

THE HONORABLE DAVID A. NICHOLS

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SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

JESSICA BRAAM, a minor child, by and through her guardians, Dale and Vickie Braam, et al.,
Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Defendants.

No. 98-2-01570-1

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PROCEDURAL SAEEGUARDS

I. INTRODUCTION

While Plaintiffs' Opposition may make an interesting closing argument to a jury, it fails to address the legal issues raised in Defendants' Motion. Furthermore, even Plaintiffs' own lead expert, Dr. Jon Conte, admits that the **image** Plaintiffs attempt to portray of foster children is inapplicable to the vast majority of children in State care. Regardless, the issues raised by Defendants' Motion, which seeks only to eliminate Plaintiffs' 42 U.S.C. §1983 claims, are purely legal.

What is most noteworthy about Plaintiffs' Opposition is what is missing, Plaintiffs offer no legal authority to support their contorted reading of the Adoption Assistance And Child Welfare Act (AACWA), which is plain on **its** face and provides no affirmative procedural rights to a child when he or she has a placement change. Plaintiffs have also failed to provide any legal authority for the proposition that a child has a constitutionally protected liberty interest in a "stable home," instead ignoring existing contrary law and asking the Court to do the same. Another glaring omission is Plaintiffs' failure to identify any basis upon which Lyle Quasim can be held personally liable for money damages under 42 U.S.C. § 1983. The grounds Plaintiffs have cited for the imposition of liability on Mr. Quasim at best establish a claim for negligence, which is not cognizable under section 1983. Finally, Plaintiffs have failed to cite a single case suggesting that Defendants can be held liable

1 for violations of the Washington Constitution, relying instead on a dissenting opinion and asking this
2 Court to overrule existing Washington law.

3 Also noteworthy are Plaintiffs' concessions. Plaintiffs admit that Washington has a
4 comprehensive scheme in place for a child's moves, and admit that each named Plaintiff received
5 review hearings at least twice a year while in the State's custody. Additionally, Plaintiffs apparently
6 concede that they have no constitutionally protected property interest, and that the State and
7 Department of Social and Health Services ("the Department") cannot be held liable under Section
8 1983.

9 **II. ARGUMENT**

10 **A. The A4CWA does not provide any additional procedural safeguards that Washiwton does 11 not already employ.**

12 **1. The section of 42 U.S.C. §675(5)(C) that Plaintiffs seek to enforce creates rights only 13 for parents, not children.**

14 Plaintiffs' creative reading of 42 U.S.C. §675(5)(C) ignores the foremost rule of statutory
15 construction-if the statute is clear on its face, no further interpretation is necessary. Rubin v. United

16 State, 449 U.S. 174 (1981), both Defendants' Motion and Plaintiffs'

17 Opposition, the statute bears repeating here. In its entirety, Section 675 (5)(C) reads:

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

1 needed to assist the child to make the transition from foster care to independent living;
2 *and procedural safeguards shall also be applied with respect to parental rights*
3 *pertaining to the removal of the child from the home of his parents, to a change in the*
4 *child's placement, und to any determination affecting visitation privileges of parents.*

4 42 U.S.C. §675 (5)(C) (emphasis added).

5 The first part of this statute plainly creates rights for children, but Plaintiffs do not seek to
6 enforce those rights (likely because the State's procedures already protects them; see RCW
7 13.34.145). Rather, Plaintiffs seek to enforce the only subsection that does not address the children's
8 rights, but instead recognizes those of their biological parents. The bulk of the statute establishes
9 specific procedures that are to be employed with respect to each child. There is no genuine dispute
10 that Washington follows these procedures. Plaintiffs, however, contend that the remainder of the
11 statute, that which seeks to protect "parental rights," somehow accords foster children additional
12 procedural safeguards. Such an interpretation reads much more into the statute than its words can
13 lend credence to. Every court that has considered the issue has noted that this subsection provides
14 parents with procedural safeguards. See, e.g., In re J.H., 117 Wn.2d 460,466 (1991); Norman v.
15 Johnson, 739 F.Supp. 1182, 1188 (N.D.111. 1990). *No court has read this subsection as containing*
16 *any additional safeguards for children.* This Court should not be the first.

17 **2. Plaintiffs cannot enforce this subsection of 42 U.S.C. §675(5)(C) on behalf of their**
18 **parents because they have failed to show that their parents cannot enforce it for**
19 **themselves, a fatal infirmity under both the Washington and federal tests for third party**
20 **standing.**

20 Under either Washington or federal law, the general rule is that a person does not have
21 standing to raise claims on behalf of another. Meams v. Scharbach, 103 Wn.App. 498, 511, 12 P.3d
22 1048 (2000), *citing* SinPleton v. Wulff, 428 U.S. 106, 114 (1976). This rule is overcome only if: (1)
23 the plaintiff has suffered an injury-in-fact, (2) the plaintiff and third party have a close relationship,
24 and (3) the third party is somehow hindered from raising the claim on his or her own. Powers v. Ohio,
25 499 U.S. 400,410-11 (1991); Meams, 103 Wn.App. at 512. All three requirements must be met
before third party standing can be granted. *Id.* Although Plaintiffs devote almost four pages to their

1 standing argument, they make no attempt to show that the foster children's parents are in any way
2 hindered from raising their own claims. Plaintiffs have failed to show that they have standing to
3 assert any claims under 42 U.S.C. §675(5)(C). These claims should be dismissed.

4 **3. Even if 42 U.S.C. §675(5)(C) can somehow be construed as providing additional**
5 **safeguards to foster children, the semi-annual hearing each child receives satisfies any**
6 **such requirement.**

7 The numerous procedural safeguards the State employs with respect to each child are laid out
8 in detail in Defendants Motion. What bears repeating is that Plaintiffs do not contest that Plaintiffs
9 received at least two hearings to review their placements every year they were in state custody. While
10 each plaintiff received numerous other procedural protections, the semi-annual hearing undoubtedly
11 provides the most significant protection. Plaintiffs concede that this protection was provided.'

12 **B. Plaintiffs have received all the protection that is due to them under the Due Process Clause.**

13 **1. There is no constitutionally protected "right to a stable home."**

14 It is uncontested and clearly established that a plaintiff is not entitled to procedural due proces!
15 unless he or she has been deprived of a constitutionally protected liberty or property interest. Board o
16 Regents v. Roth, 408 V.S. 564 (1972). The Supreme Court has made it clear that a statute must
17 contain "explicitly mandatory language" to create a liberty interest. Kentucky Dep't of Corrections v.
18 Thompson, 490 U.S. 454,463 (1989).² Here, Plaintiffs argue that RCW 13.34.020 establishes a
19 liberty interest in the "right to a safe, stable, permanent home." This statute, however, is a mere

20 ' Plaintiffs devote much ink to criticizing the Department's alleged failure to follow one of the
21 procedures in the Washington statutes, the use of guardians ad litem. However, this criticism is misplaced, as
22 only a court, not the Department, can appoint a guardian ad litem. RCW 13.34.100. Also, the Department ha!
23 no control over whether guardians ad litem timely submit their reports, another complaint raised by Plaintiffs.

24 * Not every violation of state law gives rise to a constitutional claim. Archie v. City of Racine, 847
25 F.2d 12 11, 1217 (7th Cir. 1988) (en bane) ('A state ought to follow its law, but to treat a violation of state lam
as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than
federal courts are the appropriate institutions to enforce state rules.').

' Plaintiffs cite numerous other statutes as evidence of this right, but argue that the right is created by
RCW 13.34.020. Defendants agree that the other statutes Plaintiffs cite evidence the legislative policy
embodied in-RCW 13.34.020. It is interesting to note that Plaintiffs do not make claims under these statutes,
instead seeking relief under 42 U.S.C. §1983, which provides attorneys' fees.

1 statement of “legislative policy” and creates no substantive rights. In re J.H. and B.H., 75 WnApp.
2 887, 894, 880 P.2d 1030 (1994)s⁴

3 “[S]tatutory policy statements as a general rule do not give rise to enforceable rights and
4 duties.” Aripa v. Dep’t of Sot. & Health Serv., 91 Wn.2d 135, 139, 588 P.2d 185 (1978) *overruled in*
5 *part on other grounds*, State v. WWJ Corp., 138 Wn.2d 595,602, 980 P.2d 1257 (1999), (holding that
6 statute providing “[DSHS] shall...cooperate with public and private agencies in establishing and
7 conducting programs to provide treatment for alcoholics” in the correctional system did not establish
8 prisoner’s right to alcohol treatment). See also, e.g., Whatcom County v. Langlie, 40 Wn.2d 855,
9 861-62, 246 P.2d 836 (1952) (holding that statute stating department of health “[s]hall make full use
10 of all existing public and free facilities and services” was policy statement and created no enforceable
11 rights). The statutory hook upon which Plaintiffs hang their due process claim is an unenforceable
12 policy statement. The Court of Appeals has expressly deemed RCW 13.34.020 a “statement of
13 legislative policy.” In re J.H. and B.H., 75 Wn.App. at 894. As such, it creates no enforceable rights,
14 and certainly no right amounting to a constitutionally protected liberty interest.

B
15 The Court of Appeals rejected a similar attempt to enforce general policy statutes regarding
16 child welfare in In re J.H. and B.M. There, a mother claimed that specific, enforceable rights were
17 created by RCW 74.13.020, which states that DSHS “shall have the duty to provide child welfare
18 services,” defined as “public social services . . . which strengthen, supplement, or substitute for, parenta’
19 care and supervision for the purpose of.. . (2) Protecting and caring for homeless, dependent, or
20 neglected children.” RCW 74.13.920. The court held that “[t]his general duty is an example of a
21 statutory policy statement that does not give rise to enforceable rights.” In re J.H. and B.H., 75
22 Wn.App. at 891. As RCW 13.34.420 is also a mere “statement of legislative policy,” it also “does not
23 give rise to enforceable rights.” @.

24 _____
25 ⁴ The correct name for this case is actually In re J.H. However, as In re J.H., 117 Wn.2d 460 (1991),
has been heavily cited by both sides in this case, confusion would undoubtedly arise by using the same case
name. Thus, Defendants refer to the present of Appeals case as In re J.H. and B.H.

1 In addition to Washington law's foreclosure of a due process claim hinged on "rights"
2 contained in RCW 13.34.020, courts nationwide have uniformly held that there is no constitutionally
3 protected right to a stable home. The Fifth Circuit expressly declined to find a liberty interest in the
4 right to a stable home in Drummohd v. Fulton County Dep't of Family & Children's Services, 563
5 F.2d 1200, 1209 (5th Cir. 1977) (*en bane*), *cert. denied*, 437 U.S. 910 (1978). The Seventh Circuit
6 held that there is "no clearly established right to a stable foster-home environment" in K.H. v.
7 Morgan, 914 F.2d 846,854-55 (7th Cir. 1990). The Maryland Court of Appeals followed suit in &
8 Adoption/Guardianship No. 2633,b46 A.2d 1036, 1047 (Md. App. 1994), and the Ninth Circuit
9 recognized this weight of authority in Gibson v. Merced County Dep't of Human Resources, 799 F.2d
10 582, 589 (Sth Cir. 1986). Plaintiffs make no attempt to distinguish these cases or argue that their
11 holdings are unfounded. In fact, the only case which Plaintiffs cite in support of their liberty interest
12 argument that even involves foster children is Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987).
13 Taylor lends no support to the creation of a liberty interest in a stable home, recognizing only the
14 interests of "the right to be free from the infliction of unnecessary pain" and "the fundamental right of
15 physical safety." *Id.* at 794.

16 As established by both Washington and federal law, there simply is no constitutionally
17 protected liberty interest in the right to a stable home. As Plaintiffs cannot satisfy this preliminary
18 burden, their due process claims must fail.

19 **2. Even if there were a constitutionally protected right to a stable home, Plaintiffs cannot**
20 **show how an extra hearing prior to each move, in addition to the twice yearly hearings**
21 **foster children already receive, would increase the likelihood of a stable home without**
22 **overburdening the State.**

23 Plaintiffs are not entitled to their requested procedural safeguards unless they can show that the
24 likely benefit of the procedure outweighs the burden its implementation would place on the state.
25 Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Here, Plaintiffs request two additional safeguards-
pre-move notice and a pre-move hearing. However, foster children already receive at least two

1 hearings per year. Plaintiffs do not contest this.⁵ Plaintiffs take great pains to show that the current
2 system results in multiple placements for some children, but make no attempt to show how another
3 hearing would reduce the number of placements. They do, however, acknowledge that an additional
4 hearing would be costly.⁶ They also concede that notice and additional hearings would be impractical
5 in “emergency situations.”⁷ Thus, (even Plaintiffs’ own brief defeats their argument.

6 Once again, Plaintiffs fail to address the legal authority that is contrary to their view.
7 Although carefully explained in Defendants’ Motion, a few points bear repeating. The United States
8 Supreme Court rejected procedures very similar to those requested here in a challenge to New York’s
9 foster care system in Smith v. Organization of Foster Families for Equality & Reform [OFFER], 43 1
10 U.S. 816 (1977). The Supreme Court rejected the plaintiffs’ contention that an independent review
11 should be performed automatically prior to a child’s removal from a foster home. *Id.* at 850. This
12 decision was based in part on the Court’s recognition of the value of a less adversarial, less formal,
13 and less traumatic process. *Id.* at 857. In Drummond, 563 F.2d at 1210, the Fifth Circuit also noted
14 that additional hearings could harm foster children by detrimentally slowing the placement process.

15 Plaintiffs’ own expert, Christopher Winstanley, echoed the Fifth Circuit’s concerns in his
16 deposition testimony. When asked whether he thought “it would help to have more court hearings,”

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18 ⁵ In fact, they provide literally no evidence on most of the Plaintiffs, instead relying on general foster
19 care studies. Plaintiffs can hardly argue that each individual Plaintiff received inadequate process without
20 providing evidence as to what process each received. It seems that Plaintiffs have forgotten that no class has
21 been certified.

22 ⁶ No legislative appropriations currently exist for these additional costly hearings. Thus, if this Court
23 were to find in favor of Plaintiffs on this issue, the State Legislature and County Councils would be forced to
24 reallocate scarce tax dollars to hold these hearings at the expense of other programs. Numerous non-party
25 entities and individuals, in addition to the Department, including the county court systems, assigned counsel
programs, and guardian ad litem programs, would need to dedicate additional resources to conduct the
additional procedures Plaintiffs suggest. Such policy determinations would be better left to the legislature for a
system-wide analysis, rather than to the Judiciary with a limited set of facts and no power of appropriation.

⁷ Plaintiffs fail to define “emergency situations.” However, most circumstances necessitating a
placement change could be considered emergencies. Plaintiffs cannot seriously argue that Department social
workers move children unless the change is needed. Thus, it seems that Plaintiffs have, in effect,
acknowledged that their requested procedures would be impractical in many situations.

1 Winstanley responded, "More court hearings? Not necessarily, no, I do not think so.. .I' Winstanley
2 Dep., p. 102 1.25 - p. 103 11. 1-2, attached in relevant part to Declaration of Hooke as Exhibit A. The
3 dialogue continued as follows:

4 Q Would it help to have noted in the hearing every time a child is moved from foster
placement to foster placement? Would that cut down on multiple placement?

5 A It would raise the workload.

6 Q So it would not cut down on multiple placement; it would just make your job
harder?

7 A Indirectly it would lead to more placements because it would be an incremental
8 increase in the amount of time available to spend on any particular-incremental
decrease in the amount of time available to spend on any particular case.

9 Winstanley Dep., p. 103 11. 14-24.) Winstanley's statements are bolstered by the testimony of another
10 of Plaintiffs' experts, Mary Rogers, who stated that caseworkers are already overburdened with
11 Department procedures and paper work. Declaration of Rogers, p-3,1.26 -p-4,11.1-2, p.5, 11.17-20.⁸

12 Moreover, Plaintiffs' lead expert, Dr. Jon Conte, in his recent deposition testimony, admitted
13 that the procedural safeguards already in place work well for over eighty percent (80%) of children in
14 foster care. Conte Dep., p.82,11.1 1-17, attached in relevant part to Declaration of Hooke as Exhibit B.
15 In fact, more than half of foster children had no more than two placements while in state custody, and
16 less than two percent (2%) had more than five. Id. at pSO, 11.10-16 and p-59,11.11-15. Even Amie
17 Anderson, whom Plaintiffs have selected as their poster child for the Department's alleged failings,
18 testified that she had numerous court hearings and other procedural protections, such as attorney and
19 guardian ad litem representation.' Anderson Dep., p.26, 11.2-25, p.27,11.1-10, p.30,11.3-8, attached in
20 relevant part to Declaration of Hooke as Exhibit C.

21 _____
22 * Ms. Rogers' Declaration was submitted with Plaintiffs' materials in Opposition to this Motion. It
appears that Ms. Rogers last worked for the Department in 1987, thirteen years ago.

23 ⁹ It is also noteworthy that, considering the extreme abuse Amie's biological father inflicted upon her,
24 she is doing remarkably well, maintaining a 3.7 grade point average as a senior at Bothell High School and
25 holding a job at her local library. Anderson Dep., p.4,11.2-9; p.7, 11.7-22. Amie doesn't smoke, drink alcohol
or use drugs, has never been in trouble with the police, and has never wanted to harm herself. Id. at p.33,11.10-
15, p.34, 11.23-25. Plaintiff Patrick Morris, who is also now an adult, also stated that he was not harmed at all
by his multiple placements. See letter from Patrick Morris to Whom It May Concern, written March 15,2000,
attached to Declaration of Hooke as Exhibit D.

1 It is clear that both Washington and federal law preclude a finding that Plaintiffs have a
2 constitutionally protected liberty interest. Hence, their Due Process claims must fail. Nonetheless,
3 even if this Court creates a liberty interest, Plaintiffs are not entitled to additional procedural
4 safeguards. The additional hearings that Plaintiffs request would undeniably be extremely costly to
5 the State, and may actually do the children more harm than good. According to Plaintiffs' own
6 experts, the current system works for most children, is already burdened with too many procedures,
7 and would not be helped by additional hearings. Plaintiffs themselves have proven that the benefit, if
8 any, of the requested additional procedures is outweighed by the burden they would impose on the
9 State. Plaintiffs cannot meet the Mathews v. Eldridge balancing test.

10 **C. Defendant Quasim cannot be held liable for money damages under Section 1983 because**
11 **Plaintiffs have not alleged that he violated a well established constitutional right.**

12 Plaintiffs effectively concede that, based on Will v. Michigan Dep't of State Police, 491 U.S.
13 58,71 (1989) they have no cognizable claim for money damages against the State, the Department, or
14 Mr. Quasim in his official capacity. Plaintiffs also fail to offer any admissible evidence to show that
15 Mr. Quasim personally participated in any alleged deprivation of Plaintiffs' rights. Plaintiffs'
16 challenge to the adequacy of Mr. Quasim's supervision of Department social workers assigned to
17 participate in the Plaintiffs' dependencies is insufficient as a matter of law because there is no
18 respondeat superior or vicarious liability actionable under 42 U.S.C. §1983. Polk County v. Dodson,
19 454 U.S. 312,325 (1981).

20 In their Opposition, Plaintiffs have, for the first time, articulated the basis on which they allege
21 Mr. Quasim is personally liable. They claim that Mr. Quasim "can be held liable for damages for not
22 training, supervising, or controlling of (sic) his subordinates; for acquiescing in the constitutional
23 deprivation of the plaintiff children's right to a safe, stable and permanent home; [and] for remaining
24 callously indifferent to the rights of foster children." These allegations, however, are patently
25 insufficient to state a claim for money damages against an individual state official under 42 U.S.C.
§1983.

1 A state official can be held liable for money damages under Section 1983 only if he or she
2 violated a constitutional right that has well established at the time of the violation. Harlow v.
3 Fitzgerald, 457 U.S. 800 (1982). It is not enough that the state official could have predicted that
4 courts would establish the right based on existing case law. Anderson v. Creighton, 483 U.S. 635, 640
5 (1987). The specific right asserted must have already been explicitly established. *Id.* Thus, Mr.
6 Quasim cannot be held liable for money damages unless the specific right asserted-the constitutional
7 right to a stable home-was clearly established at the time he allegedly violated it.

8 Not only was the constitutional right to a stable home not clearly established when Mr.
9 Quasim allegedly violated it, it does not exist now. As explained in the Due Process discussion
10 above, there is no constitutionally protected liberty interest in the right to a stable home. Every court
11 which has been asked to create one has expressly declined. Drurnmond v. Fulton County Dep't of
12 Family & Children's Services, 563 F.2d 1200, 1209 (2nd Cir. 1977) (en bane), *cert. denied*, 437 U.S.
13 910 (1978); K.H. v. Morpan, 914 F.2d 846, 854-55 (7th Cir. 1990); In re Adoption/Guardianship No.
14 2633,646 A.2d 1036,1047 (Md. App. 1994).

15 As to Mr. Quasim, the Seventh Circuit rejected Plaintiffs' precise claim in K.H. v. Morgan,
16 914 F.2d at 853. The court held that state officials could not be liable for money damages under
17 Section 1983 because there was no "clearly established right to a stable foster-home environment."
18 *Id.* No court has recognized such a 'right since the Seventh Circuit's decision. There was no "clearly
19 established right to a stable foster-home environment" in 1990, and there is none today. If this Court
20 finds that such a right exists, it will be the first to do so. This purported constitutional right does not
21 exist now, and certainly did not exist throughout Mr. Quasim's tenure at DSHS when the alleged
22 violations occurred." Thus, Mr. Quasim cannot be held liable for money damages under Section
23 1983.

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1^o Mr. Quasim was Secretary of the Department from December 1995 through July 2000

1 In support of their argument that Mr. Quasim can be held personally liable for money damages
2 under Section 1983, Plaintiffs rely extensively upon Marisol A. v. Giuliani, 929 F.Supp. 662 (SDNY
3 1996). However, the issue of personal liability for money damages was not raised, addressed, or even
4 mentioned in Marisol A. The opinion does not recite the standard for holding a state official liable for
5 money damages under Section 1983, or even say whether the plaintiffs were seeking money damages.
6 The case is totally inapplicable to claims against Mr. Quasim.

7 Plaintiffs also rely upon Cunningham v. Gates, 229 F.3d 1271 (9th Cir. 2000), Blondis v.
8 Thompson, 877 F.Supp. 1268 (E.D.Wisc. 1995) *different result reached on reconsideration*, 967
9 F.Supp. 1104 (1997), and Crux v. City of Laramie, 239 F.3d 1183 (10th Cir. 2001), all of which
10 actually support a finding that Mr. Quasim is immune from liability in this suit. Conveniently,
11 Plaintiffs ignore the fundamental rule that money damages cannot be awarded under Section 1983
12 unless the officer violated a clearly established constitutional right. Cunningham, 229 F.3d at 1287,
13 Crux, 239 F.3d at 1187. In Cunningham, the court specifically held that the Plaintiffs had met their
14 burden of proving that the right the defendants allegedly violated was clearly established.
15 Cunningham, 229 F.3d at 1287-88 (holding that Fourth Amendment's right to be free from excessive
16 use of force was clearly established in case where police officers shot plaintiffs). In Blondis, the
17 defendants admitted that the plaintiffs had "colorable constitutional claims." 877 F.Supp. at 1277.

18 Blondis, however, best demonstrates Mr. Quasim's immunity and Plaintiffs' propensity for
19 quoting cases out of context. As explained above, the court stated that "[a] plaintiff bears the burden
20 of showing that: (1) the defendants' actions violated a constitutional or statutory right; and (2) the right
21 was clearly established and reasonable persons in the defendants' position would have known their
22 conduct violated that right." 239 F.3d at 1187. The court then held that the Fourth Amendment's
23 admonition against the use of excessive force includes the constitutional right "to be free from a hog-
24 tie restraint" where the arrestee has "diminished capacity." *Id.* at 1189. However, the court held that,
25 prior to its decision, this right was not clearly established, precluding a finding of liability against the

1 state officers. *Id.* at 1190. The portion of the opinion which Plaintiffs cite relates only to the liability
2 of the city itself, not individual officials. *Id.* at 1191.

3 Municipality liability is based on a wholly different standard, which is inapplicable here. *See*, e.g.,
4 *Id.* at 1187-91 (using different rule for determining individual officers' liability and city's
5 liability). The State, its agencies, and officials are not municipalities subject to Section 1983 claims
6 for allegedly unconstitutional policies or customs. *See, e.g., Board of County Commissioners v.*
7 *Brown*, 520 U.S. 397, 403 (1997). Unlike counties, cities, and other municipalities, states, state
8 agencies, and state officials are not "persons" subject to suit under Section 1983. *Id.* Therefore,
9 Plaintiffs' heavy reliance on cases addressing municipal liability claims for allegedly inadequate
10 training or supervision is wholly misplaced.

11 **D. There are no cognizable claims for damages for violations of the Washington Constitution.**

12 There is no cause of action for money damages for a violation of the Washington Constitution.
13 *Spurrell v. Block*, 40 Wn.App. 854, 862, 701 P.2d 529 (1985) ("The constitutional guaranty of due
14 process, Const. Art. 1, s. 3, does not of itself, without the aid of augmenting legislation, establish a
15 cause of action for money damages, against the State in favor of any person alleging deprivation of
16 property without due process."). *See, also Wailer v. Washington*, 64 Wn.App. 318, 336, 824 P.2d
17 1225 (1992) (stating plaintiffs "conceded that no independent tort cause of action for violation of due
18 process existed in Washington"); *Stems Amusement, Inc. v. Washington*, 7 Wn.App. 516, 500 P.2d
19 1253 (1972) (holding that Due Process Clause of Washington Constitution does not "create a cause of
20 action for money damages against the State"). Plaintiffs ask the Court to overrule these appellate court
21 decisions, citing only Justice Sande's dissenting opinion in *Benjamin v. WSBA*, 138 Wn.2d 506, 98C
22 P.2d 742 (1999) which did not involve the Due Process Clause. Under established Washington law,
23 Plaintiffs' claims based on the Washington Constitution are not cognizable.

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III. CONCLUSION

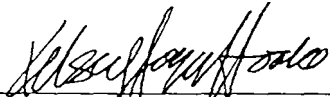
Plaintiffs' stories undeniably evoke sympathy. However, Defendants' Motion is not an opportunity for Plaintiffs to make a closing argument. Plaintiffs' claims must still comport with the law. The claims challenged in Defendants' Motion are not legally viable. Plaintiffs' claims under the AACWA must be dismissed as the subsection upon which they rely grants rights only to parents, not foster children. Their Due Process claims must be dismissed because there is no constitutionally protected liberty interest in the right to a stable home. Additionally, both of these claims should be dismissed because Plaintiffs are already accorded twice yearly hearings, satisfying any possible procedural requirements. Plaintiffs' claims for money damages against the State, the Department, and Mr. Quasim must be dismissed because they have not shown that any of these Defendants is a "person" subject to suit under Section 4983, or that Mr. Quasim violated a clearly established constitutional right. Lastly, their claims based on the Washington Constitution must be dismissed as there are no private causes of action for money damages for alleged violations of the Washington Constitution.

RESPECTFULLY SUBMITTED this 14th day of May 2001.

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