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The Honorable DAVID A. NICHOLS  
Motion to Bifurcate  
June 25, 2001  
1:30 p.m.

STATE OF WASHINGTON  
WHATCOM COUNTY SUPERIOR COURT

NO. 98-2-01570-1

DEFENDANTS' RESPONSE  
TO PLAINTIFFS' MOTION TO  
BIFURCATE

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

Plaintiff,

v.

STATE OF WASHINGTON and the  
DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Defendants.

DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION TO BIFURCATE

Am GENERAL OF WASHINGTON  
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1 Defendants, State of Washington, Department of Social and I-health Services (DSHS)  
2 and Lyle Quasim, respond to plaintiffs' motion to bifurcate the trial in this matter as follows:

3 I. Since The Basis For Plaintiffs' Class-Wide Requests For Injunctive Relief Have  
4 Been Dismissed, There Is Not&me. To Bifurcate.

5 As described in defendants' currently pending motion to dismiss all class action claims  
6 and all claims for injunctive relief, the sole basis for plainriffs' class action claims and request  
7 for injunctive relief was the alleged unconstitutional deprivation of "procedural safeguards"  
8 prior to any change in foster care placement. See also defendants' opposition to plaintiffs'  
9 motion to certify as class action pursuant to CR 23 (both of these briefs are incorporated herein  
10 by reference). Those claims were dismissed with prejudice in the Courx's June 1.2001, order  
11 granting partial summary judgment to defendants, which effectively dismissed the injunctive  
12 relief and class claims as well. Therefore, there no longer is any basis for plaintiffs' claims for  
13 injunctive relief, or their class claims.

14 The.onJy claims remaining ate the individual plaintiffs' damage claims premised on  
15 alleged negligence and discrimination. Plaintiffs do not seek, nor would there be a basis for,  
16 bifurcating these remaining damage claims. Consequently, since there are no longer any  
17 injunctive or class claims to bifurcate; plaintiffs' motion should be denied.

18 n. Altematively, Plaintiffs' Motion Is Premature Given The Pending And  
19 Anticibated Motions For Surnmarv Judament And The Potential Economy  
Served BY Allow&z Any Necessary Pre-Trial AnDellate Review.

20 Even if plaintiffs' claims for class-wide injunctive relief could somehow **be** construed  
21 as having survived the Court's June 1, 2001, order granting partial summary judgment, the  
22 viability of such claims remain subject to defendants' pending motion for summary judgment  
23 based on separation of powers and nonliability for discretionary policy decisions. If necessary,  
24 other potentially dispositive motions may be filed.  
25

1 The interests of judicial economy would be best served by having these dispositive  
 2 motions decided, then staying the trial to allow any necessary appeals to be taken. This would  
 3 avoid the probability of conducting a four-month trial that the appellate courts may determine  
 4 should have been dismissed, or needs to be retried, in whole or in part. At the conclusion of  
 5 the appellate process when the issues remaining to be tried, if any, are established, all parties  
 6 and the Court would be in a better position to ascertain whether bifurcation is advisable, or not.  
 7 Accordingly, plaintiffs' motion to bifurcate should be denied at this time as premature.

8 III. In Any Event, Plaintiffs Are Incorrect That Bifurcation Would Be Judicially  
 9 Economics And Substantially Reduce The Length Of The Proposed Initial  
 10 Trial.

11 Plaintiffs are incorrect in making two assumptions: (1) that any surviving claims for  
 12 injunctive relief would be tried to the bench, and (2) that the proposed bench trial would be  
 13 concluded within one or two weeks.

14 To be entitled to relief, whether injunctive or monetary, plaintiffs must prove  
 15 defendants acted unlawfully or negligently. Courts are prohibited from rendering advisory  
 16 opinions, so parties seeking equitable relief in the form of injunctions or writs of mandate must  
 17 prove a justiciable controversy exists, including proof that the challenged conduct actually  
 18 caused or will cause direct and substantial harm to the plaintiffs. See, e.g., Malyon v. Pierce  
 19 County, 131 Wn.2d 779, 813, 935 P.2d 1272 (1997); Walker v. Munro, 124 Wn2d 402, 411,  
 20 414,879 P.2d 920 (1994).

21 Defendants have a constitutional and statutory right to a jury on these issues of liability  
 22 and causation, assuming such claims survive the motion and appellate processes. RCW  
 23 7.24.090 and CR 57 both provide that when issues of fact arise in cases requesting equitable  
 24 declaratory or injunctive relief, the right of trial by jury on fact issues remains inviolate.  
 25 Defendants do not waive their right to a jury trial on the liability and fact issues in this case.

1 Consequently, plaintiffs are incorrect in suggesting that any surviving injunctive claims can  
2 only be **tried** to the bench.

3 Addinonally, plaintiffs are unrealistic in their suggestion that, in one or two weeks,  
4 liability **and** causation can be proved, and essentially a legislative hearing can be  
5 comprehensively conducted to arrive at some form of an injunction purporting to resolve issues  
6 regarding child welfare policies, procedures, and appropriations of public tax dollars. Proof of  
7 liability, causation, and 'the defense of such claims will alone consume far more than two  
8 weeks. Most, if not all, of the same witness,es and evidence needed to address the liability and  
9 causation issues in plaintiffs' claims for monetary relief would also be needed to address the  
10 similar liability and causation issues in plaintiffs' claims for injunctive relief. T'bus, the  
11 previous agreed estimate of several months to try the case, whether in one or two parts,  
12 remains accurate-

13 Moreover, judicial economy ordinarily must be furthered before a court should exercise  
14 its discretionaxy authority to bifurcate one trial into various parts Myers v. Boeine Co.; 115  
15 Wn.2d 123, 140, 794 P.2d 1272 (1990). In light of piairmffs' need to prove liability and  
16 causation under either theory of relief before any relief could be granted, it would m&e tittle  
17 sense, and certainly would not be economical, to try the liability, causation, and other fact  
18 **issues nvice.**

19 IV. Plaintiffs Are Inviting Error BY Suggesting That Their Eautable Ininjunctive  
20 Claims Should Be Tried Before The Adeouacy Of Their Lenal Remedies Are  
jkDlored. And Before All Issues Of Material Fact Are Resolved.

21 Plaintiffs also are inviting error by suggesting that injunctive relief should be decided  
22 before exploring the availability or adequacy of remedies **at** law, and before all issues of  
23 material fact are resolved in the case. **If there** is an adequate remedy **at** law, an injunction  
24 should not issue. Kucera v. Deuartment of fransu., 140 Wn.2d 200, 209, 995 P.2d 63 (2000).  
25 Consequently, the availability and adequacy of remedies at law must be explored first. Id.

1 Further, the propriety of an injunction depends on a balancing of all the equities, which cannot  
 2 be accomplished until all issues of material fact are resolved. Chaney v. Fetzer, 100 Wn.  
 3 App. 140, 151, 995 P.2d 1284, review denied, **142 Wn2d** 1001 (2000). When material facts  
 4 are in dispute, injunctions should not be issued. Therefore, accordingly, plaintiffs are inviting error  
 5 by suggesting that an injunction should be prematurely issued before all the evidence is heard  
 6 and all questions of material fact, including those pertaining to liability **and** causation, are  
 7 resolved by a jury. If an injunction is deemed appropriate and manageable at the conclusion of  
 8 the trial, then one could be ordered by the court at that time, rather than before all the evidence  
 9 is in and a determination can be made as to whether there is an adequate remedy at law.

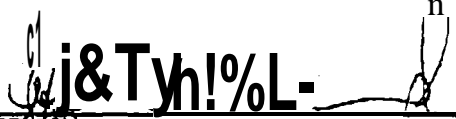
10 V. Conclusion

11 Based on the foregoing reasons, plaintiffs' motion to bifurcate should be denied. A  
 12 proposed order to this effect is attached.

13 RESPECTFULLY SUBMITTED this 20th day of June, 2001.

14 CHRIS~E O. GREGOIRE  
 15 Attorney General

16 Kelly P. Con; WSBA #SSS  
 17 CORR CRON-IN, LLP

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 19 **JEFF FREIM** U-ND. WSB #17384  
 20 k&&&k Anorney &eneral  
 21 Attorneys for State Defendants