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The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed, or caused delivery of a true copy of the foregoing to: Kelly Corr and Jeff Friemund at the regular office or residence thereof.

DATED this 27th day of April, 2000, at Bellingham, Washington.

7

8

Lonnie Clement

9

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

10

11

JESSICA BRAAM, a minor child, by and >

12

through her guardians, Dale and Vickie >

Braam; JENNEIVA BURSCH, a minor child,)

13

by and through her guardians, Greg & Sherry)

Bursch; CASSIDEE BURSCH, a minor child, by)

14

and through her guardians, Greg & Sherry >

No.982015701

15

Bursch; DESI MORGAN, a minor child, by >

and through her guardians, Lori Morgan)

16

and Lonnie Morgan; PATRICK MORRIS, a >

**CHILDREN'S BRIEF
IN OPPOSITION TO
DEFENDANTS MOTION
FOR SUMMARY
JUDGMENT**

17

minor child, by and through her guardians, >

Kathy and David Morris; TIM OLSON, a >

18

minor child, by and through his guardians, >

David and Diane Olson; SHAUN SANCHEZ,)

19

a minor child, by and through his court >

appointed GAL, Shawn Hosford; AMIE >

20

ANDERSON, a minor child, by and through)

(DAVID A. NICHOLS)

her court appointed GAL, Jim Haynes, >

21

ROBYN BRANDON, a minor child, by and >

through her guardian, E. Sparrowhawk Brandon;)

22

BETH HARDIN, a minor child, by and through)

her guardians, David and Mary Hardin;)

23

ERYK HARDIN, a minor child, by and through)

his guardians, David and Mary Hardin; >

24

IVORY HARDIN, a minor child, by and through)

25

her guardians, David and Mary Hardin;)

26

EBONEY HARDIN, a minor child, by and through)

her guardians, David and Mary Hardin,)

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E. DEFENDANT QUASIM IS LIABLE FOR INJUNCTIVE RELIEF AND DAMAGE UNDER 42 U.S.C. ~ 1983..... 47

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I. INTRODUCTION

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When Amie Anderson was three years old, the Washington Department of Social and Health Services ('DSHS') petitioned the juvenile court to remove Amie from her parents. Their petition was granted and the court placed Amie in the custody of defendants. For the next fourteen years, DSHS shuttled her from home to group home to hospital to psychiatric center, and back through a series of foster homes, group facilities and youth centers. By the age of eighteen she had been in more than twenty-eight placements and more than twenty schools. Though the agency persuaded the juvenile court to terminate the rights of Anne's parents when Amie was six years old, she was never adopted.

Plaintiff Robyn Brandon, was placed in defendants' custody when she was only six months old. Before she was three years old, DSHS moved her through six different placements. At a time critically important to her healthy development, Robyn had no consistent, loving primary care provider. The system taught her from infancy that trusting and forming close bonds with anyone would always result in betrayal and desertion.

Foster care for Beth and Ivory Hardin and their siblings was a revolving door. Before Beth was eight years old, she had been removed by DSHS from her parents no less than three times. DSHS took Ivory away Tom her parents a second time in August. Two months later, several months before her fifth birthday, Ivory was raped in the foster home DSHS selected for her.

The stories of Anne, Robyn, Beth, and Ivory would be tragic if they were the only children subjected to such devastating harms while in the state's custody. But

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1 they are only a few of the thousands who over the years have been subjected to such
2 “officially” sanctioned mistreatment while in defendants’ care. Data recently
3 reported by the federal Children’s Bureau, indicates that of all the children placed in
4 DSHS foster care during fiscal year 1998, a substantial number of whom were in care
5 for less than a month’, more than a third (5648 children) had three or more
6 placements. For children in care more than two years but less than three, more than
7 half had been in three or more placements (928 children).² Neither these figures nor
8 the harmful impact of the agency’s practices are news to DSHS. But for more than
9 twenty years, they have done little to put an end to it.

10 In 1985, the same year that Amie Andersen entered foster care in Washington,
11 Dr. C. Henry Kempe, noted pediatrician and founder of the National Center for the
12 Prevention and Treatment of Child Abuse and Neglect, wrote :

13
14 An intelligent treatment plan must be made that does full justice to the rights
15 of the child without subjecting him or her to the alternative institutional
16 assault of unduly prolonged placements. Many a child, having been robbed of
17 his or her family for his own good, is subsequently robbed of each new family
18 substitute in turn, a truly devastating blow to any attempt at bonding for the
19 child.³

20 For decades, the professional literature has emphasized the critical importance of
21 stability for the healthy development of child victims of abuse and neglect, like Amie,
22 Robyn, and the other named plaintiffs. Research with this group of children at risk
23 also documents that those resilient children, children who are able to “snap back”

24 ² U.S. Department of Health and Human Services, Administration for Children and Families, CHILD
25 WELFARE OUTCOMES 1998 : ANNUAL REPORT, p. S-296 (2000). “[A]pproximately 40 percent of the
26 children placed into care return home within 30 days.”

² U.S. Department of Health and Human Services, Administration for Children and Families, CHILD
WELFARE OUTCOMES 1998 : ANNUAL REPORT, pp. S-291-5-296 (2000)

³ C. Henry Kempe, “International Perspective and Prospects Regarding Assault Against Children” in,
ASSAULT AGAINST CHILDREN, (John H. Meier, ed. 1985).

from the abuse suffered at home, have in common a close bond with at least one person who provided them with stable care.⁴

In addition, the professional standards of the two national organizations which oversee child welfare practices specifically address the need to provide and maintain a stable home for children in foster care. The Council on Accreditation for Children and Family Services STANDARDS RELATING TO FOSTER AND KINSHIP CARE SERVICES require that the child welfare agency's procedures support stable placements for children. Compliance with this Standard requires that only in rare instances should the average number of moves per child exceed two placements during their stay in foster care.⁵

Child Welfare League of America Standards originally published in 1975, required that "[a] suitable home, where continuity of relationship can be maintained for the anticipated duration of the placement should be selected from the outset."⁶ CWLA also warned against "the practice of moving a child from one foster home to another in the hope of improving the situation should be avoided, since each additional placement repeats for a child the painful experience of separation."⁷ In a revision of the CWLA Standards in 1995, the agency wrote "[t]he family foster care agency social worker and foster parents... should work actively to achieve stability of care with the foster family.*"

⁴ Robert T. Muller & Kathryn E. Lemieux, "Social Support, Attachment, And Psychopathology In high Risk Formerly Maltreated Adults", ~CHILDABUSE&NEGLECT~, ~~~ (~000) .

⁵ Council on Accreditation for Children and Family Services, STANDARDS ON FOSTER AND KINSHIP CARE SERVICES, Standard S.2 1.306 and rating indicator 2. (7* Edition, 200 1).

⁶ Child Welfare League of America, STANDARDS FOR FOSTER FAMILY SERVICE, Standard 3.8, pp. 41-42 (1975)

⁷ Id.

*Child Welfare League of America, STANDARDS OF EXCELLENCE FOR FOSTER FAMILY CARE SERVICES, Standard 2.46 (1995)

1 Recently, the American Academy of Pediatrics added to the weight of
2 professional authority on the harmful impact of multiple placements on the growth
3 and development of children in foster care. The Academy concluded that “[multiple
4 moves while in foster care (with the attendant disruption and uncertainty) can be
5 deleterious to the young child’s brain growth, mental development, and psychological
6 adjustment.” The Academy added “children need continuity, consistency, and
7 predictability from their caregiver. Multiple placements are injurious.”

8 For years, administrators as well as caseworkers for defendants have known
9 about the harmful effects of shuttling children from one temporary placement to
10 another. One report after another from task forces, surveys, and the defendants’ own
11 research department have documented the frequency with which children are moved
12 around. Each of these same reports repeats a similar litany of causes of the frequent
13 moves suffered by children in defendants’ custody. Within the last few months,
14 defendants published yet another legislatively mandated study confirming that the
15 shuttling of children continues unabated.

17 Both Congress and the Washington legislature responded to the concern about
18 the debilitating impact on children shuttled from one temporary placement to another.
19 The need to put an end to such foster care drift was the purpose of the federal
20 statutory reforms enacted by Congress in the Adoption and Child Welfare Reform
21 Act of 1980.” Among those statutory mandates was the requirement that procedural
22 safeguards be provided whenever any one of three actions occurred in a foster child’s
23

24 _____
25 ⁹ American Academy of Pediatrics, *Policy Statement on Developmental Issues for Young Children in*
Foster Care (REOO12), November 2000

26 ¹⁰ The legislative history is set forth in some detail in *Plaintiff’s Response to Defendants’ 12(b)(6)*
Motion to Dismiss Plaintiff’s Federal Statutory Claims and will not be repeated here.

case - (1) the child was removed from the home of his parent or guardian, (2) the child's placement was changed, or (3) a change in the visitation between parent and child was made. With the exception of emergencies, before a change in placement is made, such procedural safeguards require, at minimum, that a child and his parent be afforded pre-removal notice and some opportunity to be heard on the replacement. For the substantial number of children in foster care whose parental rights have been terminated, "the right to such safeguards obviously lies only with the child and/or his legal representative.

Washington's legislature has expressly forbidden the practices which plaintiffs challenge in their complaint. It has declared that the state has certain obligations to the children it removes from their parents and for whom it assumes the role of *parens patriae*. Among these basic rights is the right to a safe, stable, and permanent home. This right arises whenever the state assumes custody of a child. It is not a right granted to all victims of abuse and neglect but only to those children placed in the state's custody. The language of the statute does not describe stability as a preference, a goal, or a presumption. DSHS is not commanded to provide a stable home only when it is convenient, expedient, or easy. Furthermore, the right vested in abuse victims placed in state custody is the right not to a placement but to a stable home. A series of temporary placements like those experienced by each of the named plaintiffs cannot be said to satisfy the legislative mandate for a stable home.

" As of September 20, 1998, more than 2700 children in DSHS custody had parental rights terminated. U.S. Department of Health and Human Services, Administration for Children and Families, CHILD WELFARE OUTCOMES 1998 : ANNUAL REPORT, pp. 5-292 (2000)

1 The federal and state statutes at issue here restrain defendants' ability to
2 shuttle children from placement to placement with no accountability for the harm
3 caused by this practice. Defendants do not have unfettered discretion to move
4 children through innumerable temporary placements. In exchange for exercising the
5 awesome power to interfere **with** and in many cases terminate the constitutionally
6 protected parent-child relationship, defendants are required to provide an environment
7 that is safe, stable, and nurturing. Children in foster care have a right to be protected
8 from harms that are either physical or psychological. They have the right to be
9 protected from the harms caused by repeated, numerous changes in placement.

10 Implicit in defendants' Motion is the assertion that no matter how many times
11 a child is shuttled from placement to placement, no matter how serious the harm
12 caused by these constant relocations, and no matter how long lasting the harm caused
13 by their actions, they can continue to subject thousands of children to the same
14 harmful practices with impunity. If accepted, defendants' argument would permit
15 them to continue known harmful practices that have documented negative effects
16 upon a child's health and development that carry forward into adulthood. Both the
17 federal and state statutes place restraints on the agency's shuttling of foster children
18 and erect substantive and procedural limitations upon this practice.

21 II. STATEMENT OF FACTS

22 Noticeably absent from the "Facts" section of *Defendants' Motion for Partial*
23 *Summary Judgment* are any facts related **to the individual plaintiffs.**¹² **Instead they**
24

25
26 ¹² The brief summaries of the plaintiffs case files provided by defendants in a latter section of their
brief (*Defendants' Motion for Partial Summary Judgment*, pp.1BKKfl @Bm~qv, P L L C

1 merely paraphrase numerous sections of the Washington Code. Plaintiffs submit the
2 following brief statement of facts for some of the named plaintiffs in support of their
3 opposition to defendants' motion,

4 Amie Andersen

5 Plaintiff Amie Loreen Anderson entered foster care on March 26, 1985; she
6 was three and a half years old. During her time in care, the only dependable constant
7 in Amie's life was utter unpredictability. She lost contact with her older brother, who
8 remained with their parents. See Periodic Review Report (June 8, 1993). She
9 changed "homes" more than twenty-five times during her more than fourteen years in
10 foster care. Twenty-one of these moves occurred after she was freed for adoption. In
11 one year, Amie endured nine different placements. She was never adopted. For years,
12 she was without a guardian ad litem or other legal advocate. See September 21, 1995
13 Review Order (assigning GAL).
14

15 Nearly every time Amie moved to a new foster care placement, she was
16 forced to attend a new school in a different school district, making consistent
17 academic instruction and true learning nearly impossible.
18

19 Moreover, her repeated movements frustrated any attempt at providing the
20 significant medical and mental health services necessitated by her early history of
21 abuse - and exacerbated by the state's failure to provide her with a stable, consistent
22 caretaker. On more than one occasion Amie expressed that she was tired of
23 counseling because she did not feel that she was making progress. See Periodic
24

25
26 their parents leading up to the children's placement in foster care but fail to mention anything about
their treatment while in foster care.

1 Review Report (May 6, 1994), at 7; Periodic Review Report (March 23, 1995), at 7.
2 Despite the fact that Amie’s natural parents abused alcohol, she was not tested for
3 fetal alcohol syndrome until well into her teenage years. She never had a long-term
4 doctor or dentist.

5 Her many therapists and case workers continually documented the trauma
6 Amie had suffered as a result of her many changes in placement and her resulting
7 inability to form meaningful relationships with her adult caregivers. They wrote
8 “Amie has difficulties especially with bonding and attachment.” Periodic Review
9 Report (May 6, 1994), at 6; see also Letter from DessyeDee Clark to Laurie
10 Richardson (September 19, 1995), at. 2; and “Amie has already been traumatized by
11 multiple placements.”; Periodic Review Report (March 23, 1995), at 6 and the “state
12 is very much aware that Amie has had too many moves.” She was moved to her
13 twentieth placement the next day.

14 She was diagnosed on various occasions with major depression, identity
15 disorder, dysthymic disorder, and reactive attachment disorder. Her special
16 psychological and educational needs made her a difficult child to care for. Despite
17 this knowledge, the department repeatedly failed to provide her foster families with
18 necessary services, or even basic information regarding the severity of Amie’s
19 behavior. See Service Episode Record (October 2, 1995) (“Amie would have
20 succeeded in [foster] home if the State had only provided appropriate services.”);
21 Periodic Review Report (May 6, 1994), at 7 (family therapy provided only after foster
22 family felt unable to care for Amie); Periodic Review Report (March 23, 1995), at 7
23 (despite much advanced notice, the state provided family counseling “too late”).
24
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Throughout her time in foster care, Amie maintained that “I just want a family.” Service Episode Record (November 9, 1995). Declaration of Katina Ancar and Cynthia Novotny.

Robyn Brandon

Plaintiff Robyn Brandon was removed from her home at age six months for neglect, lack of supervision, and “failure to thrive” in her mother’s care. Periodic Review Report (Jan. 13, 1989), at 2. The department moved Robyn six times in her first two years in care. See Child Placement and Legal History. After her sixth move, her caseworker noted that “This child has had a lot of moves, doesn’t need more. . . . Think another move would be devastating. Had a real shaky move.” Service Episode Record (May 17, 1990). A month passed before Robyn was able to “relax and settle” into that foster home. Letter from Ellen Johnson to Jude McNeil (May 24, 1990), at 1. Five months later, Robyn was moved to yet another foster placement. See Child Placement and Legal History.

For months after entering state care, Robyn did not have a guardian ad litem to assert her interests. See Agreed Shelter Care Order (June 6, 1988) (stating that GAL “appointed on 5-10-88,” but noting on the signature line that “G.A.L. Not Assigned”); Periodic Review Report (Jan. 13, 1989) (“Guardian ad litem “none assigned”). She was never represented by an attorney. See, e.g., Periodic Review Report (October 20, 1989); Periodic Review Report (July 27, 1989); Periodic Review Report (Jan. 13, 1989); Periodic Review Report (Jan. 10, 1989

Robyn’s mother was not told when Robyn was moved from one foster home to another. & Periodic Review Report (Jan. 13, 1989), at 8 (no signature on lines

1 stating that “parents notified of visitation changes” and “parents notified of placement
2 changes.”); Periodic Review Report (October 20, 1989) (no signature attesting that
3 parent received mandatory copy of the report or was notified of changes in visitation
4 or placement). However, it was not only Robyn’s mother who was not always aware
5 of her daughter’s location. Strikingly, it was clear that even the caseworkers charged
6 with Robyn’s supervision were sometimes unaware of her whereabouts. See Service
7 Episode Record (“Apparently, on [October 13, 1989] Robyn was transferred to [the
8 Haroldson home]. I was not informed.”); Service Record (August 9, 1989) (“Robin
9 was picked up at Linda Cochran’s [sic] foster home. She had been caring for her for
10 the Stotleys.”); Periodic Review Report (January 19, 1989) (indicating Robin staying
11 with in another home “on a private arrangement between foster parents”).
12 Declaration of Katina Ancar and Cynthia Novotny.

13
14 Beth, Ivorv, Ebonev, and Eryk Hardin

15 Beth was born on October 31, 1981. In defendants’ brief description of the
16 Hardin children, there are several inaccuracies or omissions. First of all, they assert
17 that the children entered state custody in August, 1989. Beth and her brother Eryk
18 were first placed in foster care in 1984. They entered care again following the death
19 of an infant sibling. (*Findings of Fact, Conclusions of Law, and Order Terminating*
20 *Parent Child Relationship*, January 15, 1992). Their placement in foster care in
21 August, 1989, was no less than Beth and Eryk’s third time in state custody.
22

23 Secondly, defendants fail to indicate that the father’s parental rights were
24 terminated in January, 1992.¹³ Ironically, the court based its termination of the
25 father’s rights on his chaotic lifestyle, and history of instability. It determined that
26

1 In October, 1989, several months before her fifth birthday. she was raped by a
2 twelve-year-old boy in the foster home (*Findings of Fact, Conclusions of Law, and*
3 *Order Terminating Parent Child Relationship*, January 15, 1992). During the first
4 fourteen months in foster care she was moved five times between foster and receiving
5 homes. Her adoption in 1996, four years after DSHS terminated her parents' rights,
6 disrupted less than a year later. During April, 1997, she was in eight different
7 placements including some nights when she was left to sleep on the floors in DSHS
8 offices.

9 Ebony, the youngest of the Hardin children, was born on July 14, 1986. She
10 entered foster care for the second time in August, 1989, when she was just three years
11 old. During the first fourteen months she was in foster care, Ebony was in six
12 different placements - including several receiving homes and foster homes. She was
13 separated from her siblings for almost two years.

14 Eryk, brother of Beth, Ivory, and Ebony, was born on July 10, 1983. Like his
15 siblings, he was in foster care during 1988 and reentered care in August, 1989.
16 Defendants provide no evidence that any hearings or reviews were held between 1992
17 and the present.

18 Defendants do not provide any evidence that prior to each change in
19 placement for the Hardin children either before the guardianship in 1992 or after the
20 children left the Hardin home and were shuttled from placement to placement, that
21 the foster parents were provided with the requisite notice under RCW 74.13.300.
22 While court records suggest that at some point, the children were represented by a
23 Guardian ad Litem, defendants present no evidence of when the GAL was appointed
24
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1 nor how long she served. Also absent from their brief declarations, is any evidence
2 that when the children did have a GAL, that the GAL received notices of each change
3 in placement. Prior to the termination of the father's parental rights in 1992, he was
4 also entitled to notice of changes in placement. The defendants' motion and
5 supporting papers is devoid of any evidence that the father was provided with notice
6 or opportunity to be heard on those changes in placement. In fact, the record suggests
7 that the agency did not provide the father with notice about significant changes while
8 the children were in state custody.⁴ Finally, though defendants provide the statement
9 of a DSHS employee that the records indicate there were eight administrative or court
10 reviews during the 1989 to 1992 period, there is no evidence that the court itself was
11 ever told about the changes in placement nor that the court made the requisite
12 findings that defendants suggest are part of the panoply of procedural safeguards
13 already guaranteed to foster children. Declaration of William Grimm and Cynthia
14 Novotny.
15

16 III. SUMMARY OF ARGUMENT

17 Children in foster care and their parents are entitled to procedural safeguards
18 whenever the agency proposes to change a foster child's placement.⁵ These rights
19 arise out of the provisions in the Adoption Assistance and Child Welfare Act
20

21
22 ⁴ See, e.g., Judge Schindler's Findings of Fact, Conclusions of Law, and Order Terminating Parent
23 Child Relationship (January 15, 1992) finding that "[s]ome grounds for the father's anger are certainly
24 justified, e.g. Eryks' having suffered a burned hand during the 1984 foster care placement, and Ivory
25 having been raped by another foster child in approximately October, 1989, and the father's not
26 learning of that incident until two months later."

" Defendants misstate plaintiffs' position on the nature of the procedural safeguards required.
At the hearing on Defendants' Motion to Dismiss, we advised the court that the same stringent
procedural protections that apply to the child's initial removal from the parent's home are not be
required when making a change in placement. We also conceded that in an emergency situation, an

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1 ('AACWA') that were the subject of the court's earlier denial of the Defendants'
2 Motion to Dismiss. Defendants now concede that parents have a right to notice under
3 the federal law but argue that parents are the only parties entitled to procedural
4 safeguards. Construing the statute as narrowly as defendants propose conflicts with
5 the purposes for which the AACWA was enacted. Even if the federal statute is read to
6 vest this right only with the parents, plaintiffs, whom defendants concede are the
7 intended beneficiaries of any procedural safeguards concerning a change in
8 placement⁶, have the right to seek enforcement of that right.

9 The provision of other procedural safeguards, such as the appointment of a
10 Guardian Ad Litem or the right to a review hearing after a child has been in care for
11 six months does not satisfy the federal statutory requirement related to changes in
12 placement. Neither does granting notice and hearing to the foster parent before
13 removing a child from their home. The right to procedural safeguards under the
14 federal statute rests with the parent and child who is being moved and is triggered by
15 the agency's decision to move the child to another placement.
16

17 Defendants fail to show that there is an absence of a genuine issue as to the
18 material facts in this case. Indeed, plaintiffs' pleadings and supporting documents
19 previously filed in the case and exhibits attached to this response provide substantial
20 and uncontroverted evidence that many of the procedural safeguards which
21 defendants allege satisfy the federal statute are not implemented. With one exception,
22

23
24 opportunity to be heard after the change in placement would satisfy the federal statutes requirement of
25 procedural safeguards. *Verbatim Report of Trial Proceedings*, at pp. 30,39

26 ⁶ See, Defendants' Motion for Partial Summary Judgment stating that a similar state statute providing
notice of a change in placement to foster parents "is intended for the benefit of foster children."
Defendants' Motion, at p. 14

Defendants' Motion and supporting papers is devoid of any evidence that those procedural safeguards upon which their Motion rests are actually implemented.

Plaintiffs claim of entitlement to procedural safeguards related to a change in placement also rests upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A liberty or property interest entitled to protection under the Due Process Clause may arise from either of two sources, the Due Process Clause itself or the laws of the States. Washington's statutory scheme applicable to children placed in defendants' custody, vests children in foster care with a right to a safe and stable placement. RCW 13.34.020. This statute establishes a state-created liberty interest sufficient to implicate the right to procedural due process.

Defendant Quasim cannot escape liability for his inaction in light of the overwhelming evidence that throughout his tenure, the agency's practice of shuttling children from one placement to another was widely known, its harmful impact upon children admitted, and yet it continued unabated. While he had no personal involvement in the plaintiffs cases, his failure to address the deficits in training, policy, and supervision of caseworkers directly contributed to the continuation of the harmful practices of which plaintiffs' complain.

IV. ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate, and the moving party is entitled to judgment as a matter of law, only if the "pleadings, affidavits, depositions, and admissions" establish the "absence of any genuine issues of material fact." *Western Telepage, Inc. v. Cdy of Tacoma Dept. of Financing*, 140 Wn.2d 599, 607 (2000)

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(citing CR 56(c)). The moving party has the burden of showing that there is no issue of material fact. *Hash v. Chikdrerz 's Orthopedic Hosp. & Medical Center*, 110 Wn.2d 912, 915 (1988).

A defendant may move for summary judgment in either of two ways. First, a defendant may recount its version of the facts and argue that there is no genuine issue in the facts as set forth. See id. at 916. Alternatively, a moving party can meet its burden by indicating that the non-moving party lacks sufficient evidence to support its cause of action. See id. (citations omitted). In this instance, the moving party must identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,“ which establish the absence of a genuine issue of material fact. *White v. Kent Medical Center, Inc.*, 61 Wn.App. 163, 170 (1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Only after the moving party has met its burden of producing factual evidence showing entitlement to judgment as a matter of law does the burden shift to the nonmoving party to come forth with facts showing the existence of a genuine issue of material fact. See title 9A, 915. If a moving party does not sustain its burden, a Court should not grant the motion whether the nonmoving party has submitted evidence in opposition to the motion or not. See id.

In ruling on a motion for summary judgment, the Court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Reid v. Pierce County*, 136 Wn.2d 195, 201 (1998). A Court may resolve disputed factual issues only when, in light of the evidence presented, “reasonable minds could reach

1 but one conclusion.” *Sudquist Homes, Inc. v. Snohomish County Public Utility*, 140
2 Wn.2d 403, 406-07 (2000) (citations omitted).

3 As set forth below, defendants have not established the absence of a genuine
4 issue of material fact. They marshal few facts in support of their Motion and those
5 facts are largely irrelevant to the issue of whether plaintiffs are provided with the
6 procedural safeguards required by the federal statute and Due Process Clause of the
7 Fourteenth Amendment. Plaintiffs evidence establishes that many of the procedural
8 safeguards upon which defendants rest their case are not implemented.

9 **B. FOSTER CHILDREN HAVE THE RIGHT UNDER THE AACWA TO NOTICE OF**
10 **PROPOSED PLACEMENT CHANGES AND AN OPPORTUNITY TO BE HEARD**

11 This court previously rejected defendants’ argument that provisions of Title
12 42 U.S.C. §4 671(a) and 675(S)(C) fail to create rights that are privately enforceable
13 by plaintiffs. Defendants concede that children have a right under §675(5)(C) to
14 permanency hearings as provided in the first part of the statute, but now maintain that
15 the court should interpret the statute to grant the procedural protections delineated in
16 the latter part of the same section only to parents.¹⁷

18 Section 675 (5)(C) provides in its entirety:

19 (C) with respect to each such child, procedural safeguards will be applied,
20 among other things, to assure each child in foster care under the supervision of
21 the State of a permanency hearing to be held, in a family or juvenile court or
22 another court (including a tribal court) of competent jurisdiction, or by an
23 administrative body appointed or approved by the court, no later than 12
24 months after the date the child is considered to have entered foster care (as
25 determined under subparagraph (F)) (and not less frequently than every 12
26 months thereafter during the continuation of foster care), which hearing shall
determine the permanency plan for the child that includes whether, and if

17 The logical extrapolation of defendant’s statutory interpretation argument would exclude parents from the procedural protections of periodic reviews.

1 applicable when, the child will be returned to the parent, placed for adoption
2 and the State will file a petition for termination of parental rights, or referred
3 for legal guardianship, or (in cases where the State agency has documented to
4 the State court a compelling reason for determining that it would not be in the
5 best interests of the child to return home, be referred for termination of
6 parental rights, or be placed for adoption, with a fit and willing relative, or
7 with a legal guardian) placed in another planned permanent living
8 arrangement and, in the case of a child described in subparagraph (A)(ii),
9 whether the out-of-State placement continues to be appropriate and in the best
10 interests of the child, and, in the case of a child who has attained age 16, the
11 services needed to assist the child to make the transition from foster care to
12 independent living; and procedural safeguards shall also be applied with
13 respect to parental rights pertaining to the removal of the child from the home
14 of his parents, to a change in the child's placement, and to any determination
15 affecting visitation privileges of parents;

9 Interpreting this statutory text requires that the court "consider[] not only the
10 bare meaning of the word but also its placement and purpose in the statutory
11 scheme." U.S. v. Davidson, 2001 WL 392 117 (9th Cir. 4/1 g/2001) citing Bailey v.
12 United States, 516 U.S. 137, 145 (1995). In determining the "plainness or ambiguity
13 of the statutory language" the court must look "to the language itself, the specific
14 context in which the language is used, and the broader context of the statute as a
15 whole." *Robinson v. Shell Oil Company*, 519 U.S. 337, 341 (1997) [citations
16 omitted]. When the language of the statute is ambiguous, then the court may
17

18 "examine the textual evolution of the contested language and the legislative
19 history that may explain or elucidate it. In examining the textual evolution
20 and legislative history of a statute, however, the function of the courts is to
21 determine the intent of the legislature, not to rewrite the statute based upon
22 our own notions of appropriate policy." U.S. v. Davidson, 2001 WL 392117

22 Defendants fail to adhere to these principles of statutory interpretation. They
23 simply misinterpret the statute, focusing upon one phrase and ignoring other phrases
24 and the context in which they occur. First of all, the statute begins with the phrase
25 "*with respect to each such child.*" This language emphasizes that the procedural
26 safeguards that follow throughout the section apply

1 Immediately following this phrase, the statute mandates that “*procedural safeguards*
2 *will be applied, nrrtottg other things.. .*” By adding the phrase ‘among other things,’
3 Congress clearly indicated that the permanency hearing requirements that follow this
4 language are not the only procedural safeguards that must be provided “with respect
5 to each such child.” Defendants’ interpretation of the statute ignores these provisions.
6 Finally, defendants focus on the ‘with respect to parental rights’ language at the end
7 of the section, but ignore the immediately preceding phrase that “*procedural*
8 *safegturds stull also be applied.*” These latter procedural safeguards are “among the
9 other things” that must be provided “with respect to each such child.” Rather than
10 excluding children from the procedural safeguards related to changes in placement,
11 the statute adds those to the ones mandated in the earlier part of the section.

12 While there appears to be no legislative history with regard the particular
13 phrase at issue here, there is ample legislative history about the intent of Congress in
14 enacting the AACWA. Without repeating that history here’*, plaintiffs note that
15 concerns about instability, foster care drift, and a lack of permanent homes for
16 children in foster care were the critical deficits in the foster care system that Congress
17 intended to address. Throughout the AACWA, Congress created a series of
18 procedural protections to put a halt to that drift and instability. Clearly, children in
19 foster care were the intended beneficiaries of these protections.
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22 Defendants’ interpretation of the statute is inconsistent with Congress’ intent
23 to alleviate the harmful instability experienced by children in many of the states’
24 child welfare systems. If accepted, their version of the statute would deprive a
25 significant number of children in foster care of any procedural protections whatsoever
26

1 related to changes in placement. The most recent published statistics for Washington
2 indicate that there are 2700 children in DSHS custody whose parental rights are
3 terminated but who have not been adopted.” According to defendants, there an
4 additional number of (older) children whose parental rights have been terminated and
5 who have a permanent plan of “emancipation” and who are not included in that
6 number. For those children the agency is not even looking for an adoptive home. 20
7 Since termination of parental rights extinguishes all substantive and procedural rights
8 of these children’s parents, RCW 13.34.200; *In the Matter of Dependency of G.C.B.*,
9 73 Wn. App. 708, 716-717 (1994); *In the Matter of Dependency of F.S.*, 81 Wn App.
10 264, 267 (1996), there is no parent to receive notice of an impending change in their
11 placement and no one to question whether the change is in their best interests. These
12 children are some of the most vulnerable persons in care. They are some of the
13 children who have been in care the longest. 21 They are also more likely to have
14 suffered a series of multiple placements than children who have been in care for
15 shorter periods of time. **

17 Plaintiff Amie Anderson’s placement history is illustrative of the high risk of
18 multiple placements following the termination of parental rights. Amie was freed for
19 adoption on November 19, 1988. After the rights of her mother and father were
20 terminated, Amie was moved at least 21 times For many years, she had no guardian
21 ad litem. She was never adopted. Each time the department decided to move Amie
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23 ¹ See, Plaintiffs’ Response to Defendants’ 12 (b)(6) Motion to Dismiss Plaintiffs’ Statutory Claims.
24 ² U.S. Department of Health and Human Services, Administration for Children and Families, CHILD
WELFARE OUTCOMES ~~~~ : ANNIJAL REPORT, pp.5-292(2000)
25 ³ Id, at 5-292 n.4, 5-294. In 1998, approximately 395 children left care to “emancipation.”
26 ⁴ In 1998, of the children who left care to be adopted, 57% had been in care more than three years.
I& at 5-295.

1 to another foster home, the department was obliged to give notice or a hearing only to
2 itself, with no possibility of a inquiry into the motivations for the move, or for
3 ensuring the appropriateness of the next placement.

4 Under defendants' interpretation, those children who are in the most dire need
5 of stability and permanence, would be deprived of any procedural protections. Such
6 an outcome clearly runs contrary to Congressional intent underlying the AACWA.

7 Children with no legal "parents" are not the only group that would go without
8 anyone to question the propriety of another change in placement under defendants'
9 interpretation. Children for whom the permanent plan is not reunification presumably
10 have little contact with their parents and the parents have little motivation to respond
11 to notices of a change in placement. These children, too, have no protections from
12 indiscriminate multiple moves.

13 In the hearings and reports leading up to passage of AACWA, Congress heard
14 ample testimony about the harm inflicted upon children by multiple moves while in
15 care. While parents also are impacted by a change in the child's placement, the
16 relative harm they experience is small when compared to all the negative, often
17 permanent consequences suffered by the child who is moved from pillar to post.

18 Changes in placement may create significant obstacles to a child's continuing
19 relationship with their parents. The greater the distance between the parents' home
20 and the foster placement, the more difficult it becomes for child and parent to
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26 *' While one in five children in care less than a year have three or more placements, two thirds of
children in care at least three years but less than four had three

maintain contact.²³ For the child, however, the consequences of multiple moves are much more far-reaching. As the plaintiffs' histories illustrate, changes in placement may suspend or terminate a child's relationship with their siblings.²⁴ It disrupts their health care and treatment, each time setting back the progress that has been made as the child and therapist must get to know one another anew. Multiple moves also are a significant contributor to the lack of consistent and necessary medical care. Constant changes in school, school districts, and teachers delays the identification of special needs, inhibits the child's opportunities to make academic progress, and as in Amie's case, condemns the child to repeat grades. They also exact an incalculable toll upon the child's psychological well-being. A child learns not to develop long-term relationships because the defendants' system teaches them that most relationships will be short-lived. Considering the relative harm experienced by parent and child, reading the statute to mandate procedural protections for the child is consistent with the overall Congressional purpose.

None of the case law cited by defendants' holds that parents are exclusively entitled to the procedural protections of 42 U.S.C. 5675 (5)C. *In Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), abrogation on other grounds reco,tized, *Suter v. Artis M.*, 503 U.S. 347 (1992), the court considered whether the AACWA created rights for children only, or for their natural parents as well. See *Norman*, 739 F.

²³ The child's case plan must be designed "to achieve placement in a safe setting that is . . . in close proximity to the parents' home, consistent with the best interests and special needs of the child.. ." 42 U.S.C. §675 (5)(A)

²⁴ See, e.g., William Wesley Patton & Dr. Sara Latz, "Severing Hansel from Gretel: An Analysis of Siblings Association Rights, 48 M-I L&V. 745,760-768 (1994), for a discussion of the importance of sibling bonds

²⁵ Edward L. Schor, "The Foster Care System and the Health Status of Foster Children", 69 PEDIATRICS 521, 526 (1982) noting that "[t]he reality of multiple foster home placements during a

Supp. at 1188. The court concluded that the Act created rights for both foster children ~I~I~I their parents. See, id. Such a finding is wholly consistent with plaintiffs' current claims. While the Nornzan court found that §675(5)(C) suggested Congressional intent to provide rights to parents, neither directly or by implication does the court hold that the rights listed in

§ 675(5)(C) were granted solely to parents. More importantly, the court stated that when a statute provides for the continued unification or reunification of a family, it cannot be said to be only for the benefit of the children, both the children and the parents are beneficiaries of such a policy. fi at 1188.

Norman therefore stands for the proposition that rights under the AACWA may enure to both parents and children, they are in fact reciprocal rights, or “two sides of the same coin,” that may be vindicated by either a parent or a child. 26

Defendants also attempt to read more into *In ye J.H.*, 117 Wn2d 460 (1991) than was actually decided. The *J.H.* court referred to 42 U.S.C. § 675(5)(C) in its discussion of whether the AACWA affords rights to foster parents. However, the court did not hold, or even imply, that § 675(5)(C) does not grant such rights to foster children. Moreover, the court explicitly declined to decide the issue of a foster child’s rights because it found that in the case before it, the children were in fact “afforded full opportunity to request. . . [a review and to] challenge the change in placement.” *Id.* at 478. As explained more fully below, many of the plaintiffs and other children in foster care do not have a Guardian Ad Litem for all or a part of the

period of several years yields a pattern of multiple, unrelated sources of health care and incomplete medical records.”

26 cf. *Wooky v. Baron Rouge*, 211 F.3d 913,923 & 11.46 (5th Cir. 2000) (the interest in the constitutionally-protected parent-child relationship is “reciprocal in that it belongs to the children as much as it does to the parents”) (quoting *Bennett v. Town of Riverhead*, 940 F. Supp. 48 1,488-89 (E.D.N.Y. 1996)).

1 time they are in care. The evidence also shows that many of those who do have an
2 appointed GAL receive poor representation due to high caseloads. Accordingly, *J.H.*
3 does not bolster defendants' argument.

4 In summary, the AACWA confers rights upon both foster children and their
5 parents. Both the language and history of AACWA make it clear that children were
6 the beneficiaries of the act and its procedural protections. It is consistent with that
7 language and history that 42 U.S.C.5 675(5)(C) accords foster children protections,
8 which, among other things, include procedural safeguards whenever the agency
9 proposes to change the child's placement.

10 1. The Provision of Periodic Reviews and Other Safeguards Does Not Satisfy
11 Plaintiffs' Right to Procedural Safeguards Related to A Chance in Placement

12 Throughout their Motion, defendants maintain that the current Washington
13 juvenile court statutory scheme satisfies all the procedural safeguards to which
14 plaintiff are entitled under the federal statute. These other procedural safeguards
15 provided for by state statute do not satisfy the specific requirement of the federal
16 statute related to changes in placement. Neither the statutory mandate that the court
17 appoint a Guardian Ad Litem for the child, nor the provision of a periodic review
18 hearing after a child has been in care for six months satisfies the federal statutory
19 requirement that children and parents be provided with procedural protections
20 whenever there is a change in placement. Neither does granting notice and hearing to
21 the foster parent before removing a child from their home.²⁷ This latter statute offers
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²⁷ RCW 74.13.300 requires that the child must have resided in the foster home for ninety days before
26 the five day notice provision is applicable. RCW 74.13.300 (1). The statute offers no protection to
foster parents or children whose placement is interrupted before the 90 days. Many of plaintiffs'
placements did not last the requisite 90 days.

no protection to the child in situations in which the foster parent requests the move. Under such circumstances, the child might not oppose the move out of the foster home. However, granting him or her notice and opportunity to be heard would give them a chance to participate in the decision about the new placement and might very well help ensure greater stability in the next placement.²⁸

2. Children Do Not Receive The “Panoply of Safeguards” Provided For in State Statutes

Among the “panoply of other safeguards” which defendants insist eliminate the need for any procedural safeguards when a foster child’s placement is changed is RCW 13.34.100. RCW 13.34.100 requires the appointment of a Guardian Ad Litem for any child who is the subject of an abuse or neglect proceeding. There is a comparable provision in federal law under the Child Abuse Prevention and Treatment Act, 42 U.S.C. 95106a et seq. A recent study, however, conducted by the Office of the Family and Children’s Ombudsman, reported that almost one third of all children entitled to appointment of a GAL under RCW 13.34.100, “were without the services of a GAL.”²⁹ For many children who do have an appointed GAL, the quality of representation is poor. For example, the Ombudsman found that in Pierce, Spokane, and Y&ma counties, GALs have caseloads of up to four hundred children.³⁰ Adding to the concerns about the quality of GAL services, a survey of Washington judges conducted as part of the Court Improvement Project reported that forty percent of

²⁸ The child’s participation in decisions about placement is recommended by many child welfare and child development experts. See, u., Judith S. Rycus & Ronald C. Hughes, FIELD GUIDE TO CHILD WELFARE, Volume IV, at 744-749, Vera Fahlberg, M.D., A CHILD’S JOURNEY THROUGH PLACEMENT, “Minimizing the Trauma of Moves” pp. 175-204 (1991)

²⁹ Office of the Family and Children’s Ombudsman, Report on Guardian Ad Litem Representation of Children in Child Abuse and Neglect Proceedings, at 9 (January, 1999)

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judges responded that GALs rarely file the required reports.³ Clearly, the safeguards of this statute are not being implemented.

At several points in their Motion, defendants argue that RCW 74.13.300 “provides foster children with full procedural safeguards which apply whenever the child is moved from one placement to another” (Defendants’ *Motion*, at 14). RCW 74.13.300, however, provides no such procedural protections to a child or their appointed GAL, if any. It grants a foster parent only the right to notice of a change in placement. Just as with the GAL statute, however, this safeguard is more theoretical than real. Defendants provide no evidence whatsoever of compliance with this statute in plaintiffs’ cases or in general. To the contrary, the deposition testimony of plaintiffs witness, Royce Roberts, indicates that foster parents are not aware of their rights under the statute and do not receive such notices. (*Deposition of Royce Roberts*)

Defendants’ concede that parents are entitled to notice and opportunity to be heard on a change in the child’s placement. But the evidence again refutes their argument that children’s interests and rights are being adequately protected by others. Defendants’ motion and declarations provide no support for their claim that in the plaintiffs cases, their parents received the requisite notice. To the contrary, plaintiffs have introduced uncontroverted evidence that parents do not get any notice and are deprived of any opportunity to challenge the agency’s move of the child.

³ Office of the Family and Children’s Ombudsman, Report on Guardian Ad Litem Representation of Children in Child Abuse and Neglect Proceedings, at 13 (January, 1999)

American Bar Association Center on Children and the Law, State Court Assessments 1995-1998: Dependency Proceedings Volume 4 Timely Judicial Decision-M

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Declarations of Royce Roberts and Deborah Lippold filed in support of *Plaintiffs' Motion to Certify Class Action*.

Defendants place much emphasis upon the judicial reviews and permanency planning hearings, suggesting that once again, these provisions provide sufficient protections for foster children. Of course, such hearings are not triggered by a change in placement and as the defendants' own documents indicate, many changes in placement occur in the interim between one review and the next.

Defendants' documents show only that some type of judicial or administrative review occurred periodically during the time the plaintiffs were in foster care. 32 All that can be concluded from the declaration of Ms. App., however, is that the case record or state's computer database indicates that there was some sort of hearing. No conclusions whatsoever can be drawn from defendants' evidence about who received notice of the review hearings, whether the notice was timely, who attended, what reports were or were not provided to the court at the hearing, what factual determinations were made by the court, or whether any changes in placement were brought to the judge's attention. Indeed, the boilerplate court forms found in some of named plaintiffs files that include just a series of check boxes suggest that many of these reviews were perfunctory.³³ Additional evidence from the State Court Assessment found that '[although timely, these hearings generally do not result in a permanent plan for the child and are similar to regular court review of a child in placement. Consequently, the evidence does not support defendants' broad claims

32 In some cases, the reviews were not conducted at the required six month intervals. E.g., Periodic reviews in the case of Jenneiva Bursch during 1990-1991 were held on May 17, 1990, December 13, 1990, and August 15, 1991.

1 may review of state taxpayers' constitutional claims even though taxpayers did not
2 meet federal standing requirements) (citations omitted). Accordingly, the rules of
3 federal standing are inapplicable to plaintiffs' action. & *ASARCO*, 490 U.S. at 416
4 (1989); *Marriage of Gilbert*, 88 Wn. App. 362, 373-74 (1997) (finding "persuasive"
5 the assertion that "state law, not federal law, governs" standing in state courts) (citing
6 *ASARCO* 490 U.S. at 417); *cf. Robinson v. City of Seattle*, 2000 WL 1455849 at *3
7 (Wash. App. Div. 1, Oct. 2, 2000) (noting that "prudential notions of standing" do not
8 apply to the Washington Constitution or its laws).

9 Under Washington law, a litigant has standing to assert a claim if she has "a
10 personal stake in the outcome of the case" and would benefit from the relief
11 requested. *Sabey v. Howard Johnson & Co.*, 2000 WL 1056342 at "2 (Wash.App.
12 Div. 1, July 24, 2000); *see also* *Erection Co. v. Department of Labor & Indus.*, 65
13 Wn.App. 461, 467, 828 P.2d 657 (1992), *aff.*, 121 Wn.2d 513 (1993). Plaintiff
14 foster children have suffered serious injury as a result of the multiple placement
15 changes they were subjected to while in defendants' custody. Defendants' own
16 reports and studies admit to a continued failure to provide children with consistent
17 caregivers and desperately needed services. DSHS has deprived these already
18 vulnerable children of the most important element necessary for emotional growth
19 and developmental. & Washington State Institute for Public Policy, CHILDREN IN
20 LONG-TERM FOSTER CARE IN WASHINGTON: PRELIMINARY FINDINGS [hereinafter
21 WSIE'P REPORT] (February 2001). In the most egregious cases, these children exit
22 foster care without the social and practical skills they need to maintain jobs, homes,
23 or relationships with others.
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1 Plaintiff An-tie Anderson is indicative of the emotional injuries foster children
2 carry with them as a result of the state's refusal to meet their most basic needs for
3 stability and nurturance. Amie's files are replete with references to her "feeling[s]
4 [of] insecur[ity]" and "difficulties, especially with bonding and attachment." See
5 Periodic Review Report (May 6, 1994). As a result of her fifteen years of continuous
6 transfers among foster homes, Amie was diagnosed without a multitude of disorders,
7 including (after her 23rd placement) reactive attachment disorder. See Periodic
8 Review Report (September 1, 1995). Declaration of Rebecca Perbix Mallos.
9 Characteristic of Amie's emotional quandary is that, even when her outward behavior
10 signaled that she "was not bonding" to her caregivers, it "was evident" that Amie
11 desperately wanted a family and wished to remain with her foster parents. I& see
12 also Service Episode Record (November 9, 1995).

13
14 Plaintiffs seek to preclude the type of irreparable emotional, psychological,
15 and developmental harm that Amie and other plaintiff foster children have suffered,
16 and to guarantee that the state provides the fundamental stability and nurturing
17 necessary for foster children to develop and thrive. Notice of any change of
18 placement would significantly increase the ability to scrutinize (1) the reasons for the
19 move, (2) whether supportive services might eliminate the need for the move, (3) the
20 department's efforts at ensuring that the new foster home is adequately prepared to
21 care for the individual child, and (4) the ability to obtain necessary services in the
22 new home. Plaintiffs therefore have a keen personal interest in the outcome of this
23 litigation.
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1 Finally, under Washington law, “[w]here a controversy is of serious public
 2 importance and immediately affects substantial segments of the population,” standing
 3 rules should be applied even more liberally. *Gilbert*, 88 Wn.App. at 373-74 (quoting
 4 *Farris v. Munro*, 99 Wn.2d 326, 330 (1983) (alterations in original)). At any
 5 moment, on average, 10,000 abused and neglected are committed to the care of the
 6 Washington foster care system. The state of Washington is their only ‘parent, the
 7 institution responsible for providing their day-to-day care and ensuring their long-
 8 term recovery from the traumas that brought them into care. The state’s failure to
 9 provide these vital necessities to abused and neglected children is a matter of extreme
 10 public concern. Few things are more important than the care and ultimate success of
 11 those children, who because of physical mistreatment, sexual abuse, or neglect, have
 12 been entrusted to the custody of the state. The frequency with which the problems in
 13 the foster care system are taken up by the legislature also is indicative of its serious
 14 public importance.

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 16 State law standing doctrine governs in this action. Because plaintiffs have a
 17 personal stake in the outcome of this action, would benefit from the relief requested,
 18 and the matter is of serious public importance, plaintiffs have standing under
 19 Washington law to pursue their claims.

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 21 **D. PLAINTIFFS HAVE A RIGHT UNDER THE DUE PROCESS CLAUSE TO**
 22 **PROCEDURAL SAFEGUARDS AGAINST MULTIPLE PLACEMENTS**

23 Washington state law provides foster children with a definitive right to a safe,
 24 stable, and permanent home. Defendants contend that, although couched in the
 25 explicit language of a statutory right, the statute intends only that stability and safety
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1 be an “aspirational goal.” However, the language of the statute is unequivocal. It
2 requires that DSHS provide a child in its custody with a home, not a series of
3 temporary placements. *Doe v. New York City Dep’t of Soc. Serv.*, 670 F. Supp. 1145
4 (S.D.N.Y. 1987) (practice of shuttling foster children from placement to placement
5 “completely contrary to goal of foster care system”). The home selected and
6 supervised by DSHS must be safe. But safety is not the only obligation. DSHS is
7 under an explicit obligation to provide a stable home. Washington state law creates
8 an enforceable right to a safe, stable and permanent home of which no child can be
9 deprived without the due process protections of notice and the opportunity to be heard
10 to challenge placement changes.³⁴

11 Defendants rely on *Smith v. Organization of Foster Families for Equality and*
12 *Reform*, 431 U.S. 816 (1977) as support for the proposition that foster parents and
13 foster children have no liberty interest in maintaining their relationship, and that
14 plaintiffs therefore are not entitled to due process protections when they are moved
15 from one foster placement to another. This argument misconstrues plaintiffs’ asserted
16 liberty interest and the holdings of the cases regarding the due process rights of foster
17 children. Plaintiffs do not allege that they have an entitlement to a particular home,
18 or to placement with specific substitute parents. What state law unequivocally
19 guarantees to plaintiffs and what they seek to enforce in this action is the right to a
20 stable home. Nowhere in the New York statutory scheme at issue in *OFFER*, was
21 there any such language.
22
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24
25 ³⁴ Defendants misstate plaintiffs’ argument regarding pre-removal notice and hearings.
26 Plaintiffs have long asserted that there are in fact some situations in which a hearing prior to the child’s
removal from foster home would prove to be burdensome or be against the best interest of the child. For
example, plaintiffs agree that when a child is in immediate danger, a hearing prior to a move to another

1 The Fourteenth Amendment provides in pertinent part that no state shall
2 “deprive any person of life, liberty, or property, without due process of law.” U.S.
3 Const., Amend. XIV. The Supreme Court has emphasized that “in a constitution for a
4 free people, there can be no doubt that the meaning of ‘liberty’ must be a broad one
5 indeed.” *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The “touchstone” of
6 the Fourteenth Amendment’s Due Process Clause is protection of “the individual
7 against arbitrary action of government,” *Wolff v. McDon&l*, 418 U.S. 539, 558
8 (1974), and prevention of governmental officials’ “abus[e] [of] power.” *DeShaney v.*
9 *Winnebago County Dept. of Soc. Sews.*, 489 U.S. 189, 196 (1989) (internal
10 quotations omitted).

11 The Fourteenth Amendment requires sufficient procedural protection to guard
12 against the unconstitutional governmental deprivation of liberty interest. The level of
13 process due once a constitutionally protected interest is implicated, is determined by
14 balancing three factors: 1) the private interest at stake; 2) the risk of erroneous
15 deprivation of the interest and the value of additional procedural protections; and 3)
16 the governmental interest, including financial and administrative costs. & *Mathews*
17 *v. Eldridge*, 424 U.S. 319,335 (1976).

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20 1. The Laws of the State of Washington Confer a Right to a Safe, Stable
21 Permanent Home

22 The Fourteenth Amendment Due Process Clause offers procedural protections
23 to state law-created liberty interests. *See Greenholtz v. Inmates of the Nebraska*
24 *Penal Correctional Complex*, 442 U.S. 1, 7 (1979). State law creates a liberty interest

25
26 home is not required. cf. *Dnunmond*, 563 F.2d at 1210 (noting that “[s]ometimes extreme haste is
necessary to an emergency to place a child”).

1 by establishing “substantive predicates” to guide **the** discretion of official decision-
2 makers, and by mandating the outcome upon a finding that the relevant criteria have
3 been met. *Olim v. Wakinekona*, 461 U.S. 238, 249-50 (1983) (no liberty interest
4 because interstate prison transfer left to “completely unfettered” discretion of
5 officials); &t g, *In re Cashaw*, 123 Wn.2d 138, 144 (1994) (laws that place
6 substantive limits on decision making “can create an expectation that the law will be
7 followed, and this expectation can rise to the level of a protected liberty interest”).
8 Whether a state statutory scheme creates a protected interest is determined on a “case-
9 by-case basis.” *Greenholtz*, 442 U.S. at 12. Furthermore, the statutory guidance
10 offered to direct official discretion need not be concrete and totally objective. Rather,
11 the state law criteria establishing a liberty interest may consist of language more
12 subtle than definitive directives. *See Board of Pardons v. Allen*, 482 US. 369, 381
13 (1987) (liberty interest in parole unless certain standards met, even though the
14 decision is ““necessarily subjective . . . and predictive””).

16 The purpose of Washington’s child welfare system is to “safeguard, protect
17 and contribute to the welfare of the children of the state.” RCW 74.13.010.
18 Consequently, the state has an obligation to provide “comprehensive” child welfare
19 services to abused and neglected children in order “to assure the safety, well-being,
20 and quality of care being provided is within the scope of the intent of the legislature.”
21 RCW 74.13.031; see also RCW 74.13.020(5) (instituting a duty to furnish “adequate
22 care” to foster children).

24 To this end, Washington state law provides that children in foster care are
25 entitled to “basic nurturing includ[ing] the I-&& to a safe, stable, and permanent home
26

1 and a speedy resolution of any proceeding under this chapter.” RCW 13.34.020
2 (emphasis added). This right is unqualified. A child’s entitlement to this right
3 supplies the basis for the state’s ability to place a child in state care, should her family
4 be abusive or unable to provide for her needs. ~~See~~ When the rights of basic
5 nurture, physical and mental health, and safety of the child and the legal rights of the
6 parents are in conflict, the rights and safety of the child should prevail.”; see also In
7 ye Welfare of Sumey, 94 Wn.2d 757, 762-63, 621 P.2d 108 (1980) (state has a parcns
8 patriae right and responsibility to intervene when parental actions seriously conflict
9 with the physical or mental health of the child). The establishment of these rights is
10 based on the legislative conclusion that “[p]lacement disruptions can be harmful to
11 children by denying them consistent and nurturing support.” RCW 74.13.3 10. To
12 prevent such harm, the legislature intended that the child welfare system “play[] an
13 important role in giving consistent and nurturing care to children placed in its care.”

14 [Notes following RCW 74.13.2501

15
16 To ensure the right of a stable and nurturing environment, the law also
17 mandates that

18 placement selection shall be made with a view toward the fewest possible
19 placements for each child. If possible, the initial placement shall be viewed as
20 the only placement for the child. The use of short-term interim placements of
21 thirty days or less to protect the child’s health or safety while the placement of
choice is being arranged is not a violation of this principle. RCW 74.13.290.

22 From the very beginning of the child’s entry in to care the law requires that the
23 agency select placements that ensure safety and stability for the child.

24 Acknowledging the circumstances under which many children enter care and that
25 emergencies may arise while the child is in a placement, the statutory scheme does
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not bar all changes in placement. For the best interests of the child, the statute permits temporary placements. However, the mere that fact interim placements are authorized does not weaken the child's right to a stable placement. Allowing such placements simply acknowledges the undeniable fact that many children enter foster care under exigent circumstances. Moreover, the statute's command that interim placements be limited to no longer than thirty days underscores that it is the those very circumstances that make stability and consistency in care so c-n&al; See also RCW 13.34.062(5) ("No child may be placed in shelter care for longer than thirty days without an order, signed by the judge authorizing continued shelter care.").

The significance of stability and permanence to the psychological welfare of children, especially those who have been victims of abuse and neglect, is similarly emphasized in other parts of the state's statutory scheme. These statutes reaffirm the fundamental right of a child in foster care to a safe, stable, and permanent home. Because training is recognized as a "valuable tool to reduce placement disruptions, the statute requires that foster parents receive training prior to placing a child. RCW 74.13.250.³⁵ Other sections reinforce the importance of reducing changes in placement, including the mandate to provide additional foster parent training to curtail disruption of foster home placements, RCW 74.13.310; to expand adoption programs "to encourage stable placements foster children" who are unlikely to return to their birthparents, RCW 74.13.3200; and to provide short-term respite care for foster parents caring for children with special needs with the goal of "minimiz[ing] disruptions to the child." RCW 74.13.270. Finally, RCW 74.13.300, regarding

³⁵ "Foster parent preservice training shall include information about . . . attachment, separation, and loss issues faced by birth parents, foster children, and foster par **B~TFB~~DA~ERT, PLL~**
A T T O R N E Y S A T L A W

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notification of placement changes, was enacted “solely to assist in minimizing disruption to the child in changing foster care placements.”

This scheme sets forth more than the “unilateral hope” or “statistical probability” that a child will not be shuttled from one placement to another without attention to the detrimental effects of such moves on a child’s psychological welfare. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 465 (1981). Rather, the law provides an explicit and untempered “right to a safe, stable, and permanent home.” RCW 13.34.020. The statute also “create[s] an expectancy on the part of the children, their legal parents and of the public that children will not be moved from any home at the mere whim of an agency.” *In re Dependency of J.H.*, 117 Wn.2d 460,470 (1991). The agency does not have discretion to transfer a child to another home “for whatever reason or for no reason at all.” *Meachum v. Funo*, 427 U.S. 215, 228 (1976). To the contrary, the language limiting changes in placement to situations in which the child’s health or safety requires protection strengthens the child’s right to stable, long-term placement decisions by the department. See RCW 74.13.290. While health and safety may on occasion require subjective determinations, such determinations are sufficient to form the basis of a state-created liberty interest. See *Alleg* 482 U.S. at 381; see also *Taylor By and through Walker v. Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987) (liberty interest where agency’s “comprehensive” scheme noted that worker must visit foster children as “frequently as necessary” and make assessment of “child’s total needs”).

The laws of the state of Washington explicitly establish plaintiffs’ rights to the kind of stability and permanence in care and opportunity for development that their

parents were unable to provide. Such explicit rights are entitled to procedural safeguards under the Due Process Clause.

2. The Risk of Erroneous Deprivation and Value of Additional Safeguards Requires Notice and Opportunity to Be Heard Whenever A Non-Emergency Change in Placement Is Imposed

Once a due process liberty interest is established, the second *Mathews vs. Eldridge* factor requires the Court to consider the potential risk of error under present procedures. *See Mathews v. Eldridge*, 424 U.S. 319,335 (1976). The Supreme Court has noted that an evaluation of the current procedural process is relevant to the inquiry of whether additional safeguards would be beneficial. See id. at 343. Defendants argue that the risk of erroneous deprivation of plaintiffs' liberty interest is minimal in light of the procedural protections already afforded by state law. However, as evidenced by the placement and personal histories of the named plaintiffs in this action, "the fairness and reliability of the existing . . . procedures" are highly questionable. *Mathews*, 424 U.S. at 343. Moreover, plaintiffs' strongly contest the assertion that "each of the named plaintiffs was accorded the procedural safeguards provided" by Washington law.³⁶ The list of laws put forth as facts by defendants are, at best, poorly implemented. At worst, DSHS wholly ignores them. The actual facts make clear that those laws have failed to protect plaintiffs from repeated changes in care. The failure of the current procedures shows that a pre-move hearing is both valuable and necessary in protecting plaintiffs' right to safety and a stable home.

³⁶ *Defts' Mtn for Partial Summ. Judgt. Re: PlQj5' Claims for AkmeF?d& Sc@+@ifJE RT P L L C*

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Pursuant to RCW 13.34.100, children in dependency proceedings have the right to representation by either an attorney or a Guardian ad Litem (“GAL”). However, more than thirty percent of children involved in those proceedings do not have a GAL. After plaintiff Amie Anderson’s GAL withdrew in July 1992, another was not assigned until September 21, 1995. See Review Hearing Order (September 21, 1995), at 3 (“A GAL is to be appointed for the child.”).³⁷ Robyn Brandon, six months old when she entered care, was not assigned a GAL for nine months. See Periodic Review Report (January 13, 1989), at 1. This GAL withdrew after Robyn’s mother’s parental rights were terminated. Robin never had legal representation. Accordingly, defendants’ assertion that plaintiffs’ representatives must receive all notices to which parents are entitled means little when most are in fact unrepresented. ³⁸ That right offers even less protection when any indication that DSHS provided mandatory notices to parents is conspicuously absent. See Periodic Review Report (January 13, 1989) (no signature confirming notification of visitation or placement changes); Periodic Review Report (October 20, 1989) (no signature confirming that the report had been provided to parent, or that parents had received of visitation or placement changes).

Defendants also offer an inventory of review and permanency planning hearings which defendants claim in and of themselves adequately protect plaintiffs against multiple placements. However, defendants themselves acknowledge that the

³⁷ Nonetheless, subsequent review orders do not indicate that the GAL was present at later hearings. See Review Hearing Order (January 30, 1997), at 1 (no indication that GAL appeared at hearing); Review Hearing Order (July 17, 1997), at 1 (same).
³⁸ Though defendants argue that there would be little benefit from requiring the appointment of a child representative, because “the representative’s attempts to discern the child’s best interest” would simply “duplicate those of the State,” defendants now do a dismal job of ascertaining the needs of the children

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computer-generated list is not reliable as a record of whether these hearings actually occurred. See Declaration of Ann App 17 4-6. These records also do not testify to the substantive content of those hearings. Notwithstanding the requirement that the court enter particularized findings, a review of plaintiffs' review hearing orders demonstrates a dramatic lack of specificity. Most of these orders consist of a simple checklist and boilerplate language. There is precious little attention to the specific needs (educational, physical, psychological) of the individual child. Placement changes between review hearings are routinely rubber-stamped without explanation.

Perhaps more fundamentally, it is not apparent that the specific number of times that child was moved while in care generally - or even in the period between review hearings specifically - is reported to the court. See Individual Service Plan Addendum (October 23, 1995) (for the first time mentioning the actual number of times Amie had moved: 23). Neither the DSHS Periodic Review Reports nor the Review Hearing Orders provide a specific section in which to identify the number of times a child has been moved among foster homes. Although Periodic Review Reports provide a "Begin date of current placement episode," the "definition of current placement episode date" is the child's initial placement in foster care, rather than the time since placement at the present foster home. See Periodic Review Report (June 27, 1997), at 2 (identifying March 26, 1985 the "[B]egin date" of plaintiff Amie Anderson's "current placement episode," at a time when Amie had been in care for twelve years). The lack of this basic information presents the unmistakable risk that a reviewing court may overlook the fact that a child has

in their care. See WSIPP Report, at 6 ("Systematic assessment of children is not routine, and their psychosocial needs are not specifically weighed in decision-making.")

experienced a high number of placements - even within short periods of time.³⁹

1 Without accurate information even the most concerned and motivated court is unable
2 to intervene to assure that a child is receiving needed care.

3 Equally glaring is the transfer of children just prior to review hearings.
4 Despite Amie Anderson's foster parents' (the Haynes) request that she return to their
5 home; Amie's attorney's intervention; Amie's express wishes; and the court's
6 specific inquiry about Amie's placement with the Haynes, Laurie Richardson, Amie
7 Anderson's caseworker worked diligently to move Amie to a group care setting Jo&
8 days before an upcoming hearing. See Letter from Laurie Richardson to Joann
9 Edward (October 1995). It is apparent that Richardson orchestrated such moves
10 routinely. By her own words, in a "normal" case (with sufficient management and
11 services), she "wouldn't worry a bit about moving a kid into placement right before a
12 hearing." Id. In Amie's case, however, Richardson fe&ed appearing "underhanded."
13 The express motivation for transferring Amie was two-fold. First, Richardson hoped
14 to avoid the "ordeal" of providing in-home services that the department had
15 previously denied the family. Id. Second, by moving Amie only days before the
16 hearing, Richardson could, as in other cases, compel the court to see the move as a
17 done deal, thereby precluding any meaningful review of the placement decision.
18 Such purposeful and regular undermining of the court's determination of the most
19 appropriate placement for the child renders the perfunctory periodic reviews
20 ineffective in protecting plaintiffs' immediate interests in stability.
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25 ³⁹ It turther goes without saying that placements of which the court is not aware cannot be adequately
26 addressed at review hearings. See Service Episode Record ("Apparently, on [October 13, 1989] Robin
was transferred to [the Haroldson home]. I was not informed."); Service Record (August 9, 1989)
("Robin was picked up at Linda Cochrans [sic] foster home. She had been caring for her for the

Even more evidence of the superficiality of such hearings is the fact that case workers are routinely unprepared for them, repeatedly failing to submit timely reports and requesting continuance after continuance. See Review Hearing Order (February 16, 1989) (report not timely submitted to court); Motion and Order (February 3, 1989) (requesting continuance for uncontested hearing, because worker not prepared and report not yet submitted); Motion for Continuance and Order of the Court (January 3, 1990) (granting three-week continuance “so caseworker has more time to prepare report”). The resulting delays and absence of adequate information on the child’s situation prevents the court from receiving crucial information regarding child’s needs and effectively reviewing the child’s situation. By the time the Court obtains the requisite data (if ever), a crisis situation may have worsened.

Accordingly, contrary to defendants’ representations, current state practices expose plaintiffs to recurring moves within Washington’s foster care system. The ability to present additional facts, to probe the agency’s rationale, and to challenge the state’s decision would be of great value in preventing further emotional damage to an already vulnerable population.⁴⁰

3. The Interests of the State of Washington Warrant The Procedural Protections Sought by Plaintiffs

The last factor in the due process inquiry is the public’s interests in any additional procedures. See *Board @Regents v. Roth*, 408 U.S. 564, 570 (1972). The public interest includes administrative and costs burdens. See *id.* However, the

Stotleys.”); Periodic Review Report (January 19, 1989) (indicating Robin staying with someone other than assigned foster placement “on a private arrangement between foster parents”)

⁴⁰Defendants also argue that the federal secretary’s approval of the Washington state plan suggests that the state’s procedures in no way violate plaintiffs’ due process rights. However, the approval of the

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1 existence of circumstances in which “some valid governmental interest . . . that
2 justifies postponing [a] hearing until after the event” is “extraordinary.” See id. at
3 570 n.7.

4 “[T]he State has an urgent interest in the welfare of the child . . .” SantosX~~
5 v. *Kramer*, 455 U.S. 753, 766 (1982). This fact is evidenced by the existence of
6 Washington’s foster care system itself and the laws implementing that concept. The
7 government is profoundly interested in assuring that children have access to the
8 “rights of basic nurture, physical and mental health, and safety . . . [as well as] a safe,
9 stable, and permanent home.” RCW 13.34.020; see also *Prince v. Massachusetts*,
10 321 U.S. 158,165, 168 (1944) (state has interest in “protect[ing] the welfare of
11 children” and in giving them “opportunities for growth into free and independent
12 well-developed men and citizens,” as well as in protecting “the physical and
13 psychological well-being of child abuse victims”).

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15 Therefore, the public interest, rather than contradicting the interest in added
16 procedural protections, actually warrants those safeguards. Provision of notice and
17 the opportunity for a hearing would improve the adequacy of long-term placements
18 and contribute to the very goals set out in Washington law : lowering foster parent
19 burn-out, RCW 74.13.270; expanding adoption programs “to encourage stable
20 placements for foster children” who are unlikely to return to their birthparents, RCW
21 74.13.320; lowering placement numbers is reinforced by other sections, including the
22 mandate to provide additional foster parent training to curtail disruption of foster
23 home placements, RCW 74.13.310; and providing short-term respite care for foster
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26 plan implies no conclusions that the state is either implementing the promises made in the plan or
complying with the requirements of federal due process.

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1 parents caring for children with special needs with the goal of “minimiz[ing]
2 disruptions to the child,” RCW 74.13.270.

3 Notice would also place a minimal burden on the agency. Hearings would, no
4 doubt, add an administrative cost, and perhaps provide an additional financial burden.
5 However, administrative and “financial cost alone is not . . . controlling” in the due
6 process inquiry. *Mathews*, 424 U.S. at 347. Moreover, the necessity of justifying the
7 need for the move and the adequacy of the new foster home will force greater
a attention to foster parent preparation and the needs of the child, thereby reducing
9 placement changes, increasing permanency, and lowering the overall cost of care.

10 The law establishes that foster children hold a liberty interest in stability and
11 permanence while in foster care. Moreover, the facts vigorously dispute defendants’
12 contention that it has sufficiently protected plaintiffs’ interest. Therefore, the risk of
13 erroneous deprivation is apparent. Finally, the countervailing governmental interest
14 does not outweigh the interest and the risk of deprivation. Accordingly, defendants
15 are not entitled to summary judgment on these claims.

17 **E. DEFENDANT QUASIM IS LIABLE FOR INJUNCTIVE RELIEF AND DAMAGES**
18 **UNDER 42 U.S.C. § 1983.**

19 Secretary Lyle Quasim argues that, because he had no personal involvement
20 in the files of the named plaintiffs, he is not at fault for their injuries. Under 42 USC
21 § 1983, individual state officials are liable for failing to supervise and train their staff,
22 leading directly to civil rights violations.

24 Supervisors can be held liable for: (1) their own culpable action or
25 inaction in the training, supervision or control of subordinates; (2)
26 their acquiescence in constitutional deprivation of which a complaint

is made; or (3) for conduct that showed a reckless or callous indifference to the rights of others.

Cttningham v. Gates, 221 F.3d 1271, 1292 (9th Cir. 2000).

Quasim failed to provide adequate training to foster care workers and parents (See Declarations of Mary Rogers, Christopher Winstanley, and Dr. Jon Come). These failures and Defendant Quasim's indifference to the needs of these foster care children resulted in the constitutional violations discussed in *Marisol v. Giuliani*, 929 F. Supp. 662 S.D.N.Y. 1996 (1996), a landmark case involving the rights of children in foster care, the Federal District Court identified the constitutional rights of foster care children to permanency, appropriate foster care placements and conditions in foster care. In *Marisol*, the Federal Court ruled:

Plaintiffs purport to divide their federal constitutional claims into four categories: "(1) the right to protection from harm while in foster care; (2) the right to conditions and duration of foster care consistent with the purpose of their custody; (3) the right not to be deprived of entitlements created by New York State law without due process; and (4) the right to associate with their biological family members." Plaintiffs' Memorandum of Law in Opposition to Defendants' Partial Motions to Dismiss at 12. Plaintiffs' brief, however, fails to conform to this outline. Indeed, the contours of plaintiffs' substantive due process claims are vague at best.

After careful consideration, however, this Court concludes that plaintiffs are in fact arguing that they were harmed impermissibly by, among other things, defendants' alleged failure to provide appropriate foster care placements and their failure to preserve plaintiffs' right to family integrity. This Court is of the opinion that the asserted right to be free from harm encompasses the asserted rights to appropriate conditions and duration of placements . . .

The Second Circuit has extended the reasoning of *Younaber.g* to children who are the responsibility of the state. See *Societv for Good Will to Retarded Children. Inc. v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984'); see also *Doe v. New York Ci& DeD't of Social Sews.*, 649 F.2d 134, 141 (2d Cir.1981), cert. denied, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983). Indeed, in the child welfare context, that court

1 has recognized that, “[w]hen individuals are placed in custody or under
2 the care of the government, their governmental custodians are
3 sometimes charged with affirmative duties, the nonfeasance of which
4 may violate the constitution.” Doe, 649 F.2d at 14 1. This Court agrees
5 with the decision of other courts to extend to children in foster care a
6 substantive due process right to protection from harm. See, e.g.,
7 Nortleet ex rel. Norfleet v. Arkansas Dept of Human Servs., 989 F.2d
8 289, 291-93 (8th Cir.1993); Yvorzne L. ex rel. Lewis v. New Mexico
9 Dept of Human Servs., 959 F.2d 883, 892-93 (10th Cir.1992). K.H.
10 Through Murphy v. Morgan, 914 F.2d 846, 849-50 (7th Cir.1991);
11 Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th
12 Cir.), cert. denied, 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145
13 /1990); Aristotle P. v. Johnson, 721 F.Supp. 1002, 1008-10
14 (r.D.Ill. 1989).

15 The parties agree that custodial plaintiffs have a constitutional right to
16 be free from harm. The issue facing this Court with respect to
17 custodial plaintiffs, therefore, is not whether they are entitled to
18 protection from harm but, rather, how broad that protection must be.
19 The Supreme Court has held that the right to be free from harm
20 encompasses the right to essentials of care including adequate food,
21 shelter, clothing, and medical attention. See Younabera, 457 U.S. at
22 324, 102 S.Ct. at 2462. Additionally, the state must provide reasonably
23 safe conditions of confinement. See id. at 315-16, 102 S.Ct. at 2457-
24 58. Custodial plaintiffs, however, ask this Court to take an expansive
25 view and recognize a substantive due process right to be free not only
26 from physical harm but also from psychological, emotional, and
developmental harm. Defendants, on the other hand, urge this Court to
take a narrower approach to custodial plaintiffs’ substantive due
process claims.

18 The Court is inclined, at this juncture, to take a broad view of the
19 concept of harm in the context of plaintiffs’ substantive due process
20 claims. Clearly, the state is required to protect children in its custody
21 from physical injury. This Court further finds that custodial plaintiffs
22 have a substantive due process right to be free from unreasonable and
23 unnecessary intrusions into their emotional well-being. As the United
24 States District Court for the Northern District of Illinois reasoned, “[a]
25 child’s physical and emotional well-being are equally important.
26 Children are by their nature in a developmental phase of their lives and
their exposure to traumatic experiences can have an indelible effect
upon their emotional and psychological development and cause more
lasting damage than many strictly physical injuries.” B.H. v. Johnson,
715 F.Supp. 1387, 1395 (N.D.Ill.1989); see also Aristotle P., 721
F.Supp. at 1009-10 (finding that “[t]he fact that the plaintiffs’ injuries
are psychological rather than physical is of no moment” and that such

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injuries support substantive due process claim); *Doe v. NOV Yor-k Citv Lhq't of Socid Servs.* **6170 F.Supn.** 1145, 1175-76 (S.D.N.Y.19871 (finding that defendants violated plaintiffs' substantive due process rights by subjecting them to physical, emotional, and psychological harm).

Clearly, Mr. Quasim's failings and indifference invades and violates the children's federal and constitutional rights. For these reasons, he is individually liable for damages under 5 1983.

The State does not challenge Plaintiffs' 4 1983 actions for injunctive relief.

1. Quasim Tolerated and Accepted the System-Wide Practice of Multiple Foster Care Placements.

Who is responsible for the wholesale shuttling of foster children from house to house? Who is responsible for the Department's failure to provide the mental health care prescribed for foster children in State care?

By stating he had no involvement in the files of Amie Anderson and Robin Brandon and other plaintiff children, Mr. Quasim implies that those caseworkers involved are at fault. Amie Anderson alone had over 19 different caseworkers. But Amie's and ant the other plaintiffs experience in the foster care system is not unique. The life of each child in this lawsuit testifies that DSHS, *as a system wide practice*, failed to provide "safe, stable, and permanent homes." This is the record of DSHS' policy of multiple placements:

Child	Number of Placements	Separated from Siblings by DSHS
Jessica Braam	7	Yes, Half sister Mary and Three Half brothers living in Texas
Robyn Brandon	18	No siblings to separate from
Cassidee Bursch	6	Yes
Jenneiva Bursch	6	Yes

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Beth Hardin	30	Yes
Eboney Hardin	15	Yes
Eryk Hardin	13	Yes
Ivory Hardin	35	Yes
Amie Anderson	29	Yes
Shaun Sanchez	12	Yes
Desi Morgan	11	Yes
Patrick Morris	16	Yes
Tim Olson	10	Yes, when brother Matthew was moved to biological fathers home
Total	208	

These 13 children have lived in over 208 homes.

DSHS' records confirm the extent of this institutional victimization of children. A 1995 DSHS study funded in association with the Kellogg Foundation and Families For Kids showed the Department routinely placing children in multiple foster care homes:

- Over 14,000 children were moved more than twice.
- Over 7,000 children were moved three times.
- Over 3,000 children were moved four times.
- Over 2,000 children were moved five times.
- Over 1,000 children were moved six times.
- Over 700 children were moved seven times.
- Over 1,300 children were moved more than eight times.

Report on Children in Foster and Group Care Placements in Washington State Between June 1985 and August 1995, Office of Children's Administration Research (May 1, 1996). (Exhibit to Conte Dec.)

A 1997 DSHS study found that 44% of the children in foster care longer than one year had been in three or more homes. Many of these children have been in 10,20,30, and even 40 homes.

More recent DSHS data confirms that this practice continues unabated. On October 20, 1999, Dee Wilson, Regional Administrator, summarized the latest study on multiple placements:

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1 25% of children in Washington State, who remain in foster care for
longer than one year, have 4 or more placements; 15% of these have 6
or more placements.

2 Ms. Wilson admits “These are distressing numbers.. .” (Exhibit 4to Novotny Dec.)

3 When biological parents abandon their children in the homes of strangers, DSHS
4 considers it “neglect” or “abandonment” and removes the child. Yet DSHS often
5 continues this abandonment by leaving the child in the homes of one stranger after
6 another. Although these are foster homes, to the child they are all strangers and the
7 harm is the same.
8

9 2. Quasim Understood His Denartment Had a Svstem-Wide Practice of
10 Multiple Placements, Yet Acauiesced to the Violation of Foster
11 Children’s Rights
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13 If in a few isolated cases foster children moved from house to house for years
14 on end, the fault would rest with a few indifferent caseworkers. However, when
15 thousands of children suffer the same harm from a widespread practice of hundreds of
16 caseworkers, a system-wide failure exists; and fault lies with thehead of the
17 Department who authorizes or tolerates such practices.

18 Quasim cannot claim he was unaware of the suffering and harm his agency’s
19 practice caused children. When he took office in December 1995, Quasim’s
20 immediate predecessor, Secretary Jean Soliz, was so distressed about the
21 Department’s indifference to children and wholesale “violation of children’s right’s”
22 that she initiated action to sue her former agency to enforce the rights of foster care
23 children. (Deposition of Jean Soliz.)
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1 Dr. Jon Conte, a Professor of Social Work at the University of Washington and an
2 expert on the Washington State foster care system, summarized over two decades of
3 DSHS' reports and knowledge on the causes of multiple placements- all completed
4 and done before Quasim took office. These studies produced from the Department's
5 files criticized Agency management of the foster care system, including:

- 6 • Foster parents inadequately trained.
- 7 • Caseworkers inadequately trained.
- 8 • Foster parents inadequately informed about the social and health history of the
9 child.
- 10 • Problems with adoption support.
- 11 • Financial disincentives to adopt.
- 12 • Lack of other incentives to adopt.
- 13 • Lack of permanency planning options.
- 14 • Legally freeing a child without prospects for a permanent placement.
- 15 • Focusing on one resource for permanence.
- 16 • Lack of clear timeline and tasks for realization of worker's primary, or only,
17 permanency plan.
- 18 • Native American heritage identified after a plan has been undertaken.
- 19 • Incomplete relative search.
- 20 • Underutilization of extended family.
- 21 • Lack of clear direction on prioritizing a child's need to be with extended
22 family when the family meets only minimal parenting standards.
- 23 • Inadequate communication between CPS, CWS and adoption units.
- 24 • Lack of collaboration between DCFS and private agencies.
- 25 • Caseloads are too large.
- 26 • Supervisors have too many supervisors.
- To few CSW workers, as supported by caseload studies.
- Inadequate clerical support for social workers.
- Lack of incentive to use staffing dollars efficiently.
- Home study backlog.
- Lengthy paperwork process.
- Unmanageable files.
- Form 13-41 is incomplete.
- Delays or changes in case plans due to worker turnover.
- Low prioritization of finalization-crisis comes first.
- Over-reliance on guardianships.
- Interstate compact delays.
- Children are not prepared for adoption.
- Child evaluations are delayed or not done at all.

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- Children are often not seen by their worker on a regular basis.

1 (Declaration of Jon Conte Ph.D.)

2 At trial, plaintiffs will introduce study after study that show Quasim knew of the
3 criticisms of management practices, knew of the harm it was causing children but
4 took no meaningful action. And plaintiffs will show how they and other children
5 suffered severe injury by this callous indifference to their plight.
6

7 The mismanagement of the Agency was also repeatedly publicized in *ihc*:
8 media. For example, during Mr. Quasim's tenure, the Seattle PI published one story
9 on September 23, 1999 stating:

10 Two year olds sleep in an office building. Teenagers are sent to a
11 homeless shelter, then turned out onto the street each morning.
12 Troubled youths are jailed on minor charges because the state can't
13 provide a place to live. Children are shuttled between emergency
overnight beds, sometimes in dirty, overcrowded homes.

14 (*Seattle Post Intelligencer*, September 23, 1999; Exhibit 5 to Declaration of Dr.
15 Conte)

16 Quasim personally wrote a letter to the Governor's office explaining why a
17 ten-year-old girl, a victim of multiple placements, was living in DSHS offices during
18 the day until DSHS caseworkers lost her. Quasim wrote:

19 [she] has had several temporary foster care placements, while awaiting
20 a more permanent placement. She spent many daytime hours in the
21 DCFS office between temporary placements.

22 Eventually, DCFS could not find the girl.

23 On May 6, the girl was in the office again. She returned sometime in
24 the morning after an overnight placement. At approximately 3:00 to
25 3:10 the girl was seen leaving the office with another youth by a
building guard . . . The child has not been seen since that time."

1 Finally, no dispute exists that multiple placements continued unchecked
2 through Quasim's tenure. Based in part on data from Quasim's term, the Washington
3 State Institute for Public Policy released a report in February 2001 that found:

4 Multiple placements are associated with worse outcomes for children.

5 Even for children with few impairments, being moved from setting to
6 setting often increases their problems.

7 Given the harm associated with multiple placements, the clear ideal is
8 connecting children with the most appropriate setting at the onset of
9 their foster care experience, taking into account their psychological
10 and physical needs.

11 (Exhibit to Conte Dec.).

12 The Institute's study found that Mr. Quasim and the agency had failed to properly
13 train caseworkers and correct the long standing practices that contributed to multiple
14 placements.

15 0 "Placement failure can also cause problems in children who were
16 previously functioning adequately."

17 • "Placements are often made without planning or matching children
18 and foster parents."

19 0 "Foster parents are not always fully informed about the children's
20 history or problem behaviors."

21 • "Children's psychosocial needs are not routinely taken into
22 account."

23 0 "Children must repeatedly fail before their level of care increases."

24 0 "Some children's behavior deteriorates as a consequence of
25 disrupted placements."

26 (Exhibit to Conte Dec.).

The study also noted:

"At present in Washington State, like most other states, placement
decision-making is not based on matching children to services and
settings that are specifically designed to meet their needs and ensure
stability. Decision-making about services and level of placement is
instead driven by legal mandates, scarcity of placements, available
community services, and cost. Systematic

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not routine, and their psychosocial needs are not specifically weighed in decision-making.” p. 6

Secretary Quasim had clear knowledge of the damage caused by multiple placements and his Agency’s failures that contributed to this practice. Agency mismanagement created this policy, and under Quasim’s tenure, it only worsened.

3. Former Secretary Quasim Is Liable For Damages

Individual state officials are responsible for failing to supervise and train their staff, leading directly to civil rights violations. *Cunningham v. Gates*, 221 F.3d 1271, 1292 (9th Cir. 2000). In a similar challenge to the Milwaukee County foster care system, the Federal District Court held State officials liable for failing to adequately supervise the system:

[Supervisory liability satisfies the causation requirement of Section 1983 when supervisory officials who have not been directly involved in the deprivation itself fail to take action which they are required to take to stop the violations of their subordinates in a manner which amounts to deliberate indifference to the rights of persons with whom the subordinates come in contact, or when they create policies and practices pursuant to which the constitutional deprivation was carried out.

Blondis v. Thompson, 877 F. Supp. 1268, 1278 (E.D.Wisc. 1995).

In Cruz v. City of Laramie, 239 F.3d 1183 (10th Cir. 2001), the Tenth Circuit Court of Appeals concluded the questions of fact regarding a supervisor’s responsibility precludes summary judgment on 4 1983 claims:

Generally, “the inadequacy of police training may serve as the basis for 4 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” With respect to a showing of “deliberate indifference,” the district court determined that material issues of fact precluded summary judgment.

1 The same issues of fact exist here. Former DSHS caseworker, Christopher
2 Winstanley, states:

3 Foster Parents Are Inadequately Trained, Informed, and
4 Suported.

5 Foster parents are not trained to care for the emotionally abused
6 children in DSHS' foster care system. While foster parents were
7 provided general training about being a foster parent, they received no
8 meaningful training in the severe and complicated mental health and
9 behavioral problems of the children in the foster care system. Foster
10 parents are simply not equipped to handle or understand these
11 children.

12 (Declaration of Christopher Winstanley).

13 Mary Rogers, a DSHS foster care worker for over 20 years, alleges Mr.
14 Quasim failed to adequately train caseworkers.

15 DSHS caseworkers should be checking in with the children and their
16 foster parents as often as needed. However, many caseworkers, due to
17 large case loads and inadequate training, fail to check in with the
18 children and their foster parents even for the legally required standard
19 of once every ninety days. The result is that foster parents are left on
20 their own to deal with complicated children. DSHS seems to become
21 involved only when something goes wrong. For example, a child may
22 wrongly accuse the foster parents of neglect. Then the foster parents
23 become the subjects of an investigation. Foster parents have left the
24 foster care system because they don't feel adequately supported by
25 DSHS.

26 (Declaration of Mary Rogers)

Former Secretary Soliz indicated that one of her motivations for seeking to
file a lawsuit against DSHS was that the Agency did not consider the violation of
children's rights a priority. (Deposition of Jean Soliz). She identified agency
mismanagement as the underlying cause of multiple placements.

Q. (Mr. Farris). Do you have opinions about the management
of the agency?

A. Yes. Of course. I mean, it was my life for a long time.

Q. What are your opinions?

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1 A. My opinion is that management matters a lot in these
2 issues. And that for a long time the management in
3 children's services was very inadequate and that as the
4 system grew up over time, these inadequacies resulted in a
5 chaotic system for a long time.

6 (Deposition of Secretary Soliz).

7 DSHS caseworker Mary Rodgers assigns direct fault to Mr. Quasim's
8 indifference to the violation of children's rights.

9 Failure of the Department Management

10 Because the Secretary of the Department is ultimately responsible for
11 the management of the department, that failure must ultimately be
12 assigned to the Secretary of the DSHS, including in my opinion Lyle
13 Quasim. As the Secretary of the Department, Mr. Quasim is
14 responsible for the failure of his caseworkers to be adequately trained,
15 the failure of his employees to adequately train and inform foster
16 parents etc.

17 (Declaration of Mary Rogers at 7).

18 At trial, the jury must decide whether Secretary Quasim's conduct breached
19 his duty to foster care children and violated §1983. Under the holdings of
20 *Cunningham*, *BZondis* and *Guz*, Quasim can be held liable for damages for not
21 training, supervising, or controlling of his subordinates; for acquiescing in the
22 constitutional deprivation of the plaintiff children's right to a safe, stable and
23 permanent home; for remaining callously indifferent to the rights of foster care
24 children. These are material issues of fact. Although Quasim may blame his
25 caseworkers, it is clear that the caseworkers blame him. (Declarations of Mr.
26 Winstanley and Ms. Rogers). As the *Blondis* court concluded,

with the plaintiffs alleging systematic and widespread constitutional
violations, the State defendants shall not be allowed to wash their
hands of their alleged responsibilities.

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Be~+mzirz, 138 Wn.2d at 548-49 (Sanders, J. dissenting).

1 Plaintiffs request the Court to recognize their claim for damages from State
2 constitutional violations. Given the importance of this lawsuit, this Court has a
3 compelling opportunity to acknowledge that violations of State constitutional rights
4 do have a remedy.
5

6 **V. CONCLUSION**

7 Each year defendants petition the juvenile courts to grant them custody of
8 thousands of children whose parents, defendants' allege, are failing to provide them
9 with adequate care. Upon assuming custody of these children, defendants are
10 obligated to provide a safe, stable and permanent home to each of them. This is a
11 right to which each plaintiff and those who came after them are entitled. But for the
12 plaintiffs and thousands of other infants, boys and girls, and teenagers, their time in
13 defendants care is as abusive or more so than the maltreatment they suffered in the
14 homes of their parents. For many, the bruises they entered care with will fade but the
15 harm inflicted by defendants' actions will scar them forever.
16
17

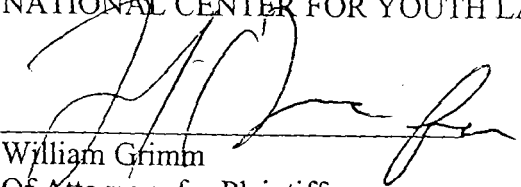
18 In support of their *Motion for Partial Summary Judgment*, defendants submit
19 two declarations - one from a caseworker the other from defendant and former
20 director Quasim. Quasim admits that he never knew the plaintiffs and rests his
21 defense solely on this fact. The caseworker also never met any of the plaintiffs, their
22 foster parents, or their natural parents. The only documents attached to either
23 declaration are a few computer printouts, which the caseworker admits are inaccurate,
24 and a few pages from the plaintiffs files - files which she describes as "voluminous"
25 and that contain between 600 and 300 pages. Neither these brief declarations nor
26

1 sparse supporting exhibits establish that there is no genuine issue of material fact on
2 the issues of plaintiffs' entitlement to procedural safeguards. Defendants have not met
3 their burden of proof and therefore, the court **should** deny Defendant's *Motion*.

4 DATED this 27 day of April, 2000.

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12 William Grimm
13 Of Attorneys for Plaintiffs
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that children in foster care are provided with a full panoply of procedural safeguards.

1 In addition, the instability experienced by the named plaintiffs despite these numerous
2 reviews attests to the failure of these safeguards to ensure stability and permanence
3 for children in foster care.

4 C. **UNDER WASHINGTON LAW, PLAINTIFFS HAVE STANDING TO ASSERT THEIR**
5 **PARENTS' RIGHTS TO PROCEDURAL SAFEGUARDS**
6

7 Should the Court accept defendant's assertion that 42 U.S.C. 5675 (5)C
8 excludes foster children from all procedural safeguards related to a change in
9 placement, however, plaintiffs are still entitled to pursue their claims as third-party
10 beneficiaries of rights conferred by the federal statute.

11 Plaintiffs initiated this suit in Washington state court. Defendants, however,
12 try to impose federal standing requirements on this court. They are mistaken. In a
13 state court action determinations of standing are governed only by principles of state
14 law. Because plaintiffs meet the requirements of state law standing rules, plaintiffs
15 may pursue their statutory claims at issue.

16 As courts of general jurisdiction, the courts of the state of Washington are not
17 limited by the restrictions of Article III of the United States Constitution. See
18 *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616-17 (1989) (recognizing that "state courts
19 are not bound by the limitations of . . . federal rules of justiciability"); *To-Go Trade*
20 *Shows v. Collins*, 100 Wn.App. 483, 489 (2000). Even when interpreting federal
21 statutory or constitutional law, this Court's ability to hear a case is not controlled by
22 federal justiciability standards. See *MARCO*, 490 U.S. at 616-17 (Supreme Court
23
24
25

26 " Some of the reviews are listed as "uncontested" while others are "contested." Defendants offer no explanation of how these two types of reviews differ.