010)] also clarified that the proper standard for determining whether a foster child's due process rights have been violated is 'deliberate indifference,' the same standard applied to substantive due process claims by prisoners."); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 845 (9th Cir. 2010)(after broad survey of existing cases concludes deliberate indifference applies to foster care substantive due process claims.);

Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987), *cert. denied,* 489 U.S. (1989)(en banc)(holding that a child involuntarily placed in a foster home may state a cause of action under § 1983 only when the state official's conduct is deliberately indifferent to the welfare of the child.); *Cohen v. District of Columbia,* 744 F.Supp.2d 236 (D.C.D.C. 2011)(applying deliberate indifference and shocks the conscience in foster care case).

The Court is also persuaded by decisions of circuit courts and other district courts that have addressed the issue and rejected Plaintiffs' contention that a professional judgment standard should apply rather than deliberate indifference, as held in *Hernandez* and *Hall*, *supra*. In *J.H. v. Johnson,* 346 F.3d 788 (7th Cir. 2003), a foster care case, the plaintiffs vigorously argued for application of a professional judgment standard based on *Youngberg*. The Seventh Circuit instead applied a modified deliberate indifference standard (one not unlike that in the Fifth Circuit) and expressly rejected a professional judgment standard as articulated in *Youngberg*. *Id.* at 792. In so holding, the Seventh Circuit held that to adopt a professional judgment standard, the court would have to overrule its decision in *K. H. ex rel. Murphy v. Morgan,* 914 F. 2d 846 (7th Cir. 1990). 346 F. 3d at 792. (As I find below, this demonstrates that Plaintiffs' reliance on *K. H.* as support *for* a professional judgment standard is entirely misplaced.) Another circuit court has expressly rejected the professional judgment standard. In *Scott v. Benson*, 742 F.3d 335 (8th Cir. 2014), the Eighth Circuit reversed the district court's sua sponte decision to apply professional judgment under *Youngberg,* and instead applied deliberate indifference to the substantive due process claim of an individual in an involuntary civil commitment. *Id*. at 339. District courts have likewise rejected *Youngberg* in a foster care setting. In *Daniel H. v. City of New York*, 115 F. Supp.2d 423, 430 (S.D.N.Y. 2000), involving a substantive due process claim by a child foster care, the district court rejected a professional judgment standard and instead

applied deliberate indifference. Likewise, in *Tylena M. v. Heartshare Children's Services*, 390 F.Supp.2d 296, 302 (S.D.N.Y. 2005), a foster care case, the district court rejected the professional judgment standard.

The Court has considered the authorities Plaintiffs cite for a professional judgment standard and finds them unpersuasive. Plaintiffs cite *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990), for the professional judgment standard, but that does not appear to be a holding in the case and was subsequently rejected by Seventh Circuit in *J.H. v. Johnson*, 346 F.3d 788 (7th Cir. 2003). In *J.H.*, a foster care case, the Seventh Circuit applied a modified deliberate indifference standard (one not unlike that in the Fifth Circuit) and expressly rejected a professional judgment standard as articulated in *Youngberg*. Id. at 792. In direct contradiction of Plaintiff's citation to *K.H.* as supporting application of a professional judgment standard, the court in *J.H.* said: "As K.H. made clear, a professional judgment exercised by a child welfare worker serves as a 'secure haven from liability' *rather than the starting point for determining liability*." 346 F.3d at 792 (emphasis added). To apply professional judgment, the court observed, it would have to overrule K. H. *Id*. The Seventh Circuit does not apply a professional judgment standard.

The Court acknowledges that the Tenth Circuit applies a professional judgment standard (one that calls, however, for far more than mere "departures" from professional judgment), in *Yvonne L. ex re. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992). The Tenth Circuit based its decision on: 1) *K. H.*, and 2) the argument "that foster children, like involuntarily committed patients, are 'entitled to more considerate treatment and conditions' than criminals." 959 F.2d at 893. Both grounds have lost viability, however. The Seventh Circuit has made clear in *J. H. v. Johnson, supra*, that K. H. does not support application of a professional

judgment standard. And, the decisions in *Hare II*, *Tamas* and *Willden* undermine the validity any distinction between prisoners and non-prisoners, whether they be involuntarily committed persons or children in foster care. The Court further notes that since *Yvonne L*., the Tenth Circuit has made clear that a plaintiff must show that the complained of conduct also shocks the conscience. That is, the professional judgment test does not stand alone. n *Schwartz v. Booker*, 702 F.3d 573, 585-86 (10th Cir. 2012), the Tenth Circuit held: "Whether the state official failed to exercise professional judgment requires more than mere negligence; the official must have abdicated her professional duty *sufficient to shock the conscience*. *J.W.*, [*v. State of Utah*], 647 F.3d at 1011. Conduct is shocking to the conscience when the degree of outrageousness and [ ] magnitude of potential or actual harm [ ] is truly conscience shocking." (Emphasis added, internal quotation marks omitted.) *J. W. v. State of Utah*, 647 F.3d 1006, 1011 (10th Cir. 201); *Johnson v. Holmes*, 455 F.3d 133, 143 (10th Cir. 2006)(abdication must be sufficient to shock the conscience); and *Uhlrig. V Harder*, 64 F.3d 567, 573-74 (10th Cir. 1995).

Plaintiffs also rely on *Winston ex rel. Winston v. Children & Youth Servs. Of Del. Cnty*, 948 F.2d 1380, 1391 (3rd Cir. 1991) for application of a professional judgment standard. The opinion itself does not actually analyze the appropriateness of applying a professional judgment standard. Rather the circuit observes, without further analysis, that the district court applied a professional judgment. Later in *Nicini v. Morra*, 212 F.3d 798, the Third Circuit observed: "Indeed, in the foster care context, most of the courts of appeals have applied the deliberate indifference standard, although they have defined that standard in difference ways." The court noted that neither party responded to the court's inquiry as to whether the professional judgment standard should apply, so the court did not analyze the appropriateness of a professional judgment standard under *Youngberg*. It applied deliberate indifference. The Court does not find

Winston to sufficiently authoritative as to control over the holding of the many circuit courts that apply deliberate indifference, especially in light of the opinions in *Hare II, Tamas,* and *Willden.*

The Court therefore concludes that the culpability standard that applies in the present case is one of deliberate indifference that shocks the conscience.

IV. The Deliberate Indifference Standard.

A recent Fifth Circuit case, *Whitley v. Hanna*, 726 F.3d 631, 641 (5th Cir. 2013), describes the deliberate indifference standard as follows: "'The deliberate indifference standard is a high one.' *Doe v. Dall. Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998). 'To act with deliberate indifference, as state actor must "know [ ] of and disregard [ ] an excessive risk to [the victim's] health or safety."' *McClendon*, 305 F.3d at 326, n. 8 (alterations in original)(quoting *Farmer v. Brennan*, 511 U.S. 825, 837 . . . (1994)). 'The state actor's actual knowledge is critical to the inquiry'—a 'failure to alleviate "a significant risk that he should have perceived but did not," while "no cause for commendation," does not rise to the level of deliberate indifference.' Id. (quoting *Farmer*, 511 U.sS. at 837, 114 S.Ct. 1970)."

In *MD v. Perry*, 294 F.R.D. at 35, this Court has found that:

> deliberate indifference requires a showing that there was a conscious disregard of a known and excessive risk to the victim's health or safety. *Hernandez*, 380 F.3d at 880 (citing *Farmer v.Brennan*, 511 U.S. 825, 837 . . . (1994); *McClendon v. City of Columbia*, 305 F3d 314, 326 n. 8 (5th Cir. 2002)); see also *Hall*, 497 Fed.Appx. at 377 n.6; *Smith v. Tex. Dep't of Family & Protective Servs.*, 2009 WL 2998202 (W.D.Tex. Sept. 15, 2009). Deliberate indifference is determined by a subjective standard of recklessness: the defendant ' "must both be aware of facts from which inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference."' *Smith v. Brengettsy*, 158 F.3d 908, 912 (5th Cir. 1998)(quoting *Farmer*, 511 U.S. at 387, 114 S.Ct. 1970). 'Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it must amount to an intentional choice, not merely an unintentional oversight. *Hall*, 497 Fed.Appx. at 377 (quoting *James v. Harris Cnty.*, 577 F3d 612, 617-18 (5th Cir. 2009)). The state of mind can be inferred, however, if the risk of harm is obvious. *Hernandez*, 380 F.3d at 881 (citing *Hope v. Pelzer*, 536 U.S. 730 . . . (2002); *see also Farmer*, 511 U.S. at 842 . . . (1970)."

This Court further observed that "To succeed on the deliberate indifference standard Plaintiffs would have to show that the systemic deficiency causes an unreasonable risk of harm and that Defendants had actual or constructive knowledge of that risk, or alternatively that such knowledge should be inferred from the obviousness of the risk." 294 F.R.D. at 35. While it is not their burden, "Defendants can defeat the claims by showing there is no such deficiency, there is no such [unreasonable] risk, or they have no actual or constructive knowledge of that risk." *Id*.

V. Plaintiffs Have Failed to Prove Deliberate Indifference.

The General Class. Applying this standard of deliberate indifference, the Court finds that Plaintiffs have failed to prove deliberate indifference on the part of all Defendants and by each Defendant on the claims asserted by each of the classes. As to the General Class, Plaintiffs have failed to prove a systemic deficiency. They have failed to prove that conservatorship caseworker caseloads are excessive-either in comparison to aspirational goals recommended by national organizations or to caseload levels set in actual practice by state agencies that provide conservatorship services to children in foster care. Caseloads in Texas, while high in some areas of the state, are not so high across the state as to constitute a deficiency. A deficiency means the job is not getting done and the Court finds the opposite. That the performance of conservatorship caseworkers is adequate is clearly demonstrated by Texas' success on CFSR safety and permanency statewide indicators in meeting national standards. Plaintiffs have also failed to prove that conservatorship caseloads cause an unreasonable risk of harm to all children in the General Class. They have made no showing of past, actual harm to children caused by excessive caseloads, which proof the Court would have expected to be readily available had there indeed been demonstrable causation. Plaintiffs have also provided no sound, statistical analysis to support their contention that excessive caseloads will imminently cause harm to

children in the future. They have failed to prove any such harm even during the pendency of this suit. The data and means of statistical analysis were available to Plaintiffs to perform this task, yet they failed to bring any such evidence to the Court. Plaintiffs have provided no reliable basis on which to assess whether there is a future risk of such harm, much less the magnitude of that risk and whether it is unreasonable. Thus, Plaintiffs are in the untenable position of having to prove the obviousness of something they were unable to prove to this Court. They have failed to make the requisite threshold showing of deliberate indifference.

Plaintiffs have also failed to prove that Defendants are indifferent to any risks associated with conservatorship case load. The Court's findings of fact amply support the conclusion that far from deliberate indifference, Defendants have in place a wide variety of systems to mitigate risks associated with caseworker caseloads and to assure safety of children in the General Class.

As to the Licensed Foster Care Subclass, Plaintiffs have failed to demonstrate a conscious disregard of a known and excessive risk caused by an allegedly inadequate array of placements, inadequate RCCL inspector and investigator staffing, or an allegedly inadequate continuous quality improvement program. While any foster care system would like to have excessive capacity in its placement array, the Court finds that Plaintiffs have failed to prove inadequacies in the Texas array that could fairly be characterized as a system-wide deficiency that exposes all children to a known and excessive risk to their health and safety. First, such a conclusion is contradicted by the fact that with its existing placement array, Texas meets national standards for permanency in four of five statewide indicators and missed on the fifth by only a small margin. Placements in the existing array are also not resulting in safety risks. Texas met the national standard for the safety of foster children in licensed care. Plaintiffs have failed to prove that the existing array in Texas constitutes a known and excessive risk of harm to the health and safety of

children—especially all children—in the Licensed Foster Care Subclass. Having failed to prove the existence of such an excessive risk, they necessarily have failed to prove it was known or was so excessive as to be obvious to Defendants. The Court further finds that DFPS is not indifferent to the need for an adequate placement array and its efforts to maintain such an array and mitigate risks to children associated with an array belie deliberate indifference. Plaintiffs have likewise failed to prove deliberate indifference with respect to RCCL staffing or continuous quality improvement within DFPS. They have failed to prove excessive risks of harm to the health and safety or children in the subclass caused by these alleged shortcomings. Again, the actual performance of Texas on the outcome measures the federal government deems most significant—safety in licensed care and permanency—demonstrate that Texas does not subject children to excessive risk of harm to their health and safety. Nor have Plaintiffs demonstrated deliberate indifference by the State. DFPS has demonstrated an awareness of risks by implementing redundant systems to assure child safety of children in licensed facilities, has been active in attempting to retain and expand staff to perform inspections and investigations of licensed facilities, and engages in continual efforts to self-improve, generated from within the agency and generated and monitored outside the agency by a variety of authorities, including the Legislature and public stakeholders. DFPS does not act with deliberate indifference to the children in its licensed placements.

As to the Basic GRO Subclass, Plaintiffs have failed to prove deliberate indifference. The Court initial observes that every decision to place a Basic service level child in a GRO is a unique decision based on the characteristics of the child and the capabilities of the specific GRO. There is no generalized excessive risk to the health or safety of a Basic level child placed in a GRO. Whether a risk is excessive or obvious must be made on a case by case basis. Plaintiffs

have failed to make that showing. Deliberate indifference cannot be shown on a class-wide basis. Plaintiffs have failed to prove even the threshold issue that when DFPS places a Basic service level child in a GRO, the child, as a result of that placement, is necessarily and always subjected to an excessive risk to his or her health or safety. They have failed to make that showing either historically with actual incidents or prospectively with reliable statistical analysis. Far from being deliberately indifferent to the health and safety of Basic service level children placed in GROs, DFPS attempts to make appropriate placements, based on the specific needs of the child and the characteristics of the placement and employs a variety of redundant measure to assure the safety of such children in such placements.

Finally, as to the Foster Group Home subclass, Plaintiffs have failed to prove deliberate indifference. As with the placement of a Basic level child in a GRO, every decision to place a child in a Foster Group Home is made on the basis of the needs of the child and characteristics of the Foster Group Home. Whether risk is excessive or obvious can only be determined on a case by case basis. For example, Plaintiffs have failed to prove that the parents in all foster group homes lack training adequate to the needs of the children placed in that home. Having failed to make that showing, Plaintiffs simply cannot show that such placements subject children to an excessive risk to health or safety. Plaintiffs have also failed to make the threshold showing that placement in Foster Group Homes do indeed subject children to an excessive risk of harm to health or safety. They have failed to make that showing either historically with actual incidents or prospectively with reliable statistical analysis. Far from being deliberately indifferent to the health and safety of children placed in foster group homes, DFPS exercises care to make appropriate placements, based on the specific needs of the child and the characteristics of the

foster group home. DFPS also put in place a variety of redundant measure to assure the safety of such children in such placements.

VI. Alternatively, Plaintiffs Have Failed to Prove Abdication of Professional Judgment.

The Court declines to adopt an abdication of professional judgment culpability standard under substantive due process. Even if the Court were to apply such a standard, however, Plaintiffs have failed to meet it. The Court has already observed that "It is not the case that the United States Constitution compels Texas to adopt a particular standard to organize its foster care system around. Instead, under the professional judgment standard Plaintiffs must show that an alleged systematic deficiency is such a departure from professional standards and practice that it cannot have been based on professionals exercising their professional judgment." *MD*, 294 F.R.D. at 35.

As to each Defendant and as to each class, Plaintiffs have failed to make this showing.

As to the General Class, Plaintiffs assume that a maximum caseload standard is even necessary for an agency to operate effectively. They have failed to prove this assertion. The Court is convinced that size of the state, diversity of its culture and variations among the 254 counties and 11 DFPS regions in the state, would make a stated maximum caseload unworkable. Plaintiffs have failed to convince the Court that there must be a maximum figure as opposed to other means to regulate workload to bring about acceptable levels of performance. Texas is, in fact, a case in point. Texas does not have a stated caseload maximum, yet its conservatorship workforce has demonstrated an ability to achieve results that meet or exceed national standards on the key areas of safety and permanence. Even if the Court were convinced that professional standards, however they may be defined, were applicable to caseloads, the Court further finds that current caseloads for conservatorship caseworkers in Texas are not so far off the mark that

Plaintiffs would set as to show lack of adherence to any standards at all. The Court also notes that no single standard governs, thus caseloads recommended by the CWLA or COA (from which the Court fails to see a huge departure by DFPS) need not control at all. Instead, caseworker case performance is measured by other professional standards. While it is not Defendants' burden to show adherence to other standards, the Court finds that the federal government sets professional standards through the CFSR process (as to safety and permanency) and through recommended face-to-face and in-home meetings to be conducted by caseworkers. Texas' conservatorship workers have met or exceeded these standards in six of the seven statewide indicators for safety and permanency plus both standards for face-to-face meetings. The only miss by Texas was on permanency in 12 months for children in care 24 months or more, and Texas would have achieved that standard, as well, with an additional 50 adoptions above the 2170 adoptions it actually accomplished in the relevant category. The Court further finds that national average performances among all states in the nation establish what may be deemed professional standards, and Texas's performance vis a vis other states amply demonstrates adherence to standards designed to measure and promote safety and permanency for children in foster care. The Court further finds that DFPS' actual workload management processes, including hands-on caseload monitoring, work sharing when necessary, and the allocation of workforce resources through the Equity of Services System or ESS are reflective of professional standards and, while not perfect, are an effective means to deal with the ever-changing demands made upon DFPS' conservatorship caseworker workforce. Plaintiffs have failed to prove a total abdication of professional standards with respect to conservatorship caseloads in Texas.

As to the Licensed Foster Care Subclass, Plaintiffs have also failed to prove a complete abdication of adherence to professional standards. The very fact that DFPS has a Performance Management Unit, regardless of whether it meets the performance standards Plaintiffs would impose upon it, demonstrates an awareness of, and attempt to comply with professional standards for continuous quality improvement. With respect to quality control, the Court also finds sufficient adherence to professional standards in the form of close Legislative oversight, including Sunset review, and in the form of DFPS' use of outside professional consultants to evaluate and propose operational changes. DFPS' response to these quality control measures reflects an adequate level of professionalism in how it maintains quality control. As to inspector and investigator staffing, the Court finds no total abdication of professional standards. Again, Plaintiffs have failed to convince the Court that compliance with an aspirational CWLA or COA guideline is the only manifestation of professionalism. Although it may not be run as satisfactorily as Plaintiffs would like to see, RCCL has in place a system managing the workloads of inspection and investigation staff members and evaluating their performances. Moreover, the Court finds a commendable level of professionalism in the Facility Intervention Treatment Staffing (FITS) process, whereby all three arms of DFPS (CPS, Contracts and Licensing) coordinate efforts to assure the safety of children in licensed facilities through redundant levels of placement oversight. The Court further finds recognition of professional standards in the fact that RCCL has self-evaluated staffing needs and determined increased staffing is appropriate at this time—a need upon which the agency is acting in the upcoming legislative appropriations. As to array, Plaintiffs have failed to prove a total abdication of professional responsibility with respect to maintaining an adequate array of placements. While it is not their burden, Defendants have demonstrated a variety of means they employ to maintain

and expand the pool of placements available to DFPS. The Court finds DFPS' Foster Care Redesign program to be an open embrace by the state of standards of professional targeted to improve the array in Texas. Ongoing efforts to recruit for the legacy system also reflect fidelity to professional standards. Finally, the Court finds that while there is always room for improvement, professional standards for permanency and safety outcomes are reflective of array adequacy and Texas has performed satisfactorily on those standards.

As to the Basic GRO Subclass, Plaintiffs have failed to prove a total abdication of adherence to professional standards. To the contrary, while it is not their burden to demonstrate, Defendants have shown that decisions to place Basic level children in GROs, when indeed it happens, are based on the application of professional standards call for recognition of he needs of the child and the capabilities of the placement.

Finally, as to Foster Group Homes, Plaintiffs have failed to prove abdication of professional standards in how DFPS runs foster group homes. At most, they have shown they would run them differently. DFPS recognizes and adheres to professional standards insofar as the agency calls for inspections of foster group homes, adequate training of its caregivers, and an adequate access to medical services.

Plaintiffs have failed to meet their burden to show an abdication of professional judgment as to any of the classes. Plaintiffs' showing fails in another respect. The professional judgment standard also requires shocks the conscience conduct. *Schwartz v. Booker*, 702 F.3d at 585-86; *Johnson v. Holmes*, 455 F.3d at 1143; *J.W. v. Utah*, 647 F.3d at 1011; *DG v. Yarbrough*, 2011 WL 6009628. The Court has already found, above, that Plaintiffs have failed to prove that Defendants' conduct shocks the conscience. That find precludes a finding of liability under the abdication of professional responsibility standard, were it to apply.

VII. Plaintiffs Have Failed to Prove Violations of Substantive Due Process Scope of Constitutional Duty.

A child in foster care in Texas has a Fourteenth Amendment substantive due process right to personal security and reasonably safe living conditions. *Hernandez v. Texas Department of Protective & Regulatory Services*, 380 F.3d 872 (5th Cir. 2004); *MD*, 294 F.R.D. at 32. The United States Supreme Court has not directly recognized a substantive due process right in a foster care case. The Fifth Circuit has not recognized such a right beyond that described in *Hernandez*.

This Court has previously recognized that Plaintiffs do not have constitutional rights per se to be free from inappropriate placements and frequent placement moves and a right not to be removed a certain distance from their home communities; *MD*, 294 F.R.D. at 54-55. Nor are there per se constitutional rights as demonstrated by the following authorities: *Sheila A. v. Whiteman*, 259 Kan. 549 (1996)(Lower court ruling: "[T]here is no inherent constitutional right of a child in foster care to a normal childhood, sibling visitation, case planning, reunification plan, stable placement, adequate social workers, or placement in the least restrictive environment."); *Del A. v. Roemer*, 777 F.Supp. 1297, 1318 E.D.La. 1991)(" There is no clearly established right to a stable foster home environment. . . . [C]hildren in State custody also have no right to be placed in the least restrictive foster care arrangement."); *Joseph A. v. New Mex. Dept. of Human Servs.*, 575 F.Supp. 346, 352-53 (D.N.M. 1982) (There is no constitutional right to a permanent, stable adoptive home nor is there an abstract constitutional right to access to the "least restrictive setting."); *B.H. v. Johnson*. 715 F.Supp. 1387, 1397-98 (N.D. Ill. 1989)("[P]laintiffs' claims to parental and sibling visitation, stable placements in the least restrictive setting possible, and adequate caseworkers are not cognizable under the substantive due process reach of the Fourteenth Amendment, because the Fourteenth Amendment does not

mandate an optimal level of care and treatment."); *Clark K v. Guinn*, 2007 W.L. 1435428 (D.Nev. 2007)(Children involuntarily in foster care "do not . . . have a substantive due process right 'not be retained in custody longer than is necessary . . . ,' nor do Plaintiffs have a substantive due process right 'to be placed in the least restrictive placement based on the foster child's needs); *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 507 (D.N.J. 2000)(The right to freedom from harm does not entitle a plaintiff to an "optimal level of care and treatment." Nor are there rights to "not remain in state custody unnecessarily" or to be "housed in the least restrictive, most family-like placement."). *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (No absolute right to access to least restrictive setting in state foster care program.); *Bell v. Milwaukee*, 746 F.2d 1205, 1246 (7th Cir.1984) (no sibling association rights); *Hanson v. Clarke County*, 867 F.2d 1115, 1120 (8th Cir.1989) ("While it is clear that the Iowa statutory scheme creates a substantive right to appropriate care and treatment, neither state law nor the liberty interests explicated in Youngberg create a substantive due process right to optimal care and treatment."); *Child v. Beame*, 412 F.Supp. 593, 602 (D.C.N.Y. 1976)(Foster care case—"[A]ccepting the importance and social desirability of a permanent and stable home and family life for a child does not mandate a federal constitutional right thereto in the child's favor."); *Baby Neal v. Casey*, 821 F.Supp. 320, 337 (E.D.Pa. 1993) ("Plaintiffs' claim to the least restrictive, most appropriate placements is simply a request for 'optimal' treatment while in the custody of the state." The state "is not required under the Constitution to provide [foster children] with an optimal level of care and treatment."); *MD*, 294 F.R.D. at 54-55.

The constitutional right likewise does not need to be extended to include an unlimited "right to be free from an unreasonable risk of harm" in foster care. Neither the United States

Supreme Court nor the Fifth Circuit (in *Hernandez* or elsewhere) has recognized such a right. Defendants contend, and the Court is persuaded, that no such right should be recognized in the present case because: "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *accord*, *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990)("Courts must resist the temptation to augment the substantive reach of the Fourteenth Amendment . . . .").

The Court is concerned that recognition of such a right that is open-ended as to the "harm" it could reach is vague, untenable and presents a serious risk of being read far read far more broadly than the right to personal security and reasonably safe living conditions that the Fifth Circuit has recognized. Plaintiffs have offered the Court no definition or reasonable limitation on the harm such a right would reach. The Court holds that there is no reason in the present case to expand substantive due process to include freedom from an unreasonable risk of undefined, open-ended "harm," such as Plaintiffs seek. If Plaintiffs are indeed exposed to imminent, actionable harm (e.g., denial of a right to personal security and reasonably safe living conditions), their remedy lies in traditional injunctive relief. There would be no need to expand substantive due process and the case can be resolved on existing law. If on the other hand, Plaintiffs cannot prove imminent, actionable harm caused by the Defendants, then substantive due process should not be expanded to reach a more nebulous, open-ended notion of "harm," and to create corresponding, expanded duties to prevent same.

VIII. Plaintiffs Have Failed to Prove a Breach of Duty.

Plaintiffs have not demonstrated that DFPS' conservatorship caseworker caseloads will imminently cause all children in PMC to be denied their right to personal security and reasonably

safe living conditions and that each child will suffer cognizable harm as a result thereof. The Court further determines that Plaintiffs have not demonstrated that DFPS' conservatorship caseworker caseloads cause all children in PMC to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions. The same facts that support the Court's conclusions that Defendants did not shock the conscience, did not act with deliberate indifference, or did not abdicate professional responsibility with respect to this issue further support the Court's conclusion that there has been no breach of the constitutional duty.

Plaintiffs have not demonstrated that inadequate regulatory oversight by DFPS will imminently cause all children in PMC who are in licensed facilities to be denied their right to personal security and reasonably safe living conditions and that each child will suffer cognizable harm as a result thereof. The Court further determines that Plaintiffs have not demonstrated that inadequate regulatory oversight by DFPS causes all children in PMC who are in licensed facilities to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions. The same facts that support the Court's conclusions that Defendants did not shock the conscience, did not act with deliberate indifference or did not abdicate professional responsibility with respect to this issue further support the Court's conclusion that there has been no breach of the constitutional duty.

Plaintiffs have not demonstrated that DFPS' placement array will imminently cause all children in PMC to be denied their right to personal security and reasonably safe living conditions and that each child will suffer cognizable harm as a result thereof. The Court further determines that Plaintiffs have not demonstrated that DFPS' placement array causes all children in PMC who are in licensed facilities to suffer an unreasonable risk of actual harm due to a

denial of their right to personal security and reasonably safe living conditions. The same facts that support the Court's conclusions that Defendants did not shock the conscience, did not act with deliberate indifference or did not abdicate professional responsibility with respect to this issue further support the Court's conclusion that there has been no breach of the constitutional duty.

Plaintiffs have not demonstrated that DFPS' placement of Basic Service Level children in General Residential Operations will imminently cause all such children to be denied their right to personal security and reasonably safe living conditions and that each child will suffer cognizable harm as a result thereof. The Court further determines that Plaintiffs have not demonstrated that DFPS causes all Basic Service Level PMC children placed in a General Residential Operation to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions. The same facts that support the Court's conclusions that Defendants did not shock the conscience, did not act with deliberate indifference or did not abdicate professional responsibility with respect to this issue further support the Court's conclusion that there has been no breach of the constitutional duty.

Plaintiffs have not demonstrated that DFPS' placement of children in Foster Group Homes will imminently cause all such children to be denied their right to personal security and reasonably safe living conditions and that each child will suffer cognizable harm as a result thereof. The Court further determines that Plaintiffs have not demonstrated that DFPS causes all children placed in Foster Group Homes to suffer an unreasonable risk of actual harm due to a denial of their right to personal security and reasonably safe living conditions resulting from lack of a wake staff, inadequate foster parent training, and inadequate access to medical services. The same facts that support the Court's conclusions that Defendants did not shock the conscience, did

not act with deliberate indifference or did not abdicate professional responsibility with respect to this issue further support the Court's conclusion that there has been no breach of the constitutional duty.

IX. Class Certification is Improper.

A certification order may be altered or amended as the case unfolds. Fed. R. Civ. PO. 23(c)(1)(C); *Comcast v. Behrend*, 133 S.Ct. 1426, 1437 fn. (2013). The Court concluded class certification is improper in this case for the following reasons:

Plaintiffs have not demonstrated that class certification is proper for the General Class because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

Plaintiffs have not demonstrated that class certification is proper for the Licensed Foster Care Subclass because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

Plaintiffs have not demonstrated that class certification is proper for the Foster Group Home Subclass because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

Plaintiffs have not demonstrated that class certification is proper for the Basic GRO Subclass because individualized issues among the class members defeat commonality, all members have not suffered the same injury, the claims of the Named Plaintiffs are not typical of those of the class, and the proposed final injunctive relief is neither appropriate respecting the class as a whole nor adequately specific.

X. Plaintiffs Lack of Standing.

The Court makes the following conclusions of law based on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 111 (1983); and, *James v. City of Dallas*, 254 F.3d 551, 553 (5th Cir. 2001).

Named Plaintiffs who are representatives of the General Class and all members of the General Class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the standing requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical.

Named Plaintiffs who are representatives of the Licensed Foster Care Subclass and all members of that class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the standing requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical.

Named Plaintiffs who are representatives of the Foster Group Home Subclass and all members of that class lack standing because their claims fail to meet the requirements of: (1) an

injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical.

Named Plaintiffs who are representatives of the Basic GRO Subclass and all members of that class lack standing because their claims fail to meet the requirements of: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between such injury and Defendants' conduct; and (3) a likelihood that judicial relief will redress the injury. They also fail to meet the standing requirement for injunctive relief that the alleged injury is imminent or real and immediate, not merely conjectural or hypothetical.

XI. Abstention is Appropriate.

Because the *Middlesex* elements for *Younger* abstention are present here, the Court will abstain from reviewing Plaintiffs' claims. *Middlesex County Ethics Comm. V. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Texas Ass'n of Business v. Earle*, 388 F.3d 515, 519 (5th Cir. 2004).

Because the relief Plaintiffs seek will interfere with the ongoing efforts of the State to create policy improving Texas' foster care system, the Court will abstain from reviewing Plaintiffs' claims under the *Burford* abstention doctrine. *Burford v. Sun Oil Co*., 310 U.S. 315 (1943); *Baran v. Port of Beaumont Navigation Dist. of Jefferson City*, 57 F.3d 436 (5th Cir. 1995).

XII. Other Conclusions of Law.

In making findings of fact and mixed questions of law and fact, especially with respect to whether Plaintiffs have met their burden of proof on causation, the Court has been mindful of guiding principles, including:

> The post hoc ergo propter hoc fallacy assumes causality from temporal sequence. It literally means "after this, because of this." BLACK'S LAW DICTIONARY 1186 (7th ed. 1999). It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship.
> . . .
> Any scientist or statistician must acknowledge . . . that correlation is not causation.
> . . .
> It is axiomatic that causation testimony is inadmissible if an expert relies upon studies or publications, the authors of which were themselves unwilling to conclude that causation has been proven.

Huss v. Gayden, M.D., 571 F.3d 442, 459 (5th Cir. 2009).

> Inferences drawn from circumstantial evidence must be reasonable inferences. . . .
> . . .
> An expert's opinion must be supported to provide substantial evidence; "we look to the basis of the expert's opinion, and not the bare opinion alone," . . . "A claim cannot stand or fall on the mere *ipse dixit* of a credentialed witness."
>
> *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005)(internal citations omitted).
>
> Opinion testimony like that offered in this case—that something *could* be, or is *possible*, or *might* have happened—cannot support a judgment.

Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456 (Tex. 1992).

> On the issue of the fact of causation, ... [the one bearing the burden of proof by a preponderance of the evidence] must introduce evidence which affords *a reasonable basis* for the conclusion that it is more likely than not that [the causation exists]. A mere possibility of such causation is not enough;[ ] and when the matter remains one of pure speculation or conjecture,[ ] or the probabilities are at best evenly balanced, [ ] it becomes the duty of the court to direct a verdict for the defendant. Where the conclusion is not one within the common knowledge of laymen, expert testimony *may* provide a sufficient basis for it, [ ] but in the absence of such testimony it may not be drawn.

William L. Prosser, The Handbook of the Law of Torts (2nd ed. 1955), § 42 (Causation and Joint Torts), at 222 (citations omitted) (emphasis added), cited in *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993)(dissent).