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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' OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY AS CLASS ACTION PURSUANT TO CR 23

I. INTRODUCTION

Plaintiffs' request for class certification is based solely on constitutional and 42 U.S.C. 0 1983 claims, all of which the Court dismissed. Plaintiffs claim they have met the requirements of CR 23(b) because they seek injunctive relief. However, the claims on which they request injunctive relief were dismissed on summary judgment. To the extent that Plaintiffs suggest newly referenced state statutes and regulations entitle them to injunctive relief, no such claims have been pled. As such, Plaintiffs have no claims on which to base class certification. Plaintiffs have failed, simply and completely, to establish any basis for class certification under CR 23(b).

Although it is plain that the requested class cannot be certified because Plaintiffs have not met the requirements of CR 23(b), Plaintiffs have also failed to meet the requirements of CR 23(a). Specifically, Plaintiffs have not shown that they are typical members of the class which they seek to represent, or that their individual cases have much

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1 in common with each other, let alone with all the foster children in the purported class. As
2 the purported class includes all children “who are at risk” of having three placements, it
3 encompasses literally every foster child in Washington. Plaintiffs’ own experts have
4 testified that the foster care system works well for the vast majority of children, even those
5 with several placements, and that the named Plaintiffs are not typical of most foster
6 children.

7 Additionally, the facts and issues of each named Plaintiff vary vastly from one to
8 another. For example, some of the Plaintiffs are now adults. -Some do not wish to be part
9 of this lawsuit. Some were adopted, then returned to foster care. In sum, the only thing
10 these plaintiffs have in common is atypicality-none of them has a story or claim like that
11 of any other foster child in the State. In fact, the named Plaintiffs probably had the most
12 tragic and unusual childhoods of all of Washington’s foster children. In addition to the
13 differences among the children, Plaintiffs’ experts testified that there are vast differences in
14 the treatment of foster children among the State’s thirty-nine counties, showing that state-
15 wide certification is inappropriate.

16 Finally, although fully explained in Defendants’ Motion for Summary Judgment re:
17 Separation of Powers, incorporated herein by reference, it bears repeating that this is not the
18 appropriate forum for any reform of the foster care system. The vague injunction that
19 Plaintiffs request itself demonstrates this, as it would place Washington’s entire foster care
20 system under the control of this Court-a daunting undertaking.

21 As Plaintiffs have failed to meet the requirements of both CR 23(a) and (b), the
22 purported class should not be certified, and Defendants request that Plaintiffs’ Motion be
23 denied. In the alternative, Defendants request that the Court delay ruling on the Motion
24 until after trial, when the specific and unique facts showing the lack of commonality and
25 typicality can be fully fleshed out in this complex lawsuit.

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II. FACTS

A. The Foster Care System.

Plaintiffs' lead expert, Dr. Jon Conte, has testified that the Department of Social and Health Services ("the Department") complies with the law and properly administers the State's foster care system for over eighty (80) percent of the children placed into foster care. Deposition of Jon Conte, attached in relevant part to Declaration of Hooke as Exhibit A, Vol. 1, p. 82, ll. 14-17, p. 47, ll. 3-22; p. 49, ll. 8-18; p. 50, ll. 10-23; p. 108, ll. 6-14. Based on a study of 77,000 foster children placed in the State's child welfare system between 1985 and 1995 (including the thirteen named Plaintiffs), Conte admitted under oath that:

- Twenty-five percent of all children removed from their parents' homes are in State custody for less than one week. Conte Dep., Vol. 1, p. 40, ll. 6-24.
- Fifty percent of all children court-ordered into foster care return home within just two months. Id.
- About seventy-five percent of all foster children are returned home within one year. Id., p. 46, ll. 3-19.
- Only approximately five percent of foster children remain in foster care more than three years. Id., p. 43, ll. 2-4.
- Sixty-eight percent of children in foster care had only one placement episode, meaning that they never re-entered the foster care system after being returned home. Id., p. 46, ll. 20-p. 47, ll. 2.
- Seventy-four percent of foster children had only one out-of-home placement. Id., p. 53, ll. 12-18.
- Ninety percent of all foster children had no more than two out-of-home placements. Id.

- Less than two percent of all foster children had five or more foster care placements.

Id. at p. 59, ll. 11-15.’

Foster children are moved from placements for a variety of reasons, most of which are beyond the Department’s control.² For example, sometimes placements are changed at the foster parents’ or child’s request, or because the child has run away. Id., p. 52, ll. 3-8; p. 60, l. 2 - p. 61, l. 25; p. 72, l. 24 - p. 73, l. 24; p. 84, ll. 4-8. Age is another factor contributing to multiple placements because potential parents are reluctant to adopt older children or adolescents. Id., p. 106, l. 6 - p. 107, l. 3; p. 109, ll. 1-22. A child’s gender, ethnicity, or pre-existing severe behavioral problems also increase the risk of multiple placements. Conte dep., Vol. 2, p. 5, l. 11 - p. 6, l. 6; p. 12, ll. 14-24; p. 15, l. 16 - p. 19, l. 16; ~. 21, l. 15 - p. 23, l. 13; p. 40, l. 20 - p. 42, l. 6; p. 56, l. 18 - p. 57, l. 1. “Legaldrift,” which can occur when court orders terminating parental rights are appealed, or continuances are granted in dependency proceedings, is yet another cause of multiple placements. Conte dep., Vol. 2 at p. 60, l. 18 - p. 67, l. 18. Each of these potential causes of multiple placements is beyond the Department’s control. Thus, as Conte testified, approximately five percent of foster children will experience multiple placements regardless of any potential reform Conte dep., Vol. 2, p. 55, l. 21 - p. 56, l. 17.

Plaintiffs’ experts agree that the effect of multiple placements, if any, depends on each child, and that there is no specific number of placements that is “too many” because each child is unique. Deposition of Jean Soliz, attached in relevant part to Declaration of Hooke as Exhibit B, p. 80, ll. 9-24. Conte Dep., Vol. 2, p. 28, ll. 8-22.

² These statistics demonstrate that a class of children who had a specified number of placements, such as five, would be a much smaller and more manageable class than Plaintiffs’ purported class, which encompasses all children in foster care. As Plaintiffs admit, the purported class includes “nearly 10,000 children.” Plaintiffs’ Memorandum, p. 14.

* Plaintiffs’ gross over-counting of placements is worth noting here. See Motion to Strike Declaration of Novomy.

1 **B. The Named Plaintiffs**

2 “[T]he current and former foster children in this lawsuit are not typical and
3 representative of most of the children in the DSHS foster care system.” Conte Dep, Vol. 1,
4 p. 58 11. 5-12, p. 84,11. 14-19. Each of the thirteen Plaintiffs had an experience vastly
5 different from those of most children in foster care, and indeed different from the other
6 named Plaintiffs as well. As Plaintiffs’ expert Soliz testified, “every child is unique.” Soliz
7 Dep., p.79. 1. 14.

8 **Patrick Morris:** Patrick does not want to be a party to this lawsuit. See letter To
9 Whom It May Concern dated March 14,2000, attached to Declaration of Hooke as Exhibit
10 C. Patrick will turn eighteen on July 1,2001. Patrick entered the foster care system in
11 1985 when he was two years old due to neglect arising from his mother’s drug abuse.
12 Deposition of Patrick Morris, attached in relevant part to Declaration of Hooke as Exhibit
13 D, p. 20,11.3-25; Declaration of Ann APP,~ 7 13. His father, whom he never met, was
14 serving a prison sentence for double homicide at the time. Id. By court order, he was twice
15 reunited with his mother for the bulk of the ensuing two years. Declaration of App, 1 13.
16 He was then in foster care for four years, primarily with one, stable foster family, before
17 being adopted in 1992. Id. Patrick’s doctor, Lawrence Lyon, testified that Patrick’s
18 placement history constituted a “fairly good record.” Deposition of Lawrence Lyon,
19 attached in relevant part to Declaration of Hooke as Exhibit E, p. 62,11. 2 1-25. Patrick is
20 now living with his biological mother. Dep. of Patrick Morris, p. 8,11. 4-1 1.

21 **Timothy Olson:** Timothy entered the State’s foster care system in 1990 due to
22 neglect and abandonment by his drug-using mother. Declaration of App, 7 16. Several
23 attempts to reunite him with his mother were made during his four-year dependency, which
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25 _____ ³ The Declaration of Ann App was previously filed in support of Defendants’ Motion for
Summary Judgment re: Procedural Safeguards.

1 ended with his adoption in 1994. Id. Timothy’s long-time physician, Dr. Carl Plonsky,
2 testified that Timothy probably had Reactive Attachment Disorder (“IWD”), a condition
3 that causes difficulty bonding and forming lasting relationships, before the age of one, and
4 that most people with RAD develop the condition at this early age. Deposition of Carl
5 Plonsky, attached in relevant part to Declaration of Hooke as Exhibit F, p. 23,11.12-20.
6 Plonsky testified that Timothy’s situation was unique, and not similar to his other foster
7 children patients. Id., p. 81, ll. 4-14. Despite Timothy’s RAD and early neglect, Plonsky
8 testified that Timothy’s long-term prognosis is good. Id., p. 27,11.5-16.

9 **Amie Anderson:** Amie entered foster care in 1985 as a three-year-old due to
10 “horrific” sexual abuse by her father, neglect, and severe behavior problems. Deposition of
11 Perbix Mallos, attached in relevant part to Declaration of Hooke as Exhibit G, Vol. 2, p. 64,
12 11.2-3. Amie was removed from some of her foster home placements due to these severe
13 behavioral problems, which ranged from burying a pet dog to smearing feces on walls. Id.,
14 p. 75, ll. 12-14. She was removed from two homes at her own request because she alleged
15 she was being sexually abused in the homes. Id., p. 68,11.7-14. Since entering State
16 custody, Amie has had “tons of” counselors to help her with her behavior and attachment
17 problems. Deposition of Amie Anderson, attached in relevant part to Declaration of Hooke
18 as Exhibit H, p. 18 11.2-7; p. 19, ll. 7-15. At the time of Anne’s deposition, she had a 3.7
19 grade point average at Bothell High School and worked part-time for the local library. Id.,
20 p. 4, ll. 2-5; p. 8, 11. 7-22. Amie is now over nineteen years old. Id. at pp. 6-7.

21 **Shaun Sanchez:**⁴ Shaun first entered foster care in 1992 at the age of three due to
22 abandonment by his mother, who had drug and alcohol problems, and his father, who was
23 incarcerated. App Declaration, 7 15. Plaintiffs’ witness Rebecca Perbix Mallos testified

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25 ⁴ It is doubtful that Shaun Sanchez is a proper party to this lawsuit, as a previous court order
precludes his participation. See Order Preventing Sanchez from Participating in Suit, attached to
Declaration of Hooke as Exhibit I.

1 that Shaun's early life was "hideous," and that he probably had RAD before he was in State
2 custody. Perbix Mallos Dep., Vol. 1, p. 75, ll. 14-17; p. 79, ll. 3-25-p. 80, ll. 1-6. Shaun
3 was removed from at least one foster home placement due to allegations that he had
4 sexually abused a foster sibling. Deposition of Shawn Hosford, attached in relevant part to
5 Declaration of Hooke as Exhibit J, p. 53, ll. 1-22.

6 **The Bursch sisters:** Jenneiva and Cassidee Bursch first entered the State's foster
7 care system in 1989 due to severe neglect. Declaration of Loretta Mee Re: Cassidee
8 Bursch, attached to Declaration of Hooke as Exhibit K, 4[3; Declaration of Loretta Mee Re:
9 Jenneiva Bursch, attached to Declaration of Hooke as Exhibit L, 13. Jenneiva was five
10 years old and Cassidee was three. Both were adopted in 1993. Unfortunately, in a strange
11 twist of events, the adoptive parents returned the girls to State care because of their severe
12 behavior problems. Id. at 7 1,6. Both are now residing with their adoptive grandparents.
13 Id. at f 7. Since entering foster care twelve years ago, the Bursch girls have had only four
14 placements with three families.' Id. at fi 8.

15 **Jessica Braam:** Jessica entered foster care in 1991 as a four-year-old due to her
16 parents' drug abuse and neglect. App Declaration, 1 14. Jessica suffers from severe
17 diabetes. Deposition of Jessica Braam, attached in relevant part to Declaration of Hooke as
18 Exhibit M, p. 5, ll. 18-21. Throughout her four-year dependency, her father was contesting
19 the termination of his parental rights. One of Jessica's successful foster home placements
20 unfortunately ended early because her foster parents moved to Hawaii. J. Braam Dep., p.
21 16, l. 25-p. 17, ll. 1-2. Jessica was adopted in 1995.

22 **The Hardins:** Beth, Eryk, Ivory, and Eboney Hardin all entered the State's foster
23 care system in 1989 due to chronic neglect by their alcoholic father, while their mother was
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25 ' According to Plaintiffs' expert, Conte, this would constitute only three placements, as two
were with one family. Conte Dep., Vol. 1, p. 91, ll. 7-24.

1 in jail for drug use. By that time, Beth was already seven years old, Eryk was six, Ivory
2 was four, and Eboney was three. App Dec. 17-10. The siblings were dependent children
3 for three years until the Hardins, their future adoptive parents, became legal guardians for
4 all four children in 1992. Id. Beth is now nineteen years old, and testified that she does not
5 want to be a party to this lawsuit. Deposition of Beth Hardin, attached in relevant part to
6 Declaration of Hooke as Exhibit N, p. 39,1. 25-p. 40,1. 1. Eryk will turn eighteen on July
7 10,2001.

8 **Robyn Brandon:** Robyn first entered foster care in 1988 when she was six months
9 old due to her failure to thrive with her mentally and emotionally impaired mother, who
10 resided in a group home. App Dec., 112. Robyn, who uses a wheelchair, was a dependent
11 child for four years before her 1992 adoption. Id., Deposition of Robyn Brandon, attached
12 in relevant part to Declaration of Hooke as Exhibit O, p. 13,11. 15-20.

13 **Desi Morgan:** Desi first entered foster care in 1988 as a two-year-old due to
14 neglect arising from her mother's drug and alcohol addictions. App. Dec., 7 11. Desi was a
15 dependent child for two years before being adopted in 1990. Id.

16 Even this brief glimpse at each of the named Plaintiffs shows the uniqueness of their
17 situations. They are not representative of the foster children whom they seek to represent.
18 Two are currently adults and are no longer in the foster care system. Two more will
19 become adults next month. Two have explicitly and unequivocally stated that they do not
20 want to be parties in this lawsuit.⁶ Two were adopted, then returned to foster care by their
21 adoptive parents. One was removed from foster homes at her own request, and another
22 because he abused another child in the home. Two are physically disabled. One changed
23 foster homes only because her foster parents moved from the state. Each named Plaintiff

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⁶ Defendants are filing separate motions to dismiss the adult Plaintiffs and the Plaintiffs who do not want to be parties.

1 has a unique and tragic tale unlike the vast majority of children in foster care, most of
2 whom do quite well, according to Dr. Conte.

3 **C. Statewide Variances**

4 Within the State, there are **six** foster care regions. Each region is run somewhat
5 differently and has issues unique to its locale. Foster children’s experiences vary greatly
6 from region to region. Plaintiffs’ witness Jean Soliz testified that “the counties vary in their
7 interest in children and their willingness to serve children,” and that some counties “treat
8 and serve children better than others.” Soliz Dep., p. 95, ll. 12-17. She went on to testify
9 that the Child Advocacy System, CASA, “is very different across the state.” Id. at p. 95, ll.
10 23-24. For example, she testified that King County uses child advocates a lot, while some
11 counties do not use them at all. Id. at p. 96, ll. 4-20. Soliz even testified that there may be
12 significant differences on an even smaller level-based on “management in a certain area,”
13 or even on the “individual caseworker.” Id. at p. 97 ll. 18-24. Similarly, Plaintiffs’ witness
14 Rebecca Perbix Mallos testified that the support foster parents receive varies from region to
15 region. Perbix Mallos Dep., Vol. 1, p. 132, ll. 3-9. Plaintiffs’ expert Conte testified that the
16 quality of care, community relations, relationships with school districts, and dependency
17 proceedings all vary according to region. Conte Dep., Vol. 1, p. 44, ll. 4-25-p. 45, ll. 1-
18 16. In addition to the vast differences among the children, regional variances make
19 statewide class certification inappropriate.

20 **III. ARGUMENT: PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF**
21 **PROVING THAT CLASS CERTIFICATION IS APPROPRIATE UNDER**
22 **CR 23.**

23 **A. Plaintiffs have no basis for class certification under CR 23(b).**

24 ***1. Plaintiffs’ request for injunctive relief is based solely on claims that***
25 ***were dismissed.***

Under CR 23(b), plaintiffs’ lawsuits must be one of three types in order to be
certified as class actions. Here, Plaintiffs allege that they meet the criteria of CR 23(b)(2),

1 which provides: “The party opposing the class has acted or refused to act on grounds
2 generally applicable to the class, thereby making appropriate final injunctive relief or
3 corresponding declaratory relief with respect to the class as a whole.” Thus, Plaintiffs must
4 present claims for injunctive relief. They do not. Each of the claims upon which Plaintiffs
5 base their request for injunctive relief was dismissed. See Order Granting Partial Summary
6 Judgment dated June 1,2001.’

7 Although Plaintiffs claim they modified their Motion in accordance with the Court’s
8 recent order dismissing all claims based on procedural safeguards, 42 U.S.C. 0 1983, and
9 the Washington and United States Constitutions, their Memorandum repeatedly shows
10 otherwise. The only claims mentioned in Plaintiffs’ discussion of CR 23(b)(2) are those
11 based on procedural safeguards. Plaintiffs argue that they have met CR 23(b)(2) because of
12 “[t]he system-wide denial of procedural due process-notice and opportunity to be heard.”
13 Plaintiffs’ Memorandum, p.30. They “challenge the failure to provide them with
14 procedural safeguards designed to **protect** them from the injury caused by being moved
15 from house to house,” and seek injunctive relief to require the Department to comply with
16 “the rights of children to a safe, stable home.” Id. All of these claims were dismissed on
17 summary judgment.’ Plaintiffs no longer have any claim upon which to base their request
18 for injunctive relief. As such, this lawsuit is not appropriate for class certification under CR
19 23(b)(2). As Plaintiffs have not cited any other basis for certification under CR 23(b), their
20 purported class cannot be certified.

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23 ’ In fact, in light of that ruling, Defendants have tiled a motion to dismiss all class claims
and claims for injunctive relief.

24 ’ The Order Granting Partial Summary Judgment dated June 1,2001 provides, in part, “No
25 issues of material fact exist as to plaintiffs’ claims that they were deprived of procedural due
process under the United States Constitution and/or 42 U.S.C. 6 1983, and defendants are entitled to
judgment as a matter of law as to these claims. All such claims shall be and are dismissed with
prejudice as to all defendants.”

1 To the extent that Plaintiffs suggest they are entitled to injunctive relief based on
2 newly alleged state statutory violations, they are effectively seeking to amend their
3 complaint a third time, without allowing Defendants an opportunity to respond. In their
4 Motion, Plaintiffs list numerous issues to be certified that cite Washington statutes and
5 regulations. None of these statutes or regulations is cited in Plaintiffs' Complaint. If
6 Plaintiffs suggest they have causes of action based on violations of these statutes and
7 regulations, they are attempting to allege new claims which they did not plead, and against
8 which Defendants have not defended themselves.' If they are, in fact, attempting to amend
9 their complaint, the appropriate method for doing so would be to file a motion to amend,
10 which they have not done. Plaintiffs have no claims upon which to request injunctive
11 relief, making class certification under CR 23(b)(2) impossible.

12 **2. *Regardless, Plaintiffs' requested injunctive relief is too vague and broad to***
13 ***be enforceable and is thus not sufficient for class certification under***
14 ***WN 2).***

15 Under CR 65(d), an injunction "shall be specific in terms; shall describe in
16 reasonable detail, and not by reference to the complaint or other document, the act or act
17 sought to be restrained." Injunctive relief must be narrowly tailored to redress the specific
18 harm alleged, and "[a]n overbroad injunction is an abuse of discretion." Lamb-Weston,
19 Inc. v. McCain Foods, 941 F.2d 970,974 (gth Cir. 1991). Vague injunctions should not be
20 granted, and will be set aside upon appellate review. E. & J. Gallo Winery v. Gallo, 955
21 F.2d 1327, 1344 (gth Cir. 1992).

22 The United States Supreme Court rejected a vague injunction very similar to that
23 requested here in Blessing v. Freestone, 520 U.S. 329, 346 (1997). There, the plaintiffs
24 alleged that Arizona's child support programs violated federal law and sought an injunction

25 ⁹ Plaintiffs' allegations that foster parents were somehow wronged by a lack of support or
by receiving misinformation are also not at issue and were not pled in their Complaint. No parents
are parties to this lawsuit, other than as guardians ad litem for minor children.

1 compelling the state to comply with federal law. *Id.* The Court deemed this request
2 patently insufficient, stating:

3 [I]t is not at all apparent that respondents sought any relief more specific
4 than a declaration that their “rights” were being violated and an injunction
5 forcing Arizona’s child support agency to “substantially comply” with all of
6 the provisions of [the federal child support statute]. We think that this defect
7 is best addressed by sending the case back. . .

8 *Id.*

9 The relief Plaintiffs request here is equally vague and unenforceable. Plaintiffs seek
10 to “specifically enjoin defendants from causing harm to the children in DSHS’s care by the
11 multiple placements of children,” and to enjoin Defendants “from further violations of state
12 and federal law which contribute to the multiple placements of children and cause harm to
13 children.” Plaintiffs’ Motion, p. 5. This requested injunction is not “specific in terms.” It
14 does not “describe in reasonable detail” the conduct to be enjoined.¹⁰ Enforcing such an
15 injunction would become a full-time job for this Court, and would place the entire foster
16 care system under this Court’s control and scrutiny.” Moreover, Department social
17 workers would have absolutely no way of knowing when they were violating it, as literally
18 every decision made with regard to a child could be a violation. The requested injunction is
19 vague, unenforceable, and precisely the type of injunctive relief the Supreme Court rejected
20 in Blessing. As such, it cannot be the basis for class certification under CR 23(b)(2).

21 Plaintiffs have failed to meet their burden of proving that class-wide injunctive relief is the
22 appropriate remedy for this lawsuit.

23 ¹⁰ In fact, it is difficult to fathom a more specific injunction that would be enforceable. For
24 example, an injunction preventing the Department from changing a child’s placements more than
25 three times, the number that plaintiffs have designated as “too many,” would lead to absurd results.
A child like Amie Anderson could not be moved from a third foster home where he or she claimed
to be sexually abused. Foster parents could not have children like Shaun Sanchez removed from
their homes after they abused other children. Jessica Braam apparently would have had to move to
Hawaii when her foster parents relocated there.

” In contrast, Plaintiffs can pursue their individual damages claims with relatively little
burden on the Court.

1 certification of an improper class on a speculative possibility that it may later meet the
2 requirements is improper. In re Hotel Telephone Charpes, 500 F.2d 86, 90 (gth Cir. 1974).

3 **2. *Plaintiffs' claims are not sufficiently similar to satisfy CR 23(a)'s***
4 ***commonality requirement.***

5 "The interests of the plaintiffs must be coextensive with the interests of the other
6 members of the class with a common right of recovery based on the same essential facts."
7 CR 23(a)(2). See also Panorama Residential Protective Ass'n v. Panorama Corp., 28
8 Wn.App. 923,934,627 P.2d 121 (1981). Substantially variable facts giving rise to
9 different claims will defeat class certification. See, e.g., Id. at 129 ("estoppel issues
10 contained too many individual variables to be tried as a class action"). Here, the facts are
11 not only substantially variable, but they vary with each and every would-be class member
12 and each and every placement at issue because, as Plaintiffs' experts have testified, each
13 child is unique.

14 In a case challenging the adequacy of New Mexico's health and educational systems
15 for children in state custody, the Tenth Circuit Court of Appeals affirmed the denial of class
16 certification due to a lack of commonality. J.B. v. Valdez, 186 F.3d 1280, 1288 (10th Cir.
17 1999). Because the children-became wards of the state under different circumstances and
18 had different experiences once in state custody, the court held that there were no common
19 questions of fact. Id. at 1289. Additionally, the court "refuse[d] to read an allegation of
20 systematic failures as a moniker for meeting the class action requirements," and thus held
21 that there were also no common legal questions. Id. This precise reasoning applies here.
22 The potential class members all entered state custody in different ways, and had vastly
23 differing experiences once there. Furthermore, the only alleged common legal issue is "an
24 allegation of systematic failures." As in J.B., the commonality requirement is lacking.

25 ***a. A determination as to whether the Department unnecessarily
moved a child too many times will require a fact-specific review of
every placement for every child.***

1 The gravamen of Plaintiffs' claims is that they were moved too many times.¹³
2 Determining the merits of these claims will require an inquiry into whether each and every
3 move for each and every child was warranted. The question of whether a child had "too
4 many" placements is inherently fact-intensive and fact-specific. Plaintiffs' lead expert, Dr.
5 Jon Conte, testified that foster children are moved for numerous reasons that are beyond the
6 Department's control. Conte testified that children's placements are changed because they
7 run away, because foster parents ask to have them removed, because the children ask to be
8 removed, and for a myriad of other factors unique to each case. He further testified that
9 many children have multiple placements because of characteristics which make them less
10 likely to be adopted-age, race, gender, existing disabilities, and behavioral problems. Still
11 others remain unadopted because of ongoing legal battles over the termination of parental
12 rights. None of these factors is within the Department's control, and the unique reasons
13 leading to each placement of each child will need to be closely scrutinized to determine if
14 the placement was wrongful.

15 Even a brief glance at a few of the Plaintiffs' placements demonstrates the
16 differences among the children and the wide variety of explanations for their placements.
17 Shaun Sanchez was removed from one foster home at the foster parents' request because he
18 sexually assaulted another child in the home. On the other side of the spectrum, Amie
19 Anderson was removed from two foster homes at her own request because she alleged she
20 was sexually abused. Patrick Morris was in State custody for an extended period of time
21 while his biological parent contested the termination of parental rights. After the parental
22

23 ¹³ If Plaintiffs are also suggesting that they received inadequate mental healthcare or were
24 forced to live in the Department's offices, these allegations are also insufficient to meet the
25 commonality and typicality requirements because they are wholly unsupported. There is no
 evidence that any of the Plaintiffs ever lived in a Department office or received inadequate mental
 healthcare. To the contrary, as Amie Anderson's example shows, the State provided all of these
 Plaintiffs with ample counseling and support.

1 rights were terminated, Patrick had just one placement before going to live with his
2 adoptive family. One placement change for Jessica Braam was necessitated by her foster
3 parents' move to Hawaii. The number of the Bursch girls' placements increased because
4 their adoptive parents returned them to foster care. The Department had no control over the
5 factors leading to any of these placement changes, all of which were made for vastly
6 differing reasons.

7 ***b. Determining whether the Department's conduct caused harm***
8 ***will also require a fact-intensive review of each child's history and***
9 ***current condition.***

10 In addition to determining whether a potential class member received "too many"
11 placements, the Court will have to determine, on a case by case basis, whether this caused
12 him or her harm. Courts have denied class certification where, as here, the "causation
13 inquiry will involve innumerable individual questions." Fisher v. Bristol-Myers Squibb
14 Co., 181 F.R.D. 365 (N.D. Ill. 1998). Plaintiffs allege that Defendants' conduct caused
15 Reactive Attachment Disorder ("I&W"). However, even if it is established that each class
16 member suffers from this condition, a fact-specific inquiry will be necessary to determine if
17 the condition was caused by unnecessary placement changes, rather than by changes that
18 were warranted and/or the child's experience before coming into State custody. Dr. Carl
19 Plonsky testified that most sufferers of RAD develop it before one year of age. Almost
20 none of the named Plaintiffs were in State custody at such an early age, and each came into
21 custody after an undeniably traumatic early life. While it is most likely that the Plaintiffs'
22 problems are the result of early and extreme mistreatment by their biological parents,
23 individualized investigations are required to determine if the Department contributed in any
24 way to this harm.

25 For many children, it is apparent that their time in State custody probably helped,
rather than harmed, them. Amie Anderson, for example, had severe behavior disorders

1 when she entered State custody, and engaged in such disruptive behaviors as smearing feces
2 on walls and burying live pets. In contrast, after years of State-funded mental health care,
3 at the time of her deposition, Amie held a 3.7 grade point average as a senior at Bothell
4 High School. Similarly, Timothy Olson’s long-time doctor, Carl Plot&y, testified that
5 Timothy likely had RAD before he ever left his biological parents’ custody, and has
6 improved dramatically since the State’s intervention. Whether the Department caused the
7 children any harm will necessarily turn on the unique facts of each Plaintiffs case.

8 *c. Variances from county to county and region to region make*
9 *statewide certification illogical.*

10 In the district court opinion denying class certification in the challenge to New
11 Mexico’s treatment of disabled children in its custody, which was affirmed in *J.B., supra*,
12 the court placed great significance on the differences inherent in a statewide action in
13 addition to the divergent facts noted above. *K.L. v. Valdez*, 167 F.R.D. 688,693 (D.N.M.
14 1996), *ujj?*, *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999). The court explained that “trial
15 of the present matter as a class action would require individualized inquiry into a network
16 of institutions servicing” the entire state of New Mexico, a large geographical area. *Id.*
17 The court stated that while class certification may be appropriate for children who all lived
18 in one state facility, the differences inherent in a class composed of children in state custody
19 throughout New Mexico defeated the commonality requirement. *Id.* The same holds true
20 here.

21 Testimony from Plaintiffs’ witnesses Jean Soliz, Jon Conte, and Rebecca Perbix
22 Mallos amply illustrates the vastly divergent conditions in various geographic locations
23 throughout the State. Soliz testified that the Child Advocacy System is “very different
24 across the state,” with some counties regularly using child advocates and some not at all.
25 She also admitted that, overall, children receive very different treatment depending upon
the county in which they live. Soliz even testified that there may be significant differences

1 on an even smaller level-based on “management in a certain area,” or even on the
2 “individual caseworker.” Additionally, Perbix Mallos testified that the support foster
3 parents receive varies widely from region to region. Similarly, Conte acknowledged
4 differences among the counties in the quality of care, community relationships, and
5 dependency proceedings. These are precisely the type of differences that made class-wide
6 certification inappropriate in j& As in New Mexico, the differences inherent in a class
7 composed of children in state custody throughout Washington defeat the commonality
8 requirement.

9 *3. Plain tiffs also fail CR 23(a) ‘s typicality requirement.*

10 The typicality requirement mandates that “the claims . . .of the representative parties
11 are typical of the claims of the class.” CR 23(a)(3); Broussard v. Meineke Discount
12 Muffler Shops, Inc., 155 F.3d 331,340 (4* Cir. 1998). The plaintiffs bear the burden of
13 proving that the claims of each named plaintiff are typical of the class they seek to
14 represent. CR 23(a)(3). The typicality requirement is closely intertwined with the
15 commonality requirement and, in fact, their analyses tend to merge. General Tel. Co. v.
16 Falcon, 457 U.S. 147, 158 n.13. *In&, supra*, in addition to finding no commonality, the
17 court held that typicality was lacking because of the different experiences each child had
18 while in state custody. 167 F.R.D. 688.

19 Plaintiffs have not even attempted to meet their burden of showing that eight of the
20 thirteen Plaintiffs have claims typical of the representative class. Jenneiva Bursch,
21 Cassidee Bursch, Patrick Morris, Arnie Anderson, Robyn Brandon, Beth Hardin, Eryk
22 Hardin, and Eboney Hardin are not even mentioned in Plaintiffs’ Memorandum. Plaintiffs
23 have the burden of proving typicality for each Plaintiff; Defendants do not have the burden
24 of proving that these Plaintiffs are atypical. Since Plaintiffs’ Memorandum fails to even
25

1 mention these eight purported class representatives, they have completely failed to meet
2 their burden of proof on this issue. The typicality requirement has not been met.

3 Moreover, as Plaintiffs' expert Dr. Conte testified, "the current and former foster
4 children in this lawsuit are not typical and representative of most of the children in the
5 DSHS foster care system." Each of the Plaintiffs named in this lawsuit is unique, and none
6 is representative of the class. Plaintiffs' witness Jean Soliz testified repeatedly that each
7 child is unique. Dr. Carl Plonsky testified that Timothy Olson was unique and unlike Dr.
8 PfcpAsky's other foster children patients. In sum, Plaintiffs' own witnesses have testified,
9 unequivocally, that the Plaintiffs are not typical foster children, and, in fact, are sad
10 aberrations.

11 Beyond this testimony, a sampling of the experiences of some of the Plaintiffs show
12 their extremely unique and individualized situations, quickly revealing that they are far
13 from typical foster children. Beth Hat-din and Patrick Morris do not even wish to be a part
14 of this lawsuit. Amie Anderson and Beth Hardin are adults, and Patrick Morris and Eryk
15 Hardin will turn eighteen next month. Some of Amie's placement changes were made at
16 her own request. Some of Shaun Sanchez's were made at the foster parents' requests.
17 Jessica Braam was moved because her foster parents moved to Hawaii. The Bursch girls
18 were adopted, then returned to foster care by their adoptive parents. Each of these Plaintiffs
19 is very different from the others, had a unique and tragic early life before entering foster
20 care, and is certainly not typical of most foster children-the vast majority of whom do
21 well, according to Dr. Conte.

22 In addition to the unique circumstances regarding Plaintiffs' foster care experiences,
23 there are serious questions as to whether the chosen class representatives were even harmed
24 by the State. For example, Plaintiffs' witnesses have testified that both Timothy Olson and
25 Amie Anderson probably had FMD before they were ever in State custody. Moreover, both

1 are doing well now. Amie's improvements can likely be credited to the "tons of"
2 counseling the State provided her after she came into its care. These two Plaintiffs plainly
3 are not typical representatives of a class purportedly composed of children suffering lasting
4 harm because of the State's involvement in their lives.

5 **C. If the Court does not deem it appropriate to deny Plaintiffs' request for class**
6 **certification now, Defendants alternatively request that the Court reserve ruling**
7 **on this fact-intensive issue until after trial.**

8 It is well established that a trial court has broad discretion as to when it should rule
9 on a motion for class certification.- Washirnton Education Ass'n v. Shelton School Dist.,
10 93 Wn.2d 783,613 P.2d 769,788 (1980); Wright v. Schock, 742 F.2d 541, 543-44 (S^{ti} Cir.
11 1984). The Third and D.C. Courts of Appeals have expressly held that it is sometimes
12 appropriate to wait to rule on certification until after the case has been decided on the
13 merits. McLauphlin v. Wohlgemuth, 535 F.2d 25 1,252 (3rd Cir. 1976) ("We find no abuse
14 of discretion in the district court's determination to defer final decision on the scope of the
15 class until after disposition of this appeal."); Larionoff v. United States, 533 F.2d 1167,
16 1183 (D.C. Cir. 1976) ("the final certification need not be made *until* the moment the merits
17 are decided.") (cite omitted, emphasis original). It is equally well settled that provisional
18 class certification is inappropriate. In re Hotel Telephone Charges, 500 F.2d 86,90 (9th Cir.
19 1974). A class cannot be certified until all certification requirements have been met. Id.

20 As the discussion above makes clear, this case is extremely complex and very fact-
21 intensive. Certifying the purported class would have wide-reaching political ramifications
22 as well as the potential practical effect of placing the entire foster care system under this
23 Court's scrutiny and control. The Court should reserve ruling on this major legal issue until
24 the facts are fully developed at trial.
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V. CONCLUSION

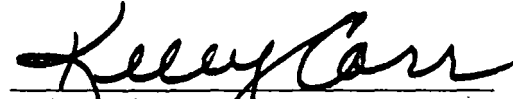
Plaintiffs have failed to meet the requirements for class certification under CR 23. Most significantly, they have not met CR 23(b) because they have no claims upon which to base their request for injunctive relief because those claims were previously dismissed. Furthermore, they have failed to satisfy CR 23(a)'s commonality and typicality requirements. For the foregoing reasons, Defendants respectfully request that Plaintiffs' Motion for Class Certification be denied in full. A proposed order is attached.

RESPECTFULLY SUBMITTED this / F ay of June, 2001.

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