The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I mailed, or caused a copy of the foregoing to: ______ at the regular office or residence thereof this 10th day of ____, ____, Washington

54493B

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHATCOM

JESSICA BRAAM, a minor child, by and through guardians, Dale and Vickie Braam; JENNEIVA BURSCH, a minor child, by and through her guardians, Greg & Sherry Bursch; CASSIDEE BURSCH, a minor child, by and through her guardians Greg & Sherry Bursch; DESI MORGAN, a minor child, by and through her guardians, Lori Morgan and Lonnie Morgan; PATRICK MORRIS, a minor child, by and through his guardians, Cathy and David Morris; TIM OLSON, a minor child, by and through his guardians, David and-Diane Olson; SHAUN SANCHEZ, a minor child, by and through his court appointed GAL, Shawn Hosford; AMIE ANDERSON, a minor child, by and through her court appointed GAL, Jim Haynes, ROBYN BRANDON, a minor child, by and through her guardian, E. Sparrowhawk Brandon; BETH HARDIN, a minor child, by and through her guardians, David and Mary Hardin; ERYK HARDIN, a minor child, by and through his guardians, David and Mary Hardin; IVORY HARDIN, a minor child, by and through her guardians, David and Mary Hardin; EBONY HARDIN, a minor child, by and through her guardians, David and Mary Hardin,

Plaintiffs,

v.

STATE OF WASHINGTON and the DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and LYLE QUASIM, Individually, and aS Secretary of the Department of Health and Human Services

Defendants.

No. 98201570 1

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

David A. Nichols

I. Introduction

This is an action brought on behalf of abused and neglected children removed from the homes of their natural parents or guardians and pl_aced in state custody to protect them from further harm. Defendants, acting under their statutory authority, deprive parents of the custody of these children and then fail to fulfill the statutory, constitutional, and common law duties

Initially, this case was brought by thirteen plaintiffs against the Washington Department of Social and Health Services seeking damages for the injuries caused by multiple changes in placement while in defendants' custody. *Amended Complaint* at p.6. Some of the plaintiffs have left the foster care system and this action was brought on their behalf by their adoptive parents. Some of the plaintiffs have remained in the state's custody for years. Since their removal from the home of their natural parents, these children have had no lasting, permanent substitute parent but a series of unrelated, temporary caretakers. Still other plaintiffs have reentered foster care when their adoptive placements failed. Concerned that their experiences of having no permanent and stable home should not be repeated for others, plaintiffs amended the complaint to seek declaratory and injunctive relief on behalf of a class of similarly situated children in foster care. The class is narrowly defined to include only a subclass of all children in foster care and the issues sought to be resolved for the class also are limited to questions concerning the procedural protections to which members of the class are entitled. *Second Amended Complaint,* at pp. 4-6.

The wholesale violation of children's rights is an opinion held not only by many child welfare experts outside of DSHS, but by the top leaders of DSHS as well. Jean Soliz and Suzanne Peterson were the Secretary and Deputy Secretary of DSHS. In this position, these two administrators were the heads of DSHS. DSHS Secretary Jean Soliz and her deputy Suzanne Peterson wrote:

> These children are in the worst position of any people in our society. Study after study shows that children are bounced from placement to placement for years on end. They get no say in where they live or with whom. Their rights to visitation or a new adoptive home are unenforced. DSHS cannot fix this without cooperation from the legislature and the courts.
>
> . . .
>
> . . .little attention is given to the misery of thousands of children in out of home care.

Exhibit 3 to deposition of Suzanne Peterson.

vls. Peterson identified the "misery" as the shuttling of DSHS' children from home to home, vho. _ . have to change schools, who _ . .don't have permanency.. . Peterson Deposition p. 92 vls. Peterson, further testified:

> *Q.* Was it your understanding at the time this document was written about the Washington State child welfare system that certain children's rights in foster care were being violated?
>
> A. . . .--yes.

Deterson Deposition p. 94

~4s. Soliz and Ms. Peterson were so offended at the violation of children's' rights and that :ourt intervention was essential they met on September 30, 1996 (after leaving office) with a arge Seattle law firm to form a "major case litigation team" whose purpose "was to conduct mpact litigation that will improve. . .child welfare and/or treatment services." *Peterson Yeposition p,* 89 DSHS, their former agency, was considered as a Defendant.

Ms. Peterson testified in support of a class action lawsuit to protect the rights of :hildren in state foster care.

> . . . if class action litigation can be conducted, if it could be conducted in such away as it creates momentum and a forum for real problem solving around these issues, then I think it has the potential to help contribute.. .

Peterson Deposition p. IO3

[I. The Proposed Class

The named plaintiffs seek to represent the following class:

> All children who are now or who in the future will be in the custody of the Department of Health and Social Services as a result of either a voluntary placement' by their parent or guardian or an involuntary removal from their parents' or guardians' home pursuant to RCW 13.34.050. 13.34.130, or 13.34.210~and who while in state custody are

' Voluntary placements are authorized under WAC $388-70-013 (8). See In re Key, 119 Wn2d 600, 836 P.2d 200 (1992).

> moved by DSHS from one home or facility to another without notice and opportunity to be heard on the change in placement and/or without their individual case plan being amended to reflect how the new placement is, among other things, in their best interests.

Pursuant to CR 23 c(4)(A) the plaintiffs seek class certification limited to the following Lssues :

- 9 Whether the defendants' practice of shuttling children from placement to placement and the resulting harms to class members violate class members' rights under Washington statutes and regulations and rights to substantive due process under the Fourteenth Amendment to the Constitution of the United States.
- 9 Whether defendants' failure to provide notice and an opportunity to be heard prior to a change in placement violates class members' rights to procedural Due Process under the Fourteenth Amendment to the Constitution of the United States.
- 9 Whether defendants' failure to provide notice of a change in placement to the child, his parent, his legal representative, court-appointed special advocate, or guardian ad litem and an opportunity to be heard prior to the move, violates 42 U.S.C. 675 (5)(C).
- 9 Whether defendants' failure to revise a child's case plan to take into account the new placement after a child is moved from one home or facility to another violates 42 U.S.C. $9671 (a)(16) & 675 (1).

III. General Principles Applicable to Class Certification.

CR 23 authorizes class actions. Plaintiffs seek class certification under CR 23 (a) and 23(b)(2) :

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are

> questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition: . . . (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...

Since CR 23 repeats verbatim the language of the Federal Rule of Civil Procedure on :lass actions, Washington courts may look to federal cases interpreting Fed. R. Civ. P. Rule 23 ?or guidance. *Brown v. Brown,* 6 Wn. App. 249,252,492 P.2d 581 (1971).

The court may not require a plaintiff to make a prima facie showing that he will prevail In the merits in order to certify the class. *See Eisen v. CarlisZe & Jacquelin,* 417 U.S. 156, 177 11974) (“nothing in either the language or the history of Rule 23 . . . gives a court any authority :o conduct a preliminary inquiry into the merits of a suit in order to determine whether it may Je maintained as a class action”). In determining whether or not to certify the class, the court lees not inquire into the merits of the underlying claims but must regard the allegations in the :omplaint as true. *WEA v. Shelton School Dist.,* 93 Wn.2d 783, 790, 613 P.2d 769 (1980) (“the certification of a class is to be undertaken with no consideration of the merits of the plaintiffs’ claims”); *Blackie v. Barrack, 524* F.2d 891, 901 n. 17 *(9th* Cir. *1975); Kirkpatrick v. J. C. Bradford & Co., 827* F.2d 718, *722, reh’g denied, 832* F.2d 1267 (1 1[ti] Cir. 1987); *Redditt v. Miss. Extended Care Centers, 718* F.2d 1381 (5th Cir. 1983); *Anderson v. City OfAlbuquerque,* 690 F.2d 796 (10th Cir. 1982); *In re Badger Mountain Irr. Dist. Securities Litigation,* 143 F.R.D. *693,696* (W.D. Wash. *1992); Rodriguez v. Carlson,* 166 F.R.D. 465,475 (E.D. Wash. *1996).*

Courts must liberally construe Rule 23 to favor class certification. *The court* in *Brown* explained why:

> We... favor a liberal interpretation of CR 23, rather than a restrictive one. Not

only does liberal application of the rule avoid a multiplicity of litigation, but (1) it saves members of the class the cost and trouble of filing individual suits; and (2) it also frees the defendant from the harassment of identical future litigation.

3rown v. *Brown,* 6 Wn. App. 249,256-57,492 P.2d 581 (1971)

The reasons for applying a liberal interpretation of the Rule are clearly served)y granting certification in this case. Separate lawsuits brought by foster children iving in other counties may well lead to different standards by which defendants' :onduct is to be measured. The parameters of defendants' obligations to children in its :ustody may be defined more narrowly or broadly from one court to the next.

[V. The Class Representatives

Plaintiff class representative Shaun Sanchez was less than six months old when ;lefendants removed him from the custody of his parents and placed him in foster care in 1989. Before the age of five, Shaun had been moved at least five times. While still a toddler, Sham-r had been in several foster home placements which lasted less than two months. Since defendants assumed custody of Shaun, he has been in approximately eleven placements. Prior to these moves, no one from the defendant agency discussed with Sham-r why he was being moved and what the new plan was for him. Shaun has not reached his twelfth birthday. Though the rights of his natural parents were terminated on the petition of defendants when Shaun was not yet seven years old, he has-never been adopted.

While in defendants' custody, Shaun has been represented intermittently by a court appointed Guardian Ad Litem (GAL). He had no GAL from October 1996 to October 1997. At least five different GALs have been assigned to Shaun since he entered foster care. His court-appointed GAL was not told about impending changes in placement prior to the defendants moving Shaun. *Dedaration of Cynthia Novotny.* Compounding defendants' failure to provide Shaun with a safe, stable, and permanent home, they denied him the mental health treatment recommended by his doctor, failed to give his foster parents sufficient information

tbout his background and needs, and neglected to monitor his care and treatment every ninety

2 lays as required by law. *Declaration of Shawn Hosford.*

3 Likewise, defendants failed to provide Jessica Braam with a safe, stable and permanent

4 rome. Jessica, now thirteen years old, was placed in defendants' custody before her fifth

5 Grthday. Between March 1991, and October 1992, she was shuttled from one foster home to

6 mother. Her placement was changed four times. Jessica's natural parents' rights were

erminated on defendants' petition in January 1994, when she was seven years old. In October

8 1995, the Braams adopted Jessica, however she re-entered foster care in July 1999, after her

9 adoptive placement failed. Since defendants assumed custody of Jessica in 1999, she has been

10 n at least five different placements throughout the State of Washington, including several

11 rooster homes and two hospitals.

12 Jessica's repeated moves are the direct result of defendants' failure to follow the

13 adoptive parent's placement request that was in Jessica's best interest. The Braams secured a

14 >ed in a residential treatment facility at Indian Trails. All defendants were required to do for

15 his placement was to place a phone call of approval to the facility. Defendants refused to

16 place the call. Nearly three months and two placements later, defendants finally agreed to

17 place Jessica at Indian Trails. Defendants failed to provide Jessica with the required 90 day

18 visits from her caseworker, did not provide Jessica with a comprehensive evaluation within

19 ninety days of entering state care, and did not fully inform the Braams of Jessica's background

20 prior to placing her in their home as a foster child. *Declaration of Vi&e Braam.*

21 Timothy Olson's placement is representative of the defendants' failure to sufficiently

22 inform the foster/adoptive parents of a child's background. Mr. and Mrs. Olson wanted tc

23 adopt a child but specifically told defendants that they did not wish to adopt a child with mental

24 or physical defects. Nevertheless, defendants placed Timothy in the Olsons' home, a child

25 with significant mental defects, covertly and con&-y to *the* Olsons' wishes. *DecZaration o,*

26 *David Olson.*

Class representatives Ivory Hardin and Desi Morgan, like Jessica Braam, are in lefendants' custody once again following a failed adoptive placement made by the de.fendants. @bile under defendants' care and custody, Ivory has been transferred from one home or Bcility to another no less than 37 times. Some of the "placements" included periods of two veeks during which she slept at the defendants' office. Many of her other placements lasted no nore than a day or two before defendants shuttled her to another home. *Declaration of Cynthia* Vovo *tny.*

Shaun, Jessica, Timothy, Ivory and Desi afford this court but a glimpse into the deficient workings of the foster care system. These examples are most unfortunate for the housands of other foster children who must trust that their legal guardian, the defendants, will ret with their best interests in mind.

V. This Action Meets the Four Requirements of Rule 23 (a) and Satisfies the Criteria for Certification

This action fulfills all the requirements for class certification.

A. Impracticalitv of Joinder

Rule 23 fust requires that the class be "so numerous that joinder of all members is impracticable." There is no precise threshold, no minimum number of class members needed to satisfy this requirement. *GeneraI Tel. Co. v. E.E.O.C., 446* U.S. *3* 18, 330 (1980); *Paxton v. Union Nat. Bank, 688* F.2d *552, 559 (8th* Cir. 1982), *cert. denied, 460* U.S. 1083 (1983); See *also,* 5 James Wm. Moore Et Al., Moore's Federal Practice 5 23.22[3]pb] (3d ed. 1997). Plaintiff must produce some evidence of or reasonable estimate of class size, but need not prove the identity of each class member or the specific number of class members. *Robidoux v. Celani,* 987 F.2d 93 1,935 (2d Cir. 1993). Exact slie of the class need not be provided as long as "general knowledge and common sense indicate that it is large." *Perez-Funez v. District*

Director, 611 F. Supp. 990, 995 (C.D. Cal. 1984). The trial court may make common assumptions to support a finding about class size. *Vickery* v. *Jones,* 856 F.Supp. 1313, 1328 S.D.111. 1994) ("[tlhis Court is entitled to make common sense assumptions to support a finding of numerosity"); *Maywalt v. Parker & Parsley Petroleum* Co., 147 F.R.D. 51, 55 [S.D.N.Y. 1993) ("precise quantification of the class members is not necessary because the court may make 'common sense assumptions' to support a finding of numerosity").

Classes of plaintiffs with as few as 50 members frequently have been approved. *Jones v. Diamond,* 5 19 F.2d 1090, 1100 n. 18 (5* Cir. 1975) (class of 48 prisoners); *Leyva v. Buley,* 125 F.R.D. 512 (E.D. Wash. 1989) (class of 50 migrant workers); *Polan v. McIntosh, 546* F.Supp. 1328 (E.D. Pa. 1982) (class of 30-40 prisoners); *Bradley v. Harrelson* 115 1 F.R.D. 422 (MD Ala. 1993) (25 inmates a year subjected to challenged practice). Once the class size reaches forty members, there is a presumption that the requirements of CR 23(a)(l) are met. *Robidoux, 987* F.2d at 936; *Consolidated Rail Corp. v. Town of Hyde Park, 47* F.3d 473, 483 (2d Cir. 1995)

The members of the proposed plaintiff class numbers in the thousands. It is composed of subclasses of all children currently in defendants' care and custody and those children who will enter the state's custody in the future. Data on the current population of foster children indicates that 52% of children in defendants' custody have had three or more placements during the most recent removal from their parents' home.* As nearly 10,000 children are in foster care each month, the plaintiff class easily exceeds 5,000 members. Defendant officials report that twenty five percent of children who remain in foster care for longer than a year have

' This data is drawn from the Adoption and Foster Care Analysis and Reporting System (AFCARS). **Exhibit A.** States receiving federal financial support for their child welfare programs under Title IV-E &.B (42 U.S.C. §§620 and 670 *etseq.)* are required to collect certain data about children in foster care. A child's number of placement while in foster care is one of the mandatory data elements. See, 45 C.F.R. 1355.40 Appendix A. AFCARS, however, does not provide a complete placement history for a child in foster care. Unfortunately, many children reenter the foster care system one or more times during their childhood. AFCARS **data** reports only the number of placements during the child's current out of home episode.

our or more placements and that fifteen percent of these children have had 6 or more blacements while in custody.[3] Other data drawn from the defendants' records indicate that the arge number of class members is not merely a recent phenomenon. An analysis of foster care ecords for the ten year period between 1985 and 1995 revealed that for children who were in bster care for longer than 12 months (1 O,OOO), 44% of them (4400) were moved to a different jlacement two or more times.' A class numbering "several thousand" satisfies the numerosity equirement with ease. *Morgan v. Laborers Pension Trust Fund for Northern California, 8* 1 :.R.D. 669,676 (N.D.Cal. 1979).

The class of children for whom certification is sought is limited to those children for whom procedural safeguards were not provided prior to their change in placement and/or those :hildren for whom there was no change in the case plan accompanying the change in llacement. The class as so defined and limited is nonetheless so numerous that joinder is mpractical.

As set forth in the declarations accompanying this memorandum, attorneys and Guardians Ad Litem with years of experience representing clients in the juvenile courts report hat notice of a change in placement is rarely provided. They learn of transfers of children only tier the fact and frequently not until the next court hearing. Even when a change in placement requires a modification of a court order, the agency moves the child to the new placement without the court's approval. In the rare instance in which notice is provided, it is inadequate md incomplete generally providing little, if any, explanation of why the child is being moved or how the new placement meets his/her best interests. Clearly, there are no procedural

' Memorandum from Dee Wilson to Jake Romo Re: Instability of Foster Care Placements (October 20, 1999). **Exhibit B**

[4] **Of&e of Children's Administration** Research, *Report* ***of*** *Children in Foster and Group Care Placements In Washington State Between June, 1985 andAugust* 1995 (May 1, 1996). Attached **as Exhibit C.** (hereinafter '*Child Placement Report* ') This report excludes large numbers of children who experienced multiple moves since it counted only those children who remained in care for I2 months or longer, and left out any children either placed with a relative or for whom no foster care payment record was found.

1 ;afeguards afforded to most children whom the agency moves from placement to placement.
2 *Yeclaration of Deborah Lippold.*
3 A change in placement for many if not most of the children who are shuttled from one
4 xome to another also does not trigger a modification in the child's case plan. Former DSHS
5 Secretary Quasim acknowledged this in a letter written in response to a complaint from foster
6 parents in 1998 : "There is no DCFS policy requiring that a new ISP (individualized service
7 ?lan) be completed whenever a child changes placement."[5] Attorneys representing parties in
8 dependency actions have observed that DSHS practice follows the policy described by former
9 Secretary Quasim. See, *Declaration of Deborah Lippold.*
10 Once plaintiffs have demonstrated that the class is composed of a substantial number of
11 persons, the trial court may consider other factors in determining whether joinder of all
12 proposed class members would be impractical. In this case, several additional factors support a
13 &ding of impracticality. First, the members of the proposed plaintiff class are constantly
14 changing. Plaintiff class members are part of the state's foster care population. That
15 population changes every day as some children are returned home, others adopted, some age-
16 out of the system, and still others enter or renter the system.[6] In 1998, 8183 new children
17 entered DCFS custody. Joinder is not only impractical, it is impossible, if as here, the plaintiffs
18 seek injunctive relief for future members. *See Horn v. Associated Wholesale Grocers, Inc.,*
19 *55.5* F.2d 270,275 (10th Cir. 1977). *Clarkson v. Coughlin* 145 F.R.D. 339 (S.D.N.Y. 1993).
20 Second, the future class members are not even identifiable. The impossibility of
21 identifying and joining future class members supported the Court of Appeals reversal of a
22 denial of class certification in *Zimmer v. City of Seattle,* 19 Wn. App. 864, 578 P.2d 548
23
24
2.5 [5] Letter from Secretary Lyle Quasim to Walter H. OEen, Jr. of 4/10/98 at 4. Exhibit D
26 [6] Of the 77,000 foster children who were placed out-of-home for more than a month, 32% had been in foster care, returned home and thereafter re-entered *the* system at least once. *Child Placement Report,* at p.8

1978). The trial judge had denied class certification on grounds that the plaintiff had failed to stablish "numerosity" of the class. Like the proposed class here, *Zimmer* involved a class of hildren "who have been or will be" removed from the custody of their parents. *Id. at 866, 578* '.2d at 549. Though plaintiff produced evidence that more than 200 children within the past 2 ears.had been subjected to the challenged practice, the trial court concluded that she had not atisfied the requirements of CR 23 (a)(l). In reversing the trial court, the Court of Appeals ound that those class members who will be subjected to the practice in the future were inherently unidentifiable" and "[ulnder these circumstances, the joinder of all members of the ,la.ss is not only impracticable it is impossible." *Id.* at *868, 578* P.2d at *550. See also, Robinson 1. Peterson, 87* Wn.2d 665, 667, 578 P.2d 548 (1978) (in challenge to jail conditions, "the oinder of all [class members] is impractical, the jail population being a constantly changing me"); *Johnson* v. Moore, 80 Wn.2d 531, 533, 496 P.2d 334, 335 (1972) (in challenge to jail letention, "the constant expansion and contraction of the class renders joinder of all its members sufficiently difficult to comply with CR 23(a)(l), citing *Adderly v. Wainwright, 46* ;-R-D. 97 (M.D. Ala. 1968).

Third, children in foster care have -little capacity to bring individual lawsuits. The problems they face in initiating such litigation are illustrated by many of the Jlaintiffs here, the majority of whom brought this litigation only after leaving the state's :ustody and control and with the support of their adoptive parents. Commencing .itigation such as this, where the plaintiffs challenge the policies and practices of their .egal custodian, are particularly difficult. Furthermore, most children in foster care ;ome from families of limited income with little access to legal representation and therefore cannot depend upon their parents to provide the resources needed to pursue relief on their behalf against state agencies with unlimited legal resources.'

' *See =., The Report* ***of*** *the Task Force on Foster Care* (February, 1989) finding that children in families receiving AFDC are 4 times more likely to end up in foster care than other children and that 70% of children in foster care Washington come from families with low socio-economic status. pp. l-2.

‘urthermore, the children themselves are often unrepresented in the dependency xocess and have little access to counsel.[8]

3. Common Question of Law or Fact

CR 23(a)(2) provides that in order for the case to proceed as a class action, there must)e a question of law or fact common to the class. This provision of the Rule is frequently :eferred to as the “commonality” requirement. Commonality requires only a single issue :ommon to the class. *Marisol v. Giuliani,* 126 F.3d *372, 376* (2d Cir. 1997); *Baby Neal v. Casey, 43* F.3d *48, 56* (3d Cir. 1994); *In re American Medical System, Inc. 75* F.3d 1069, 1080 *[6th* Cir. 1996); *Blackie v. Barrack, 524* F.2d *891, 904 (9** Cir. 1975), *cert. denied, 424* U.S. *8* 16 (1976). *See also,* Newberg and Conte, *Newberg on Class Actions, 5 3.12,* at 3-69 (3d ed. 1992) (hereinafter *“Newberg”).*

When proposed class members are moving for certification under Rule 23(b)(2) as here, the commonality requirement is relaxed. *Hodgers-Durgin v. de la Vina,* 165 F.3d 667, 675-79 *(9”* Cir. 1999), *rev ‘d on other grounds,* 175 F.3d 761 *(9”* Cir. 1999); *Walters v. Reno,* 145 F.3d 1032, 1045-48 (9* Cir. 1998) cert. denied U.S. -, 119 S.Ct. 1140 (1999); *Baby Neal v. Casey, 43* F.3d *48, 56-57* (3d Cir. 1994); *Alliance to End Repression v. Rochford, 565* F.2d 975, 976 (7th Cir. 1977). This liberal interpretation of the commonality provision has been adopted by Washington’s appellate *courts. Johnson,* 80 Wn.2d at *535-36; Zimmer v. Seattle;* 19 Wn. App. *864, 870* (1978); *Brown v. Brown,* 6 Wn. App. 249, 256-57 (197 1).

There is no requirement that every class member be affected by the institutional

’ According to a recent report, more than a third of children who are the subject of dependency proceedings have neither an attorney nor a lay volunteer advocate appointed to represent them. Vicki Wallen, *Report on Guardian Ad Litem Representation* ***of*** *Children in child Abuse and Neglect Proceedings,* at _____ (January, 1999) (hereinafter, *‘GAL Report* ‘). Exhibit E.

1 jractice or condition in the same way. *Bradley v. Hurrelson,* 151 F.R.D. 422, 426 (M.D. Ala.
2 ,993) (challenge to prison mental health care); Hassine v. Jefis, 846 F.2d 169 (3d Cir. 1988).
J 4 finding of commonality is not precluded because the harm suffered by each class member
4 nay be of a different degree and nature. *Baby Neal,* 43 F.3d at 61 (citing *Califano v. Yamas&,*
5 I42 U.S. 682, (1979)). A "common nucleus of operative fact is usually enough to satisfy the
6 :ommonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis,* 963 F.2d 1013, 1017-18 (7th
7 3ir. 1992), *cert. denied,* 506 U.S. 105 1 (1993). Such a 'common nucleus of operative fact' is
8 .ypically found where "defendants have engaged in standardized conduct toward members of
9 .he proposed class . . ..'I *Keele* v. Wexler, 149 F.3d 589, 594-595 (7th Cir. 1998). "All questions
10 If fact and law need not be common to satisfy the rule. The existence of shared legal issues
11 tith divergent factual predicates is sufficient, as is a common core of salient facts coupled with
12 disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th
13 Zir. 1998). When the class is united by a common interest in determining whether the
14 defendants' course of conduct is, in its broad outlines actionable, differences in the class
15 members positions should not defeat class certification. *Leyva* v. *Buley,* 125 F.R.D. 5 12, 5 15-
16 516 (E.D. Wash. 1989). *See also, Troutman v. Cohen,* 661 F. Supp. 802,811 (E.D. Pa. 1987)
17 (certifying class over 'typicality' and 'co-monality' objections, "because it is not the unique
18 facts of the individual appeals which give rise to this action but rather the decision-making
19 process."); *Coley v. Clinton,* 635 F.2d 1364 (S* Cir. 1980) (challenge to commitment
20 procedures).

21 Plaintiffs in the present case challenge defendants' longstanding and widespread
22 practice of shuttling children from one placement to another without notifying them or thelI
23 legal representatives of the impending move nor giving them an opportunity to question the
24 propriety of the change in placement. They allege that this practice violates their rights under
25 state and federal statutes and the United States- Constitution. Plaintiffs seek to compe:
26 defendants to comply with these state and federal statutory and constitutional mandates. F

;hared common issue is inherent in the definition of the class which is limited to those children n foster care denied the right to notice and an opportunity to be heard prior to a change in their Ilacement.'

Defendants' practices of arbitrarily, unilaterally, and frequently moving class members From one placement to another violate numerous state statutes. These statutory violations nclude RCW 13.34.020 (right to a "safe, stable and permanent home"); RCW 74.13.290 ("frrst placement shall be viewed as the only placement"); RCW 74.13.3 10 (". . .placement disruptions xan be harmful to children by denying them consistent and nurturing support . . ."); RCW 74.15.0 10 ("Children placed in foster care are particularly vulnerable and have a special need for placement in an environment that is stable, safe, and nurturing."); RCW 13.34.100 (requiring the appointment of a GAL for each child).

The questions of fact common to the members of the proposed class of children include:

- Whether the defendants move children frequently, arbitrarily, and/or unilaterally from one placement to another.
- Whether prior to each change in placement, the defendants provide notice to the child, his parent, his legal representative, court-appointed special advocate, or guardian ad litem of the intent to remove him from his current home?
- Whether the notice provided, if any, is timely and adequate?
- Whether prior to each change in placement, the defendant provides the child, his parent, his legal representative, court-appointed special advocate, or guardian ad litem with an opportunity to challenge the change in placement?
- Whether each child's case plan is amended to take into account the new placement after a child is moved from one home or facility to another?

The questions of law common to the members of the proposed class of children include:

- Whether the failure to afford notice of a change in placement to the child, his parent, hi! legal representative, court-appointed special advocate, or guardian ad litem and ar opportunity to be heard prior to the move, violates 42 U.S.C. 675 (5)(C)

' There is a subclass which includes children whose placement was changed without a contemporaneous amendment in their caseplan.

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- Whether the defendants' practice of moving children frequently, arbitrarily, and unilaterally from one placement to another violates the above mentioned state statutes.
- Whether defendants' failure to revise a child's case plan to take into account the new placement after a child is moved from one home or facility to another violates 42 U.S.C. $675 (1).
- Whether the defendants' practice of moving children frequently, arbitrarily, and unilaterally from one placement to another and their failure to provide notice and an opportunity to be heard prior to a change in placement violates a foster child's right under the Due Process Clause to the Fourteenth Amendment.

Federal regulations require that defendant maintain statistics and track children in foster :are who have had more than one placement. a, 45 C.F.R.~ 1355.40 & Appendix A. ?urthermore, recently adopted outcome measures also mandate that the state track this group of :hildren." Since the defendant is required to keep statistics on the placement history of each :hild in foster care, many of the current members of the class are identifiable. These members share a common, distinct identity supporting a finding of commonality. Members of the class 11~0 are united in the relief sought - a declaration that the current practice of moving them from)ne placement to another without notice and an opportunity to be heard violates their federal statutory and constitutional rights and an injunction requiring defendants to provide the :equisite procedural safeguards. All of these factors support a finding of commonality. Doe v. *Los Angeles UniJied School District,* 48 F. Supp.2d 1233, 1242 (C.D. Cal. 1999).

Plaintiff classes challenging a lack of procedural due process have been certified in a wide variety of cases. *Walters,* raised procedural due process questions relating to the adequacy of notice provided to aliens by the INS. In an attempt to show that there was a lack of commonality among class members, the defendants provided evidence that some class members may have received adequate notice. The Ninth Circuit rejected this argument and held that the common allegation that the INS procedures provided insufficient notice made the plaintiffs' claims suitable for a class action. *WuZters,* 145 F.3d at 1046. *Walters* commonality

,tandard was affirmed in Hedgers where the court held that “the existence of shared legal ssues with divergent factual predicates is sufficient to meet the commonality requirement of <ule 23 (a).” *Hodgers,* 165 F.3d at 678-79 (quoting Hanlon v. *Chrysler Corp., 150 F.;d* IO1 1,lO 19 (9th Cir. 1998)); *Hodgers* and *Walters* have been described as standing for the)roposition that “under Rule 23(b)(2), commonality exists if plaintiffs share a common harm or Jiolation of their rights, even if individualized facts supporting the alleged harm or violation diverge” *Doe v. Los Angeles Unified School District,* 48 F. Supp.2d 1233, 1241(C.D. Cal. 1999).

As in Doe, *Hodgers,* and *Walters,* plaintiffs in the present case seek to invalidate lefendant’s practice on constitutional and/or statutory grounds. In a civil rights case such as his, “the central showing... is that the class members share a general, common violation, rather :han a unitary claim premised on identical facts or legal remedies.” Doe at 1242. The common violation here is defendants’ practice of failing to provide procedural protections prior to a change in the plaintiffs’ placements. They allege that this practice violates their rights under provisions of the Social Security Act and the Due Process Clause of the Fourteenth Amendment. Clearly, this combination of a common violation and a shared legal theory satisfy the commonality requirement of CR 23 (a)(2).

Finally, the proposed plaintiff class is a narrowly drawn subclass of children in foster care in the state of Washington. The named class representatives clearly are members of that subclass and have experienced the same deprivation of rights as all other class members. Their injuries and ,those of the absent class members are all linked to the same practices oI defendants. Courts commonly have approved much broader classes of children seeking tc vindicate violations of their civil rights. *See. e.g, LaShawn* A. v. *Dixon,* 762 F.Supp. 959, 96C (D.D.C. 1991) (class action brought on behalf of children who are in foster care under the

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” *64 Fed Reg. 45552-54, Notice **of** Final List **of** Child Welfare Outcomes and Measures* (August 20, 1999) Congress mandated that the number of placements for each child in foster care be included in the outcome measures adopted by the Secretary of the Department of Health and Human Services. 42 U.S.C. 9 679A (1)

Xpervision of the District of Columbia Department of Human Services (DHS) and children who, although not yet in the care of the DHS, are known to the department because of reported abuse or neglect); *B.H. v. Johnson,* 715 F.Supp. 1387, 1389 (N.D. Ill. 1989) ("AI1)ersons who are or will be in the custody of the Illinois Department of Children and Family Services and who have been or will be placed somewhere other than with their parents."

2. Tvpicality

CR 23 (a)(3) requires that the "claims or defenses of the class representative must be :ypical of the claims or defenses of the class. A finding of commonality frequently supports a finding of typicality. See General *Tel* Co. v. *Falcon,* 457 U.S. 147, 157 n. 13 (1982) (noting now the commonality and typicality requirements merge). Courts often merge the typicality and commonality requirements. *Milonas v. Williams,* 691 F.2d 93 1, 938 (lo* Cir. 1984); *Rodgers v. Electronic Data* Sys. *Corp.* 160 F.R.D. *532,538* (E.D.N.C. *1995); Buy&s-Roberson v. Citibank Federal Sav. Bank,* 162 F.R.D. 322 (N.D. Ill. 1995) (commonality and typicality are closely related and a finding of one generally compels a finding of the other).

"[A] plaintiffs claim is typical if it arises from the same event or practice or course of conduct that gives rise to theclaims of other class members and his or her claims are based on the same legal theory." Keele, 149 F.3d at 595 (quoting *De La Fuente v. Stokely-Van Camp,* Inc., 713 F.2d 225, 232 (7th Cir.1983); *In re Drexel Burnham Lambert Group, Inc, 960* F.2d *285,* 291 (2d Cir. 1992), *cert dismissed, 506* U.S. 1088 (1993); *Rodriquez,* 166 F.R.D. at 472-473. The named plaintiffs must have claims "reasonably coextensive with those of absent class members without the claims having to be substantially identical." *Hanlon,* 150 F.3d at 1020. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied. ..Typicality turns on the defendant's acdons toward the plaintiff class.. ." *Smith V. University* of *Wash. Law School, 2* F. Supp.2d 1324, 1342 (W.D. Wash. 1998) (citation5

jmitted).

The focus of the typicality inquiry, like the adequacy of representation criteria which 'allows, is upon the characteristics of the class representatives. Here the proffered class ,epresentativcs are clearly part of the class sought to be certified. Each of them is currently in he custody of defendants either as a result of a commitment under RCW 13.34 or a voluntary jlacement by their adoptive parent. They each share a common grievance and challenge the ;ame conduct as the absent class members - that defendants' transfer them from one placement .o another without notice or opportunity to be heard on the change in placement. While there nay be differences among them, such as their gender, age,.number of placements endured, or .he location of the new placement in relation to the old, these facts are of little import to the determination of whether the defendants' practices violate the class members right to 2rocedural safeguards. Resolution of the class claims does not require the court to undertake zry examination of the underlying reasons for the change in placement. These individual Factual differences among class members are irrelevant to the narrow issue on which class certification is focused. Plaintiffs' claim that the defendant is engaged in a "common course of conduct" in relation to all potential class members makes certification appropriate. Brown v. Brown, 6 Wash. App. 249,255,492 P.2d 58 1 (197 1).

D. Adequacy of Representation

The final prerequisite under Rule 23(a) is that the person representing the class must "fairly and adequately protect the interests" of all members in the class. CR 23(a)(4). The purpose of this provision is to protect the due process rights of absent class members since they will be bound by the decision in the case. Crawford v. *Honig, 37* F.3d 485, 487 (9th Cir. 1994). Just as the earlier requirements of commonality and typicality tend to merge, the adequacy of representation requirement tends to merge with the~commonaiity and typicality criteria of Rule *23* (a)"; Amchem *Products, Inc. v. Windsor, 52* 1 U.S. 591, n.20 (1997).

1 Representation is adequate when counsel for the class is qualified and competent; the
2 class representative(s) does not have interests antagonistic to the remainder of the class, and
3 the class representative has a sufficient interest in the outcome of the case to ensure vigorous
4 advocacy. *Ballard* v. *Equifax Check Services,* 186 F.R.D. 589, 595 (E.D. Cal. 1999). *Valentine*
5 *v. Carter-Wallace, Inc., 97* F.3d 1227, 1234 (9th Cir. 1996); *Lerwill v. Injlight Motion*
6 *Pictures, Inc., 582* F.2d 507, 512 (9th Cir. 1978). The plaintiffs fulfill all of these
7 requirements.

8 Plaintiffs are represented by local counsel with the firm of Brett and Daugert who are
9 joined in this action by the National Center for Youth Law in Oakland, California. Mr. Fan-is
10 has successfully represented numerous children and families in claims that DSHS breached
11 certain duties. He was lead counsel in *McKinney* v. *DSHS* 134 Wn.2d 388,950 P2d 461 (1998)
12 which established the right of adoptive parents to sue DSHS for failing to disclose material
13 information about the child, he was counsel to child in *Yanker* v. *DSHS* 85 Wn. App. 71, 930
14 P.2d 958 (1997) which imposed the duty of the State to use reasonable care to investigate the
15 claims of sexual abuse; he was counsel for the family in *Bott v. DSHS* that was the first
16 wrongful adoption verdict in state history ($750,000) for failure of DSHS to disclose material
17 information about the child; in addition, Mr. Farris has successfully litigated numerous large
18 cases involving the rights of children and families. Mr. Grimm has been lead counsel in three
19 federal civil rights actions in which class certification has been granted on behalf of children in
20 foster *care. L.J. by Darr v. Massinga, 838* F.2d 118 (4" Cir. 1988) and 699 F. Supp. 508 (D
21 Md. 1988); *Angela R by Hesselbein v. Clinton, 999* F.2d *320 (8th* Cir. 1993); *David C. v.*
22 *Leavitt,* Civ. No. 93-C-206W (D. Ut. 1994). The size of the plaintiff classes in each of those
23 cases was substantially larger than the proposed class here. The issues which are the subjec
24 here are much narrower than the federal statutory and constitutional rights alleged in those
25 cases. In each of the previous cases, plaintiffs achieved, either through an injunction or tour
26 approved settlement agreement, substantial relief on behalf of the plaintiff class.

There can be little doubt that named plaintiff(s) will vigorously pursue the relief sought lerein for the absent class members. Plaintiff Shaun Sanchez has been moved at least eleven .imes since defendants became his legal custodian. I-Ie is now only eleven years old. Since defendants assumed custody of Shaun he has been separated from his siblings. Although defendants' obtained authority to place him in a permanent, adoptive home almost five year Igo, Shaun remains in temporary foster care. With this history, it is likely that Shaun will -emain in foster care for many more years. Under Washington law, Shaun may remain if foster :are until his twenty-first birthday. *RCW 74.13.031.* While in defendants' custody, Shaun has suffered substantial injury as a result of the defendants' practices. So long as he remains in defendants' custody there is a high likelihood that he will again be subjected to the harmful Tractices of which the class complains. Having suffered through more than 11 placements, certainly no on is more highly motivated to curtail the defendants' harmful practices than plaintiff Sanchez.

E. Class Certification Should Be Granted Under Rule 23(b)(2)

Class certification under Rule 23(b)(2) is appropriate when :

> The party opposing the class has acted or refused to act on grounds generally '- ~. applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The focus of a class action brought under this subsection is on the defendants' conduct. Smith *v. University of Wash. Law School, 2* F. Supp.2d 1324, 1341 (W.D. Wash. 1998)

This action challenges the failure of state agency defendants to provide procedural safeguards to members of the plaintiff class. The system-wide denial of procedural due process - notice and opportunity to be heard - is the paradigm case of a Rule 23 (b)(2) class action. It is "the classic type of. action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)." C*aZifano v. Yamasaki, 442* U.S. 682, 701 (1979) (action to enjoin federal agency from recouping benefits without a hearing).

1 The plaintiff class challenges the procedures leading to the change in their placement
2 vhile in state custody. They do not seek review of the appropriateness of each placement in
3 heir individual cases. Rather, they challenge the defendants' failure to provide them with the
4 xocedural safeguards mandated by the federal Adoption Assistance and Child Welfare Act, 42
5 J.S.C. $671 et seq. before depriving them of their entitlement to a stable placement. As such,
6 .his is an appropriate class for certification under CR *23* (b)(2). *Sorenson v. Concannon, 893*
7 ?.Supp. 1469 (D.Or. 1994); *Upper Valley Association For Handicapped Citizens v. Mills,* 165
8 7.R.D. 167 (D. Vt. 1996)(granting 23(b)(2) certification in case challenging defendants'
9 systematic failure to adopt and implement procedures to comply with the mandates of the
10 ndividuals With Disabilities Education Act); *Johnson, 80* Wn.2d at 535 (plaintiff class
11 :hallenging lack of procedural due process following their detention by police).

12 Plaintiff class representatives retain their prayer for damages while also seeking
13 :quitable relief for the class. Damage claims on the part of class members, however, do not
14 xeclude certification under Rule 23 (b)(2) as long as they are not the primary relief requested,
15 *Probe v. State Teachers' Retirement System, 780* F.2d *776 (g*[ti] Cir. 1986), *cert denied, 476*
16 J.S. 1170 (1986). See *also, Newberg* 3 4.14.at 4-39. Where declaratory and/or injunctive relief
17 s sought, a request for monetary relief, including punitive damages, does not destroy Rule
18 23(b)(2) eligibility. *Murray* v. *Local* 2620,192 F.R.D. 629 (N.D. CA. 2000)

19 As discovery proceeded in this case, the large numbers of children effected by the same
20 practices which led to plaintiffs injuries became more and more apparent. Consequently,
21 plaintiffs decided to forego an early trial date on their claim for damages in order to pursue the
22 claims and relief on the part of class members they now seek to represent. The injuries that
23 named plaintiffs have suffered as a result of the challenged practices of defendants will require
24 substantial remediation. Named plaintiffs do not have the resources to obtain the services tc
25 address the injuries suffered as a result of defenhants' practices. Nevertheless, they have
26 delayed the pursuit of those individual damages in the interest of the class of children fol

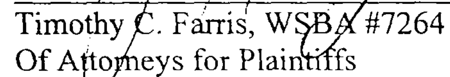
tihom they hope to prevent some of the same injuries they themselves have suffered. Under :hese circumstances, there can be little doubt that the equitable relief is paramount, thus making zertification under CR 23 (b)(2) appropriate.

VI. Conclusion

For all the foregoing reasons, the Court should certify the proposed plaintiff class with respect to the particular issues of procedural safeguards.

DATED this /o day of July, 2000.

BRETT & DAUGERT, PLLC



Timothy C. Farris, WSBA #7264
Of Attorneys for Plaintiffs