

THE HONORABLE DAVID A. NICHOLS

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SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

JESSICA BRAAM, a minor child, by and through her 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; 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, Virginia DeCosta; 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; EBONEY 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 Social and Health Services,

Defendants.

No. 98-2-01570-1

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PLAINTIFFS' CLAIMS FOR ADDITIONAL PROCEDURAL SAFEGUARDS; AND RE: PLAINTIFFS' CLAIMS FOR DAMAGES UNDER 42 U.S.C. 4 1983 AND THE WASHINGTON CONSTITUTION

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1 I. INTRODUCTION

2 Washington's comprehensive statutory scheme for the care of foster children contains a full
3 complement of procedural safeguards to ensure that the children are placed in homes that are best
4 suited for their particular needs among those available. In their Second Amended Complaint, the
5 named plaintiffs (current and/or former foster children)' allege that this comprehensive scheme
6 violates the federal Adoption Assistance and Child Welfare Act ("AACWA") and is unconstitutional
7 under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the
8 Washington Constitution. They claim that due process and the AACWA require additional
9 procedures in advance of each and every move a foster child makes from one temporary living
10 situation to another. See Mansfield Decl. at Exh. A. Plaintiffs insist that these authorities require
11 notice and an opportunity for 8 hearing *before* every move, regardless of whether a child is moved
12 because of exigent circumstances, including imminent danger to the child or the family, or whether
13 the child's placement has been in temporary shelter care or a treatment facility.
14

15
16 Contrary to plaintiffs' claims, such additional procedural hurdles are not required by law, and
17 moreover, would in many cases be harmful. DSHS must have the flexibility to make placement
18 changes on short notice when necessary to promote the best interests of the child as required by
19 Washington law. The current foster care system allows for such changes, but still permits - and in
20 fact requires - that notice and an opportunity to be heard regarding changes in placement are available
21 at an appropriate time. *Even when no change in placement has been made, every foster child in*
22 *Washington receives a hearing at least twice a year.* As noted by DSHS social worker Ann App, the
23

24
25 ' It should be noted that all adults named in the case caption make claims only on behalf of the
children, and do not assert any independent claims of their own.

named plaintiffs in this case have received the full range of procedural safeguards guaranteed to them by Washington law. *See infra* at S, III.A.4. In particular, each plaintiffs case was reviewed by a court at least twice a year. Declaration of Ann App at 717-1 9. In many instances, these children in the foster care system received far more than two hearings per year. *Id.* at 16. Plaintiffs' proposed additional "procedural safeguards" have no support either in policy or in the law, and defendants request that this Court grant summary judgment on these claims.

10 The claims in plaintiffs' Second Amended Complaint based on section 1983 of the federal
11 Civil Rights Act, and those made under the Washington Constitution, should be dismissed for
12 independent reasons as well. Plaintiffs' Complaint is not a model of clarity, and it is often difficult to
13 determine from the face of the Complaint which particular remedies plaintiffs allege flow out of
14 which claimed breaches of duty. However, to the extent plaintiffs seek money damages against the
15 State for their section 1983 claims, plaintiffs have failed to state a claim on which relief can be
16 granted, as the State is not a "person" liable under section 1983. Furthermore, the only individually
17 named defendant, Lyle Quasim, is entitled to summary judgment as to any section 1983 damages
18 claims against him, as it is undisputed that he was not individually involved in the alleged
19 deprivations of plaintiffs' rights, and there is no respondeat superior liability under section 1983.
20 Finally, any damages claims under the Washington Constitution must be dismissed because
21 Washington law provides no private cause of action for damages for such claims.

22 II. FACTS

23 Washington state law provides foster children a panoply of procedural safeguards which are
24 primarily designed to further the best interests of the children. See RCW 13.34.020; RCW 74.13.010.
25 In all proceedings related to the dependency of a child, it is the court's responsibility to appoint an

1 attorney and/or guardian ad litem (“GAL”) to represent the child. RCW 13.34.100. The child’s
2 representative must be provided all notice which a parent would receive. RCW 13.34.100; *In re J.H.*,
3 117 Wn.2d 460,477 (1991).²

4
5 The fundamental procedural safeguard guaranteed to all foster children is a court review of
6 their status at least every six months. RCW 13.34.130; RCW 13.34.145(11); *In re J.B.S.*, 123 Wn.2d
7 1, 13-14 (1993). At this hearing, the court enters findings regarding both the Department of Social
8 and Health Services’ (“DSHS”) and the parents’ compliance with the child’s disposition plan and, if
9 necessary, any revisions regarding time limits for establishing a permanent home. RCW 13.34.138.
10 Unless the child is returned to his or her parent or legal guardian, the court must make eight specific
11 written findings regarding the child’s current placement, efforts to reunite the child with his or her
12 parent or guardian, progress made, the necessity of services for the child, and an estimated date upon
13 which the child will be placed in a permanent home. *Id.*; see *In re J.B.S.*, *supra* (holding that
14 requirement of formal review hearing pursuant to statute was not satisfied by informal findings by
15 juvenile court judge). The appropriateness of the child’s placement is a key focus of these semi-
16 annual hearings. RCW 13.34.138(1)(b). Foster parents, preadoptive parents and relatives providing
17 care to the child have the right to participate in these hearings, and DSHS must notify these
18 individuals of this right. RCW 13.34.138. The child’s guardian ad litem also has a right to participate
19 in these hearings. RCW 13.34.100(5).

20
21
22 In addition to the mandatory semi-annual review hearings required for all foster children,
23 numerous other procedures exist which are designed to ensure that foster children will be placed in an
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² The Appendix to Defendants’ Motion for Partial Summary Judgment, filed herewith, contains copies of all cases, statutes and regulations cited in support of Defendants’ Motion.

1 appropriate permanent home as soon as possible. For example, a “permanency plan” addressing
2 DSHS’ goals and plan for finding a permanent home is made for every child within 60 days after
3 DSHS assumes custody. RCW 13.34.145(1). If a child is in a placement for nine months with no
4 permanent care order issued, a permanency hearing must be held. RCW 13.34.145(3). Regardless, a
5 permanency hearing must be held within twelve months of when the child was first removed from the
6 home of his or her parent or guardian. RCW 13.34.145(4). In addition to the required semi-annual
7 court review discussed above, a permanency plan hearing must be held not less than every twelve
8 months thereafter. RCW 13.34.145(10). For every permanency plan hearing, DSHS must send copies
9 of the permanency plan to all interested parties at least ten days before the hearing. RCW
10 13.34.145(5).

11
12
13 The Washington Legislature has also enacted a statute providing procedural safeguards for
14 foster children when they are moved from one foster home to another. See *In re J.H.*, 117 Wn.2d at
15 475. RCW 74.13.300 requires that a foster family receive at least five days notice of proposed
16 placement changes for every child who has resided in a foster home for ninety days. Five days notice
17 is not required only if: 1) a court has ordered an immediate change; 2) the child is being returned to
18 his or her parent or legal guardian; 3) the child’s safety is jeopardized; or 4) the child’s residence is a
19 receiving or group home. *Id.* In all situations where this five-day notice rule does not apply, the
20 foster family must be notified of the proposed change “as soon as reasonably possible.” *Id.* The
21 Legislature expressly provided that these safeguards are for the benefit of the foster child: “This
22 section is intended solely to assist in minimizing disruption to the child in changing foster care
23 placements.” *Id.*; *In re J.H.*, *supra*. Perhaps most importantly, and contrary to plaintiffs’ theory of
24 the case, the Legislature expressed its clear intent that “[n]othing in this section shall be construed to
25

1 require that a court hearing be held prior to changing a child’s foster care placement nor to create any
2 substantive custody rights in the foster parents.” RCW 74.13.300(3).

3 The overarching purpose of the child welfare statutes is “to safeguard, protect and contribute
4 to the welfare of the children of the state, through a comprehensive and coordinated program of public
5 child welfare services. . .” RCW 74.13.010. Each of the numerous required procedures reflects the
6 Legislature’s recognition of the difficult experiences some foster children have endured, and its desire
7 to improve their lives. These safeguards balance the need for fully informed decision making with
8 DSHS’ and others’ needs for flexibility in providing for the best interests of the child.
9

10 III. ARGUMENT

11 Summary judgment is appropriate where there is no genuine issue of material fact or where
12 reasonable minds could reach only one conclusion on that issue based upon the evidence presented.
13
14 *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954,963 (1997). In considering a motion for summary
15 judgment, the Court, “by examining the pleadings and the evidence before it and by interrogating
16 counsel, shall if practicable ascertain what material facts exist without substantial controversy and
17 what material facts are actually and in good faith controverted.” CR 56(d). When a party moving for
18 summary judgment has demonstrated the absence of any genuine issue of material fact, and has
19 demonstrated an entitlement to judgment as a matter of law, the burden shifts to the nonmoving party
20 to set forth specific facts that would raise a genuine issue of material fact for trial. *Schaaf v.*
21 *Highfield*, 127 Wn.2d 17,21 (1995). “[T]he plain language of Rule 56(c) mandates the entry of
22 summary judgment. . . against a party who fails to make a showing sufficient to establish the existence
23 of an element essential to that party’s case, and on which that party will bear the burden of proof at
24 trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
25

1 **A. Washington’s Procedural Safeguards Fully Satisfy The Requirements Of The Adoption**
2 **Assistance And Child Welfare Act, And The Named Plaintiffs Have Received All Their**
3 **Procedural Safeguards Guaranteed Under State And Federal Law.**

4 Plaintiffs urge that a portion of the federal Adoption Assistance And Child Welfare Act
5 (“AACWA”), 42 U.S.C. 5 675(5)(C), requires that each time a foster child is moved from one
6 placement to another, the State must provide certain specific procedural rights *prior to the move*,
7 namely, notice and a hearing. 2nd Amend. Compl., 7 4.1; see *also id.* at IT[5.3, 6.11, Mansfield Decl.
8 at Exh. A; Plaintiffs’ Memorandum In Support Of Motion For Class Certification at p. 5, Mansfield
9 Decl. at Exh. B. This novel claim, which has never been recognized by any court and which has no
10 basis in legislative history or other authority, must fall for a variety of reasons.

11 Most fundamentally, the statutory language relied upon by plaintiffs specifically addresses the
12 *parents’* rights, not the *child’s* rights. See *In re J.H.*, 117 Wn.2d at 476-77; *infra* at 5 III.A. 1. Nor do
13 the children have standing to enforce their parents’ rights. *Infra* at § III.A.2. Furthermore, even if the
14 AACWA provided rights enforceable by the plaintiffs, it would only require that “procedural
15 safeguards” be afforded, and allows the State of Washington to determine which procedures will
16 promote the best interests of the child. Washington’s complement of notice and hearing requirements
17 amply fulfills whatever statutory requirements might arguably exist. *Infra* at 5 III.A.3. Because all of
18 the named plaintiffs have received all their statutorily guaranteed review rights, summary judgment
19 should be granted in favor of defendants. *Infra* at 9 III.A.4.

20
21
22 **1. The Portion Of The AACWA Upon Which Plaintiffs Rely Grants Rights To**
23 **Parents, Not To Children.**

24 42 U.S.C. § 675(5)(C), the section of the AACWA relied upon by plaintiffs, is merely a
25 definitional section. 42 U.S.C. 9 671, the section of the statute which affirmatively provides rights,

1 requires that in order for a participating state to be eligible for payments for foster care and adoption
2 assistance, it must have a federally-approved plan which “. . . for each child receiving foster care
3 maintenance payments under the State plan . . . provides for a case review system which meets the
4 requirements described in section 475(5)(B) [codified at 42 U.S.C. 9 675(5)(B)] with respect to each
5 such child,” *inter dia.* 42 U.S.C. § 671(16). Subsection (5)(B) of 42 U.S.C. 4 675, the specific
6 subsection referenced in 42 U.S.C. 6 671(16), defines “case review system” as a procedure for
7 assuring that:
8

9 (B) the status of each child is reviewed periodically but no less frequently than
10 once every six months by either a court or by administrative review (as defined in
11 paragraph (6)) in order to determine the safety of the child, the continuing necessity for
12 and appropriateness of the placement, the extent of compliance with the case plan, and
13 the extent of progress which has been made toward alleviating or mitigating the causes
14 necessitating placement in foster care, and to project a likely date by which the child
15 may be returned to and safely maintained in the home or placed for adoption or legal
16 guardianship[.]

17 42 U.S.C. 0 675(5)(B). Plaintiffs do not rely on this subsection for their claim, evidently because
18 Washington already has a statutory requirement of a case review every six months.³ RCW 13.34.148
19 reiterates all of these requirements and more.
20
21
22
23

24 ³ Furthermore, because 42 U.S.C. § 67 1 only requires that each state have in place “a case review
25 system which meets the requirements described in section 475(5)(B),” and does not reference the section relied
upon by plaintiffs, 42 U.S.C. tj 675(5)(C), the language of subsection 5(C) is arguably not an affirmative
requirement of the AACWA.

1 42 U.S.C. 4 675(5)(C), the subsection specifically relied upon by plaintiffs for their statutory
2 claim of notice and a hearing prior to any change in placement, provides in its entirety:

3 (5) The term “case review system” means a procedure for assuring that -
4

5 ***

6 (C) with respect to each such child, procedural safeguards will be applied,
7 among other things, to assure each child in foster care under the supervision of the
8 State of a permanency hearing to be held, in a family or juvenile court or another court
9 (including a tribal court) of competent jurisdiction, or by an administrative body
10 appointed or approved by the court, no later than 12 months after the date the child is
11 considered to have entered foster care (as determined under subparagraph (F)) (and not
12 less frequently than every 12 months thereafter during the continuation of foster care),
13 which hearing shall determine the permanency plan for the child that includes whether,
14 and if applicable when, the child will be returned to the parent, placed for adoption and
15 the State will file a petition for termination of parental rights, or referred for legal
16 guardianship, or (in cases where the State agency has documented to the State court a
17 compelling reason for determining that it would not be in the best interests of the child
18 to return home, be referred for termination of parental rights, or be placed for adoption,
19 with a fit and willing relative, or with a legal guardian) placed in another planned
20 permanent living arrangement and, in the case of a child described in subparagraph
21 (A)(ii), whether the out-of-State placement continues to be appropriate and in the best
22 interests of the child, and, in the case of a child who has attained age 16, the services
23 needed to assist the child to make the transition from foster care to independent living;
24 - *and procedural safeguards shall also be applied **with respect to parental rights***
25 *pertaining to the removal of the child from the home of his parents, to a change in the*
child’s placement, and to any determination affecting visitation privileges of parents.

18 42 U.S.C. 9 675(5)(C) (emphasis added). This subsection contains two major requirements. The first
19 is that

20 with respect to each such child, procedural safeguards will be applied.. .to assure each
21 child in foster care . . .of a permanency hearing to be held.. no later than 12 months after
22 the date the child is considered to have entered foster care.. and not less frequently
23 than every 12 months thereafter during the continuation of foster care.. . .

1 This corresponds with the “permanency plan” hearing required by RCW 13.34.145, which also must
2 be held within a year after the child has entered foster care, RCW 13.34.145(3) & (4), and at least
3 every year thereafter, RCW 13.34.145(10).

4 Immediately following this “permanency plan” requirement, and separated by a semi-colon, is
5 the language upon which plaintiffs base their claim:
6

7 ; and procedural safeguards shall also be applied *with respect to parental rights*
8 pertaining to the removal of the child from the home of his parents, to a change in the
9 child’s placement, and to any determination affecting visitation privileges of parents.

10 42 U.S.C. 5 675(5)(C) (emphasis added). According to th~plaintiffs, *this text* enacts a requirement
11 that each time a child’s placement is changed, notice and a hearing must beprovided *to the chiZd* or to
12 the child’s parent, legal representative, court-appointed special advocate or GAL. Nothing in this
13 language can bear such an interpretation. The phrase “with respect to parental rights” makes it clear
14 that this provision addresses the parents’ rights, not the child’s. *Cj Norman v. Johnson*, 739 FSupp.
15 1182, 1188 (N.D.111. 1990) (noting that 42 U.S.C. 4 675(5)(C) creates rights for parents). This is
16 reinforced by the structure of subsection (5)(C). Whereas the first requirement in 42 U.S.C. §
17 675(5)(C) is of procedural safeguards “to assure each child” of a permanency plan, the second
18 requirement provides that a foster child’s parents “shall also” receive rights. The placement of the
19 phrase “with respect to parental rights” at the beginning of this clause indicates that it is to apply to all
20 three enumerated circumstances - removal from the parents’ home, change in placement, and
21 determination of the visiting privileges of parents. State law accords such procedural rights to parents
22 *E.g.*, RCW 13.34.060-.065, RCW 13.34.090, RCW 13.34.120-.130,RCW 13.34.136-.145,RCW
23 13.34.260, RCW 13.34.320, and RCW 26.44.100-.125.
24
25

1 The only Washington case to have considered similar claims, *In re J.H.*, 117 Wn.2d 460
2 (1991) confirms that this section provides rights only to parents, and that such rights do not
3 encompass the right to a pre-move hearing. See also RCW 74.13.300(3). Plaintiffs in *In re J.H.* were
4 foster parents and foster children who claimed various procedural rights under Washington statutes,
5 the United States Constitution and the AACWA. The foster parents claimed a constitutional liberty
6 interest in their relationship with foster children who were being removed fi-om their home, based on
7 their claim that “a federal statute, the Adoption Assistance and Child Welfare Act of 1980,42 U.S.C.
8 4 670 *et seq.*, creates an expectancy of some permanency in the relationship between the child and the
9 foster parents.” *Id.* at 466. In rejecting this claim, the Washington Supreme Court held:

11 The federal act requires that procedural safeguards be afforded all children in foster
12 care. [42 U.S.C. 0 675(5)(C).] *The act further requires that procedural safeguards be*
13 *affordedparents* with respect to certain agency decisions, such as the removal of a
14 child from the parents’ care, visitation privileges and changes in placement of the child.
[42 U.S.C. 3 675(5)(C).]

15 *Id.* at 476-77 (footnote citations in original reproduced in bracketed text) (emphasis added). By citing
16 to 42 U.S.C. 4 675(5)(C) after noting that the AACWA provides procedural safeguards for children,
17 and again citing to this precise section after noting that the AACWA ‘*further* requires that procedural
18 safeguards be afforded parents” and discussing the three enumerated conditions of section 675(5)(C)
19 for providing parents with procedural safeguards, the Supreme Court makes it clear that the second
20 portion of section 675(5)(C) means exactly what it says: these are rights of parents, not children.

21 While other sections of the AACWA require a state plan to provide for various procedural
22 safeguards for the benefit of children, e.g., 42 U.S.C. 9 675(5)(B) and the permanency plan
23 requirement of 42 U.S.C. 5 675(5)(C), these sections are already implemented by Washington law.
24
25

1 E.g., RCW 13.34.138 and RCW 13.34.145. In addition, Washington law grants a wide variety of
2 other procedural safeguards. E.g., RCW 13.34.148.

3 In this lawsuit, however, plaintiffs seek the implementation of additional procedural
4 requirements by relying on language that is plainly intended to provide safeguards for the parents of
5 foster children, rather than the children themselves. Because nothing in the language of the specific
6 statutory section, the statutory scheme or its legislative history suggests that the AACWA can be read
7 to support a requirement of such additional procedural safeguards other than those already provided
8 by Washington law, plaintiffs' claim should be dismissed. See *In re J.H.*, 117 Wn.Zd at 476-77; cJ:
9 also *Charlie & Nadine H. v. Whitman*, 83 F.Supp.2d 476,494-95 (D.N.J. 2000) (dismissing foster
10 children's claims under Multiethnic Placement Act because provisions accorded rights to adoptive
11 parents, not *chiZdren*).⁴
12

13
14 **2. Plaintiffs Have No Standing To Assert Their Parents' Rights Under The
15 AACWA.**

16 Nor do plaintiffs have standing to enforce the "parental rights" portion of 42 U.S.C. 0
17 675(5)(C) on behalf of their parents. The Supreme Court disfavors allowing plaintiffs to assert the
18 rights of others, and permits them to do so only under very limited circumstances. See, e.g., *Campbell*
19 *v. Louisiana*, 523 U.S. 392,397 (1998) (recognizing Court's "general reluctance to permit a litigant to
20 assert the rights of a third party"). This reluctance is grounded in two fundamental presumptions
21 underlying the American judicial system. First, courts should not unnecessarily adjudicate rights.
22

23
24 ⁴ In *Charlie and Nadine H.*, the court explained that the provisions of the Multiethnic Placement Act
25 which the foster children sought to enforce granted rights to hopeful adoptive and foster parents, not the
children. *Id.* at 494. Hence, the court concluded that "to the extent Plaintiffs fail to allege a cause of action on
behalf of any person who was denied the opportunity to become an adoptive or foster parent because of race,
color, or national origin, Defendants' motion to dismiss is granted." *Id.* at 494-95.

1 *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). Second, the injured parties themselves are the most
2 effective proponents of their own rights. *Id.* Thus, third party standing should be granted only if three
3 specific criteria are met: 1) the plaintiff has suffered an injury in fact; 2) the plaintiff and the injured
4 party have a close relationship; and 3) the injured party's ability to raise the claim on his or her own
5 behalf is impaired. See, e.g., *Campbell*, 523 U.S. at 397.

6
7 Plaintiffs do not have standing to assert their parents' AACWA claims. First, as discussed
8 below, the AACWA has not been violated, as the Washington statutory scheme provides numerous
9 procedural protections that fully comply with the AACWA. See *infra* at §4 III.A.3; III.A.4. Hence,
10 plaintiffs have suffered no injury supporting this claim. Most obviously lacking, however, is the
11 requirement that the injured parties suffer some impairment preventing them from raising the claims
12 themselves. Plaintiffs have not and cannot produce any evidence suggesting that they should be
13 allowed to assert these claims because their parents are somehow unable to do so. It is implausible to
14 suggest that the foster children are better equipped to handle the rigors of litigation than their parents.
15 See *aZso CharZie & Nadine H.*, 83 F.Supp.2d at 495 n.6 (observing that a claim by plaintiffs to enforce
16 right of person to become foster parent "would raise serious questions of standing").

17
18 **3. Washington's Procedures Fulfill Whatever "Procedural Safeguards" May Be**
19 **Required By The AACWA.**

20 As noted above, it is clear beyond peradventure that the portion of the AACWA cited by
21 plaintiffs guarantees rights to parents, not to children. However, even if 42 U.S.C. 5 675(5)(C) were
22 read to be enforceable by plaintiffs, Washington's procedures fully comply with the federal
23 requirements and protect any rights which could be claimed under the statute. Section 675)(C)(5) of
24
25

1 the AACWA requires only that a state plan provide “procedural safeguards.”⁵ Nowhere does the
2 AACWA require any specific procedures, much less the pre-move notice and hearing demanded by
3 plaintiffs. Instead, Congress left this decision to the states, which are better equipped to determine
4 which procedural safeguards will best address the foster care needs of children in a given locality.
5 This is in keeping with the overall purpose of the AACWA, which is essentially a funding statute
6 containing only minimum requirements that states must meet to receive funds and allowing the states
7 to determine the substance of their foster care programs⁶

8
9 Congress could have specified particular requirements - including the additional procedures
10 requested by plaintiffs -but it did not. The states implement and administer their foster care systems,
11

12
13) Section 675(5)(C) has only three specific requirements: 1) each child must have a written case plan to
14 facilitate placement consistent with the child’s best interests and needs; 2) within one year of original
15 placement and every twelve months thereafter, the state must review the child’s placement, and 3) the state
16 must conduct a dispositional hearing to review each child’s status within eighteen months of original placement
17 and periodically thereafter. These requirements are not at issue in this motion, which addresses plaintiffs’
18 challenge to the process by which children are moved from one temporary placement to another. Thus, these
19 specific requirements will not be discussed. *See generally* RCW 13.34 and RCW 74.13 (containing numerous
20 procedural safeguards more stringent than those required by the federal statute).

21
22 ⁶ In the language of the statute:

23 3 670. Congressional declaration of purpose; authorization of appropriations

24 For the purpose of enabling each State to provide, in appropriate cases, foster care and
25 transitional independent living programs for children who otherwise would have been eligible for
assistance under the State’s plan approved under part A [42 U.S.C. § 9 601 *et seq.*] (as such plan
was in effect on June 1, 1995), and adoption assistance for children with special needs there are
authorized to be appropriated for each fiscal year (commencing with the fiscal year which begins
October 1, 1980) such sums as may be necessary to carry out the provisions of this part [42
U.S.C. § 4 670 *et seq.*]. The sums made available under this section shall be used for making
payments to States which have submitted, and had approved by the Secretary, State plans under
this part [42 U.S.C. § 9 670 *et seq.*].

There is no dispute that Washington State’s plans have been approved by the federal government and the State
thus receives federal funds under this Act. This undisputed fact is further proof that plaintiffs’ claims of
violations of federal law are meritless. The arm of the federal government charged with monitoring the State’s
compliance with these federal laws plainly disagrees with plaintiffs.

1 and Congress logically concluded that they could best establish the details of these systems. See, e.g.,
2 *Scrivner v. Andrew*, 816 F.2d 261,263 (61^h Cir. 1987) (noting that beyond specified yearly review
3 and case plan requirements, the state is “afforded considerable flexibility in unilaterally developing
4 administrative procedures compatible with its own unique foster care circumstances”); *Vermont Dep’t*
5 *of Social and Rehabilitation Services v. United States*, 798 F.2d 57,60 (2nd Cir. 1986) (“Congress
6 afforded the states considerable flexibility to develop administrative procedures compatible with their
7 own unique foster care circumstances”); *Winston v. Children & Youth Services*, 748 F.Supp. 1128,
8 1133 (E.D.Pa. 1990), *aff’d*, 948 F.2d 1380 (3rd Cir. 1991), *cert. denied*, 504 U.S. 956 (1992) (same);
9 *In re Scott County Master Docket*, 672 F.Supp. 1152, 1204 (D.Minn. 1987), *aff’d*, 86%F.2d 1017 (8th
10 Cir. 1989) (same).

11
12 A specific portion of Washington’s foster care law provides foster children with full
13 procedural safeguards which apply whenever the child is moved from one placement to another:

14 § 74.13.300. Notification of proposed placement changes

15
16 (1) Whenever a child has been placed in a foster family home by the department or
17 a child-placing agency and the child has thereafter resided in the home for at least
18 ninety consecutive days, the department or child-placing agency shall notify the foster
19 family at least five days prior to moving the child to another placement, unless:

- 20 (a) A court order has been entered requiring an immediate change in placement;
21 (b) The child is being returned home;
22 (c) The child’s safety is in jeopardy; or
23 (d) The child is residing in a receiving home or a group home.

24 (2) If the child has resided in a foster family home for less than ninety days or if, due
25 to one or more of the circumstances in subsection (1) of this section, it is not possible
to give five days’ notification, the department or child-placing agency shall notify the
foster family of proposed placement changes as soon as reasonably possible.

(3) *This section is intended solely to assist in minimizing disruption to the child in
changing foster care placements. Nothing in this section shall be construed to require*

1 that a court hearing be held prior to changing a child's foster care placement nor to
2 create any substantive custody rights in the foster parents.

3 RCW 74.13.300 (emphasis added).

4 RCW 74.13.300(3) makes it plain that this statute is intended for the benefit of foster children:
5 “This section is intended solely to assist in minimizing disruption to the child in changing foster care
6 placements.” See *In re J.H.*, 117 Wn.2d at 470-71. Subsection (2) requires that notice must be given
7 as soon as reasonably possible every *time a foster child is moved*, regardless of how long the child has
8 been at the placement or what the exigent circumstances may be which necessitated the move.
9 Moreover, for every child who has resided in a foster home for at least 90 days, DSHS must notify the
10 foster family at least five days prior to a proposed placement change except in the case of exigent
11 circumstances, namely: 1) a court has ordered an immediate change, 2) the child is being returned to
12 his or her parents or legal guardians, 3) the child's safety is jeopardized, or 4) the child's residence is a
13 receiving or group home. RCW 74.13.300(2).

14 Additionally, all foster children continue to remain entitled to court review of their status every
15 six months. RCW 13.34.130 (7). As discussed above, Washington law provides a number of specific
16 requirements that must be fulfilled at this hearing. See *supra* at § II. Foster parents, preadoptive
17 parents, and relatives-providing care to the child have the right to participate in these hearings, and
18 DSHS must provide these individuals with notice of this right. *Id.*

19 Even assuming, *arguendo*, that the AACWA gives rights which can be enforced by the
20 children, the statute requires only that states implement “procedural safeguards” to protect *parental*
21 rights when a child is moved from one temporary placement to another. Washington law provides
22 numerous safeguards which accomplish this purpose. *E.g.*, RCW 13.34.060-.065, RCW 13.34.090,
23 24 25

1 RCW 13.34.120-.130, RCW 13.34.136-.145, RCW 13.34.260, RCW 13.34.320, and RCW 26.44.100-
2 .125. Plaintiffs' own expert, former DSHS social worker Christopher Winstanley, agrees that
3 additional court hearings would not necessarily alleviate the problem of multiple placements.
4 Winstanley Depo. at p. 102,l. 25 - p. 103,l. 24, Mansfield Decl. at Exh. C. Accordingly, plaintiffs'
5 claim that defendants have violated the AACWA by not providing them with notice and an
6 opportunity to be heard before every placement change should be dismissed.
7

8 **4. Each Of The Named Plaintiffs Was Accorded The Procedural Safeguards**
9 **Provided In The RCW.**

10 Filed with this Motion is the Declaration of Ann App. Ms. App is a DSHS social worker who
11 has reviewed the files of each named plaintiff. As shown in the App Declaration, each named plaintiff
12 was accorded the procedural safeguards specified by Washington law. App Decl. at 'I[1 7-19. In fact,
1 3 many of the plaintiffs received more than the minimum number of hearings required by the RCW:

- 14 • **Beth Hardin** (DOB 10/3 1/8 1), **Eryk Hardin** (DOB 7/10/83), **Eboney Hardin**
15 (DOB 7/14/86), and **Ivory Hardin** (DOB 12/21/84): Beth, Eryk, Eboney and
16 Ivory entered state custody in August 1989 due to chronic neglect by their
17 alcoholic father, while their mother was in jail after a drug raid. Over the
18 course of their three-year dependency, the Hardin children received eight
19 administrative or court reviews until a permanent plan, legal guardianship, was
20 established on May 7, 1992. App Decl. at IT[7-10.
- 21 • **Desi Morgan** (DOB 5/13/86): Desi entered foster care on July 1, 1988 after it
22 was alleged that Desi's mother, a multiple substance abuser who used drugs in
23 the presence of her children, neglected to properly feed, change and supervise
24 her. Desi had five court review hearings during her two-and-a-half year
25 dependency. She was adopted on December 20, 1990. *Id.* at 7 11.
- **Robyn Brandon** (DOB 1 1/5/87): Robyn entered foster care as an infant on
May 6, 1988, due to the fact that her mother was seriously emotionally and
mentally impaired and resided in a group home. During the course of her four-
year dependency, Robyn had nine court reviews. Robyn was adopted on April
30, 1992. *Id.* at 1 12.

- 1 o **Patrick Morris** (DOB 7/1/83): Patrick was placed into foster care on July 11,
2 1985, after his mother was evicted for not paying rent, had-a substance abuse
3 problem and had left her children with inappropriate caretakers. Patrick was
4 returned to his mother's care on August 5, 1985, but was placed in State
5 custody again on September 17, 1986 when his mother was arrested on
6 outstanding warrants. After a review hearing on December 2, 1986, Patrick
7 was returned to his mother. However, she disappeared with Patrick and his
8 sibling in January 1987 and evaded Child Protective Services until ordered to
9 produce Patrick at a review hearing on June 26, 1987. Patrick was placed in
10 foster care on that date, and was adopted on May 19, 1992. He had 16 court
11 reviews during the seven years that he was in and out of foster care. *Id.* at f 13.
- 12 a **Jessica Braam** (DOB 1 O/1 5186): Jessica entered protective custody on March
13 8, 1991, after it was alleged that her mother, who had long-term addiction
14 issues, had neglected her. There were ten review hearings held over the course
15 of Jessica's four-and-a-half year dependency, which ended with the entry of a
16 decree of adoption on October 15, -1995: *Id.* at 7 14.
- 17 a **Shaun Sanchez** (DOB g/13/88): Shaun was placed into foster care on February
18 5, 1992 after being abandoned by his mother. Over Shaun's seven-year
19 dependency, he received sixteen reviews. A dependency guardianship was
20 established on June 24, 1999. *Id.* at 1 15.
- 21 o **Timothy Olson** (DOB 3/15/90): Timothy entered state care on July 16, 1990
22 after it was alleged that his mother had inadequately supervised and cared for
23 him, had left him with others for extended periods of time and had neglected his
24 health care, among other things. During the course of Timothy's four-year
25 dependency, he received eight court review hearings. Timothy was adopted on
 July 1, 1994. *Id.* atI 16.
- a **Cassidee Bursch** (DOB 1/12/86) and **Jenneiva Bursch** (DOB 5/g/85):
 Cassidee and Jenn&-aware-voluntarily placed into foster care on November
 28, 1989, based on concerns that the home was filthy, the children were unable
 to speak or act in an age-appropriate manner and other instances of neglect.
 Cassidee and Jenneiva had nine reviews during their four-year dependency.
 Both children were adopted in 1993. *Id.* at 11 17-18.
- **Amie Anderson** (DOB 12/12/81): Amie was placed into foster care on March
 25, 1985. The concerns were sexual abuse of Amie by her father, neglect and
 Anne's severe behavior problems. During the course of Amie's fourteen-year
 dependency, there were 33 administrative or court review hearings. The
 dependency was dismissed on June 9, 1999, pursuant to custody hearings of
 May 4 and 18, 1999. *Id.* at 11 19.

1 **B. Washington’s Array Of Procedural Safeguards Fully Comports With The Federal Due**
2 **Process Clause.**

3 Plaintiffs also claim that the supposed failure of DSHS to provide foster children with notice
4 and a hearing before every change in placement violates the Due Process Clause of the Fourteenth
5 Amendment to the United States Constitution. 2nd Amend. Compl., f 4.1(c); see *also id.* at 17 5.4,
6 6.11, Mansfield Decl. at Exh. A; Class Action Motion at p. 5, Mansfield Decl. at Exh. B. Plaintiffs’
7 federal civil rights have not been violated, because plaintiffs have not been deprived of a
8 constitutionally cognizable liberty or property interest. Even if they could identify such an interest,
9 Washington statutes already provide for notice and hearing procedures that fully meet constitutional
10 muster.
11

12 **1. Plaintiffs Have Not Been Deprived Of A Constitutionally Cognizable Property Or**
13 **Liberty Interest.**

14 The Supreme Court has made it clear that before a plaintiff may show that he or she is entitled
15 to any type of process, a plaintiff must first establish that he or she has been deprived of a property or
16 liberty interest sufficient to warrant constitutional protection. “Not every loss, however ‘grievous,’
17 invokes the protection of the Due Process Clause.” *Smith v. Organization of Foster Families for*
18 *Equality & Reform [OFFER]*, 431 U.S. 816,858 (1977), (Stewart, J., concurring); *In re Cashaw*, 123
19 Wn.2d 138, 143 (1994) (threshold question in due process challenge is whether challenger has been
20 deprived of constitutionally protected interest). As noted in the leading *case of Board of Regents v.*
21 *Roth*, 408 U.S. 564 (1972):
22

23 The requirements of procedural due process apply only to the deprivation of interests
24 encompassed by the Fourteenth Amendment’s protection of liberty and property.. . [T]o
25 determine whether due process requirements apply in the first place, we must look not
to the “weight” but to the *nature* of the interest at stake. We must look to see if the
interest is within the Fourteenth Amendment’s protection of liberty and property.

1 *Roth*, 408 U.S. at 569-71 (emphasis original). No court has ever upheld plaintiffs’ claim of a right not
2 to be moved from home to home without a prior hearing, and in fact every court to squarely consider
3 such a right has rejected it.

4
5 **a. Property Interest**

6 Plaintiffs cannot show that they were deprived of a constitutionally viable property interest. In
7 *Roth, supra*, the Supreme Court explained that the Fourteenth Amendment’s protection of property
8 adheres to a person’s interests in “specific benefits.” The Court then defined what constitutes a
9 protected interest in a benefit: “To have a property interest in a benefit, a person clearly must have
10 more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He
11 must, instead, have a legitimate claim of entitlement to it.” *Id.* at 577. Things qualifying as property
12 interests include welfare benefits, tenured employment positions and public education. See, e.g.,
13 *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare); *Perry v. Sndermann*, 408 U.S. 593 (1972)
14 (employment); *Goss v. Lopez*, 419 U.S. 565 (1975) (education). Plaintiffs can point to no similar
15 interest in any particular foster care placement. There are simply no constitutional property interests
16 at stake.

17
18 **b. Liberty Interest**

19 Nor can plaintiffs show a constitutionally protected liberty interest. A liberty interest may
20 arise from either of two sources: “the Due Process Clause itself and the laws of the States.” *Kentucky*
21 *Dep’t of Corrections v. Thompson*, 490 U.S. 454,460 (1989); *In re Cashaw*, 123 Wn.2d at 144.
22 Plaintiffs have not identified any liberty interest arising directly from the Due Process Clause, and it
23 appears unlikely that they could do so. See *Rodriguez v. McLaughlin*, 214 F.3d 328, 337 (2nd Cir.
24 2000) (noting that a foster family “has its source in state law and contractual arrangements” and
25

1 concluding that any liberty interest that might arise in a foster care context would arise under state
2 laws, not the Due Process Clause) (citing *OFFER*).

3 Mere expectations do not give rise to a state-created liberty interest protected by the Due
4 Process Clause: “[A] State creates a protected liberty interest by placing substantive limitations on
5 official discretion.” *Kentucky Dep’t of Corrections*, 490 U.S. at 462. “The most common manner in
6 which a State creates a liberty interest is by establishing ‘substantive predicates’ to govern official
7 decision-making . . . and, further, by mandating the outcome to be reached upon a finding that the
8 relevant criteria have been met.” *Id.*; *In re Cushzw*, 123 Wn.2d at 144 (“laws that dictate particular
9 decisions given particular facts can create liberty interests, but laws granting a significant degree of
- :10 discretion cannot”). The fact that state law establishes procedures to be followed in certain situations
11 does not mean that the state has created a protectable liberty interest. *Rodriguez*, 214 F.3d at 339.
12

i 13
14 Process is not an end in itself. Its constitutional purpose is to protect a substantive
15 interest to which the individual has a legitimate claim of entitlement. . . . The State may
16 choose to require procedures for reasons other than protection against deprivation of
substantive rights, of course, but in making that choice the State does not create an
independent substantive right.

17 *OZim v. Wakinekona*, 461 U.S. 238,250-51 (1983); see *Smith v. Noonan*, 992 F.2d 987, 989 (gth Cir.
18 1993); *In re Cashaw*, 123 Wn.2d at 145.

19 The state law right which plaintiffs claim supports a constitutional liberty interest is “The
20 right. . .to basic nurturing [which] includes the right to a safe, stable, and permanent home. . .” 2nd
21 Amend. Compl., l] 2.2 (quoting RCW 13.34.020) Mansfield Decl. at Exh. A. The Fifth Circuit,
22 sitting en bane, rejected precisely this argument in *Drummond v. Fulton County Dep’t of Family &*
23 *Children’s Services*, 563 F.2d 1200, 1209 (5th Cir. 1977) (en bane), cert. denied, 437 U.S. 910 (1978).
24 In *Drummond*, the foster child’s counsel argued that “a [foster] child has a liberty right not to be
25

1 moved from home to home, without a prior hearing, particularly in light of the significant literature
2 which indicates a traumatic effect of such moves on young children.” *Id.* at- 1208. The Fifth Circuit
3 noted that there was no legal authority for the “right to a stable environment.” *Id.* In declining to
4 create such a right, the court explained:

5
6 Here, the state’s motive in interrupting [the foster child’s] environment at any point
7 was always to move him to a place which it considered superior, over the long range,
8 for his particular needs at the time. Since [the foster child] can point to no source for a
right in conflict with that state program, we hold that [he] has no liberty interest as
asserted here.

9 *Id.* at 1209. *Accord, K.H. v. Morgan*, 914 F.2d 846, 854-55 (7th Cir. 1990) (holding that there is “no
10 clearly. established right to a stable foster-home environment,” or “not to be shifted among foster
11 homes ‘too frequently’”) (per Posner, J.); *In re Adoption/Guardianship No. 2633*, 646 A.2d 1036,
12 1047 (Md.App. 1994), *cert. denied sub nom Mauk v. Engle*, 516 U.S. 809 (1995); *see also Gibson v.*
13 *Merced County Dep’t of Human Resources*, 799 F.2d 582,589 (5th Cir. 1986) (noting that “The Fifth
14 Circuit has held, and the Supreme Court has suggested, that a foster child has no constitutionally
15 protected liberty interest in remaining in a particular foster home.”).

16
17 The *Drummond* result is fully supported by Supreme Court precedent addressing what types of
18 state laws will suffice to establish a constitutional liberty interest. As noted in *Kentucky Dep’t of*
19 *Corrections*, to create a liberty interest, a statute or regulation must contain “‘explicitly mandatory
20 language,’ *i.e.*, specific directives to the decisionmaker that if the regulations’ substantive predicates
21 are present, a particular outcome must follow.” *Kentucky Dep’t of Corrections*, 490 U.S. at 463.
22 Though plaintiffs point to several Washington statutory provisions, see Plaintiffs’ Memorandum in
23 Support of Motion For Class Certification at p. 16, Mansfield Decl. at Exh. B, nowhere does
24 Washington law provide the “explicitly mandatory language” required to support a liberty interest.
25

1 In particular, plaintiffs are expected to rely on RCW 74.13.290, which provides:

2 To provide stability to children in out-of-home care, placement selection shall
3 be made with a view toward the fewest possible placements for each child. If possible,
4 the initial placement shall be viewed as the only placement for the child. The use of
5 short-term interim placements of thirty days or less to protect the child's health or
6 safety while the placement of choice is being arranged is not a violation of this
7 principle.

8 This statutory language contains no "substantive predicates" that, if met, will inevitably result in a
9 particular outcome. See *In re Cushaw*, 123 Wn.2d at 147 (finding no liberty interest in law that does
10 not reduce determination in question to "a simple equation under which predictable outcomes flow
11 from specific factual predicates"); *Kentucky Dep't of corrections*, 490 U.S. at 462. Rather, this
12 language simply provides policies and procedures, evidenced by the last word of RCW 74.13.290
13 which states that it sets out a "principle." The use of the phrase "If possible" also demonstrates that
14 RCW 74.13.290 was not intended to create a mandatory requirement. At most, RCW 74.13.290
15 establishes a guiding principle, or aspirational goal, rather than a mandatory requirement that only one
16 placement, or some other set number of placements, shall be permitted.

17 The other statutory sections upon which plaintiffs may rely are even less specific. See, e.g.,
18 RCW 13.34.020 ("legislative declaration" that right of a child to basic nurturing "includes the right to
19 a safe, stable, and permanent home" but granting no affirmative rights); RCW 74.13.3 10 (section
20 titled "Foster Parent Training" stating that "Placement disruptions can be harmful to children" but
21 granting no affirmative rights); RCW 74.15 .O 10 (general "statement of intent" regarding child welfare
22 statutes that foster children "are particularly vulnerable" but granting no affirmative rights); see *aZso*
23 *Rodriguez*, 214 F.3d at 340-41 (finding that New York statutory sections that granted procedural
24 rights and award certain preferences are not sufficient to provide liberty interests); *In re Cushaw*, 123
25

1 Wn.2d at 146 (“The adoption of guidelines to structure the exercise of discretion does not necessarily
2 create a liberty interest.”) (citations omitted).

3
4 Moreover, *OFFER*, the Supreme Court’s most extended discussion of procedural rights in the
5 context of the foster family, strongly suggested that no liberty interest arises from the state-created
6 relationship. See *OFFER*, 43 1 U.S. at 846-47 (not definitively ruling on this question because
7 procedures employed were adequate regardless of interest). In its discussion, the Court expressed
8 doubt that either the foster parent or the foster child had a protected interest in the relationship because
9 the relationship is created by the state with the expectation that it will be temporary. *Id.* at 847. The
10 inherent transitory nature of the relationship as established by state law “argue[s] against any but the
11 most limited constitutional ‘liberty’ in the foster family.” *Id.*

12
13 The three concurring justices (Justice Stewart, Chief Justice Burger and then-Justice
) 14 Rhenquist) addressed the issue head on, and staunchly denied the existence of any protected interests
15 arising out of the foster child-foster parent relationship. *Id.* at 858 (Stewart, J., concurring). The
16 concurrence emphasized that the relationship is “wholly a creation of the State,” intended from its
17 inception to be temporary in nature. *Id.* In fact, the goal of the foster care system is to provide
18 children with “temporary shelter” until they can be returned to their parents or placed in permanent
19 adoptive homes. *Id.* at 861-62. The concurring justices noted that this goal might actually be
20 hindered by leaving the child in one foster home for an extended period. *Id.* They concluded that the
21 only protection that foster children have is “simply the requirement of [New York] law that decisions
22 about their placement be determined in the light of their best interests.” *Id.* “This requirement is not
23 ‘liberty or property’ protected by the Due Process Clause, and it confers no right or expectancy of any
24 kind in the continuity of the relationship between foster parents and children.” *Id.* at 861.
25

1 2. **Assuming Argue&o That Plaintiffs Have A Protected Property Or Liberty**
2 **Interest, Washington’s Array Of Procedural Safeguards Fulfills AU**
3 **Constitutional Requirements.**

4 If a constitutionally cognizable property or liberty interest can be identified, which procedural
5 protections are required depends on “the nature of the case.” *Mu/lane v. Central Hanover Bank &*
6 *Trust Co.*, 339 U.S. 306,313 (1950); *see OFFER*, 43 1 U.S. at 847 (“Where procedural due process
7 must be afforded because a ‘liberty’ or ‘property’ interest is within the Fourteenth Amendment’s
8 protection, there must be determined ‘what process is due’ in the particular context.”). “[D]ue process
9 is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v.*
10 *Brewer*, 408 U.S. 471,481 (1972). The court must apply a balancing test to determine whether the
11 requested procedures are required. Three factors must be considered:

12 First, the private interest that will be affected by the official action; second, the risk of
13 an erroneous deprivation of such interest through the procedures used, and the probable
14 value, if any, of additional or substitute procedural safeguards; and finally, the
15 Government’s interest, including the function involved and the fiscal and
16 administrative burdens that the additional or substitute procedural requirement would
17 entail.

18 *Mathews v. Eldridge*, 424 U.S. 3 19,335 (1976), *cited in OFFER*, 43 1 U.S. at 848-49. As discussed
19 above, plaintiffs have no constitutionally protected property or liberty interest. *Supra* at 9III.B. 1.
20 Even if plaintiffs could demonstrate such an interest, Washington’s procedural safe~rds fully
21 comply with the due process requirements of the Fourteenth Amendment and the Washington
22 Constitution.

23 In *OFFER*, the plaintiffs argued that, prior to a child’s removal from a foster home, an
24 “independent review” should be conducted automatically, as opposed to at the foster parents’ request
25 as the New York statute provided. *OFFER*, 43 1 U.S. at 850. In rejecting this argument, the Court

1 noted that the state’s interest included more than financial and administrative concerns. *Id.* at 852.
2 The Court recognized that the state was actually protecting the child’s interests by subjecting him or
3 her to a less adversarial, less traumatic process. *Id.* When dealing with “delicate judgments” about a
4 child’s emotional and psychological well-being, “there is a value in less formalized hearing
5 procedures.” *Id.* The concurring justices also noted that “[a]ny assessment of the child’s alleged
6 deprivation must take into account not only what he has lost, but what he has received in return”—a
7 new home judged by DSHS to be better. *Id.* at 857, n.1 (Stewart, J., concurring). *In Drummond*, the
8 Fifth Circuit pointed out that states also have a strong interest in moving children quickly and
9 efficiently. *Drummond*, 563 F.2d at 12 10. It reasoned that “[t]he presence of additional procedural
10 safeguards and appeals procedures would naturally slow the placement process down to the detriment
11 of both child and state.” *Id.*; see also Winstanley Depo. at p. 102-103, Mansfield Decl. at Exh. C.
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13)
14 The *OFFER* Court also rejected the trial court’s conclusion that, in some cases, due process
15 required the appointment of a representative to express the child’s interests. *OFFER*, 43 1 U.S. at 852.
16 The Court reasoned that nothing within New York’s statutory scheme prevented consulting the child’s
17 wishes, and assumed that the administrative judge would naturally do so. *Id.* Considering the child’s
18 wishes, the Court continued, “does not require that the child or an appointed representative must be a
19 party with full adversary powers.” *Id.* The Court also noted that appointing representatives would
20 “represent a major administrative burden on the State.” *Id.*, n. 59. Little would be gained from this
21 burden because the representative’s attempts to discern the child’s best interests would duplicate those
22 of the State. *Id.*; see also *Drummond*, 563 F.2d at 1210 (concluding that no hearing was required and
23 stating that because many of the issues surrounding child placement are “policy inquiries, not factual
24 disputes,” “[t]he utility of a hearing.. .is doubtful”).
25

1 Plaintiffs in this case argue that they are constitutionally entitled to two specific procedural
2 safeguards in addition to the numerous safeguards already provided by Washington law: In-e-move
3 notice and an opportunity for a pre-move hearing. See Plaintiffs' Memorandum In Support Of Motion
4 For Class Certification, p.2, Mansfield Decl. at Exh. B. It is difficult to see how either of these
5 procedures would reduce the risk of error in the decision-making process. Under RCW 74.13.300, in
6 all situations, the foster family must receive notice of a proposed placement change "as soon as
7 reasonably possible," and in many cases, is entitled to notice at least five days prior to the move. No
8 discernible increase in accuracy could be obtained by requiring DSHS to send individual notice to
9 each child, rather than allowing the foster family to notify the child of an impending move.'

11 The likely benefit of providing each child with a hearing before each move is also minimal.
12 Washington law already requires a hearing for each child at least every six months. Courts have
13 frequently held that post-deprivation opportunities to be heard are constitutionally sufficient. See,
14 e.g., *Sinhogar v. Parry*, 53 N.Y.2d 424 (N.Y. App. 1981) (categorically denying request that natural
15 parents receive advance notice of proposed out-of-state moves and holding that post-placement review
16 was sufficient). As the Court noted in *OFFER*, the State presumably already considers the child's
17 best interests, and little would be gained from requiring a pre-move hearing. Additionally, as the
18 *Drzunmond* court noted, requiring further procedures could actually be detrimental to the child. With
19 all due respect to this Court, the legislature, rather than the judiciary, is the appropriate entity to
20 determine which procedures most effectively serve the best interest of the children in this state.
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25 ⁷ The limitation of the five-day notice requirement to only foster parents who have had the children for 90 days also passes constitutional muster. See *OFFER*, 431 U.S. at 854 (finding no "constitutional infirmity" in New York's limitation of certain procedures to foster parents who had children for 18 months).

1 Finally, the added financial and administrative burden to the State would be an overwhelming price to
2 pay for only a minimal benefit, if at all, to the children.

3 In *In re J.H.*, it was claimed that the foster children were denied procedural due process when
4 they were not afforded a hearing prior to their removal from the foster parents' home. *In re J.H.*, 117
5 Wn.2d at 477. The Washington Supreme Court declined to reach the issue of whether they had a
6 protected liberty or property interest, finding that the procedures mandated by the Washington statutes
7 provided them with constitutionally adequate opportunities for a hearing:

9 The children in this case and their legal representatives were in fact afforded an
10 opportunity for a hearing, thus we need not determine whether foster children are
11 entitled to due process before being moved from one foster home to another.

12 ***

13 The Washington Legislature has determined that children involved in dependency and
14 termination actions are parties to those actions and entitled to representation. [RCW
15 13.34.100] Children have a right to be represented by a guardian ad litem or an
attorney or both, [RCW 13.34.100; JuCR 9.2(b)(1)] who have the right to fully
participate in all proceedings, [RCW 13.34.0901

16 We need not decide whether the children in this case had a constitutional right to
17 challenge the move from the foster parents' home, as it appears that J.H. and C.H.
18 through their legal representative were afforded full opportunity to request that the
19 court review the agencies' decision. Due process requires notice and an opportunity to
20 be heard at a meaningful time and in a meaningful manner. [*Diedrick v. School Dzlst.*,
21 87 Wn.2d 598, 606 (1976)] The record does not reflect when the children's
representative was notified, but it is clear under the facts of this case that the children,
through their guardian ad litem, were given the opportunity to challenge this change in
placement but did not do so.

22 *Id.* at 477-78 (footnote citations in original reproduced in bracketed text; final footnote omitted).

23 Here, the Washington Supreme Court strongly suggested that whatever liberty or property interests
24 foster children might have, they are appropriately protected by Washington's procedural safeguards.

1 The procedures plaintiffs claim are required would do little to further ensure that the correct
2 placement is made for the children. They would, however, undermine DSHS' goals of quickly
3 moving children into the best possible homes without exposing them to the further stress of frequent
4 court proceedings. The requested procedures would also impose a huge financial and administrative
5 burden upon the State of Washington. Because the *Mathews v. Eldridge* balancing test weighs against
6 requiring plaintiffs' requested procedures, their procedural due process claim should be dismissed,
7

8 **C. Plaintiffs' Federal Claims For Damages Under 42 U.S.C. 0 1983 Cannot Be Maintained**
9 **Against The State, DSHS Or Defendant Quasim.**

10 Plaintiffs' federal claims for damages under 42 U.S.C. 4 1983 (including their due process and
11 any other claims) cannot be maintained against the State, DSHS or defendant Lyle Quasim. The State
12 and its agencies, including DSHS, are not "persons" who may be held liable under section 1983.

j 13 Defendant Quasim cannot be held liable unless plaintiffs can show that he personally acted to deprive
14 plaintiffs of their civil rights in his individual capacity. Because no evidence in the record supports
15 such a claim, all such claims must be dismissed. Finally, all of plaintiffs' claims under the
16 Washington Constitution must be dismissed, as Washington does not have a civil rights act analogous
17 to 42 U.S.C. 9 1983. Thus, plaintiffs cannot assert independent claims for damages for violations of
18 the Washington Constitution.
19

20 **1. The State Of Washington And DSHS Are Not "Persons" Subject To Liability For**
21 **Damages Under Section 1983.**

22 The law is well established that a state and its agencies are not "persons" subject to suit for
23 damages under 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58,71 (1989)
24 ("neither a State nor its officials acting in their official capacities are 'persons' under 5 1983"). Such
25 claims fail to state a cause of action and should be dismissed. *E.g., id.; Edgar v. State*, 92 Wn.2d 217,

1 222 (1979), *cert. denied*, 444 U.S. 1077 (1980) (“the State is not suable under section 1983 for acts of
2 its agents subjecting the plaintiff to deprivation of his civil rights”); *Ruins v. State*, 100 Wn.2d 660,
3 666-67 (1983) (also noting that Washington has not waived its Eleventh Amendment immunity).

4
5 Plaintiffs’ Second Amended Complaint does not make clear which defendants are charged
6 with particular breaches of duty, or which breaches of duty, if proven, would permit an award of
7 damages. See 2nd Amend. Compl., Mansfield Decl. at Exh. A. However, to the extent that the
8 Complaint seeks damages under section 1983 against the State of Washington and/or DSHS, these
9 claims must be dismissed. *Spurrell v. Block*, 40 Wn.App. 854, 864-65, *rev. denied*, 104 Wn.2d 10 14
10 (1985) (dismissing claims against the State of Washington and DSHS because these entities are not
11 subject to suit under section 1983); see also *Edgar*, 92 Wn.2d at 222; *Rains*, 100 Wn.2d at 666.

12
13 **2. Defendant Quasim Cannot Be Held Liable For Damages Under Section 1983.**

j 14 It is equally well-established that state employees acting in their official capacities are not
15 “persons” subject to suit for damages under 42 U.S.C. § 1983. *WI, supra*, 491 U.S. at 71. An action
16 under 42 U.S.C. 5 1983 against a state employee can only proceed against the employee in his or her
17 personal capacity. *Hafer v. Melo*, 502 U.S. 21,27 (1991). In order to maintain an action against an
18 individual under 42 U.S.C. 9 1983, the plaintiff must affirmatively produce evidence that the named
19 defendant personally participated in a constitutional deprivation. See *King v. Atiyeh*, 814 F.2d 565, 568
20 (9th Cir. 1987). Liability under section 1983 cannot be vicarious or premised on respondeat superior.
21
22 *Polk County v. Dodson*, 454 U.S. 312,325 (1981).

23 Plaintiffs are unable to produce any evidence going to the personal liability of Defendant Lyle
24 Quasim, the former secretary of DSHS. As shown by his declaration, Mr. Quasim had absolutely no
25 personal involvement in any of the named plaintiffs’ cases. Quasim Decl. at 11 3. Thus, plaintiffs

1 cannot bear their burden to show that Mr. Quasim personally participated in any practice that plaintiffs
2 point to as a deprivation of their civil rights. To the extent Mr. Quasim is alleged to be individually
3 liable, if at all, as a supervisor for the alleged conduct of his subordinates, such claims also fail as a
4 matter of law. Additionally, any claim that the state defendants are vicariously liable under section
5 1983 for the conduct of their alleged agents is meritless. Therefore, all section 1983 claims for
6 damages against defendant Lyle Quasim should be dismissed as a matter of law.
7

8 **D. Plaintiffs Have No Cognizable Claims Under The Washington Constitution.**

9 Plaintiffs allege that defendants have deprived them of their civil rights in violation of the
10 Washington Constitution. See 2nd Amend. Complaint, ¶ 6.11, Mansfield Decl. at Exh. A. However,
11 Washington does not have a civil rights act analogous to 42 U.S.C. § 1983, and alleged violations of
12 the state constitution are not independently actionable torts. See *WaZZer v. State*, 64 Wn.App. 318, 336
13 (1992); *Spurrell*, 40 WnApp. at 862; *Systems Amusement, Inc. v. State*, 7 Wn.App. 516,518-19
14 (1972). Any and all claims alleging violations of the state constitution should be dismissed as a
15 matter of law.
16

17 Even if plaintiffs could state a procedural due process cause of action under the Washington
18 Constitution, such claims should be dismissed. The protections of the United States and Washington
19 Constitutions are coextensive as to the claims relevant to this Motion. See, e.g., *J.H. v. Lutheran Soc.*
20 *Sews. of Washington*, 117 Wn.2d 460,473-74 (1991) (citing and relying on *OFFER*, 431 U.S. 816
21 (1977) and *Board of Regents v. Roth*, 408 U.S. 564 (1972)); *Morris v. Blaker*, 118 Wn.2d 133, 144-45
22 (1992) (applying procedural due process test of *Mathews v. Eldridge*, 424 U.S. 319 (1976)).
23 Plaintiffs' procedural due process claims have no more viability under the Washington Constitution
24 than they do under the United States Constitution.
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IV. CONCLUSION

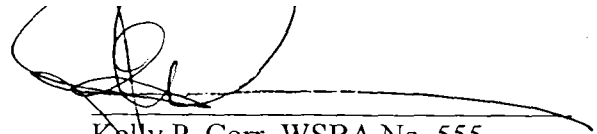
The named plaintiffs in this case have received the full range of procedural safeguards guaranteed to them by Washington law. Each plaintiffs case was reviewed by a court at least twice a year, and these children often received far more than two hearings per year. The additional procedures demanded in the Second Amended Complaint are not supported by case law, statute, the United States or Washington Constitutions, or good policy.

For the foregoing reasons, defendants respectfully request that this Court order partial summary judgment dismissing plaintiffs' claims that Washington's procedural safeguards are inadequate under the Adoption Assistance and Child Welfare Act and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Washington Constitution. Plaintiffs' claims for damages under 42 U.S.C. 0 1983, and all claims made under the Washington Constitution, should also be dismissed.*

RESPECTFULLY SUBMITTED this sth day of March 2001.

ATTORNEY GENERAL'S OFFICE

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' A proposed order is filed herewith.