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

JESSICA BRAAM, a minor child, by and >
through her guardians, Dale and Vickie >
Braarn; JENNEIVA BURSCH, a minor child,)
by and through her guardians, Greg & Sherry 1
Bursch; CASSIDEE BURSCH, a minor child, by)
and through her guardians, Greg & Sherry >
Bursch; DESI MORGAN, a minor child, by)
and through her guardians, Lori Morgan 1
and Lonnie Morgan; TIM OLSON, a >
minor child, by and through his guardians,)
David and Diane Olson; SHAUN SANCHEZ,)
a minor child, by and through his court 1
appointed GAL, Virginia DeCosta; AMIE >
ANDERSON, a minor child, by and through 1
her court appointed GAL, Jim Haynes, 1
ROBYN BRANDON, a minor child, by and 1
through her guardian, E. Sparrowhawk Brandon;)
BETH HARDIN, a minor child, by and through)
her guardians, David and Mary Hardin;)
ERYK HARDIN, a minor child, by and through)
his guardians, David and Mary Hardin; >
IVORY HARDIN, a minor child, by and through)
her guardians, David and Mary Hardin; 1
EBONEY HARDIN, a minor child, by and through)
her guardians, David and Mary Hardin,)

Plaintiffs,

v.

PLAINTIFFS' REPLY MEMO I-N SUPPORT OF
MOTION FOR CLASS CERTIFICATION - 1

No. 98201570 1

PLAINTIFFS' REPLY
MEMORANDUM IN
SUPPORT OF MOTION
FOR CLASS
CERTIFICATION

(DAVID A. NICHOLS)

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1 STATE OF WASHINGTON and the)
2 DEPARTMENT OF SOCIAL AND)
3 HEALTH SERVICES, and LYLE QUASIM,)
4 individually and as Secretary of the)
5 Department of Social and Health Services,)
6 Defendants.)
7 _____>

8 **INTRODUCTION**

9 Applying the criteria of Rule 23 and the clear weight of authority to similar
10 classes certified in the federal courts, Plaintiffs clearly establish each element of rule
11 23(a) and 23(b)(2). Offering no opposition on two of criteria, defendants spend most of
12 their Opposition trying to divert the Court from the applicable principles. Plaintiffs have
13 narrowed their proposed class definition to include only foster care children subjected to
14 multiple foster care placements, the very type of definition defendants concede would be
15 manageable. Defendants have chosen to ignore this revision of the proposed definition.
16 Defendants' claims that there is no basis in the complaint or in law for class or injunctive
17 relief are not well taken. Defendants inappropriately attempt to argue the merits of the
18 case and what they perceive to be the request for class injunctive relief, when caselaw
19 unequivocally finds these considerations to be irrelevant at the class certification stage.
20 Finally, defendants incorrectly claim that the proposed class does not share any common
21 issues of law or fact. For all of the reasons stated below, the defendants' arguments are
22 misguided and the proposed narrow class should be certified.

23 Plaintiffs have attached to this brief one case, Babv Neal For And Bv Kanter v.
24 Casev, 43 F.3d 48 (3^d Cir. 1994) because that case contains a well-reasoned analysis of

25 PLAINTIFFS' REPLY MEMO IN SUPPORT OF
26 MOTION FOR CLASS CERTIFICATION - 2

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1 most of the arguments defendants in the present case raise against class certification. In
2 an opinion firmly grounded in the law of class actions, Babv Neal shows why class
3 certification is appropriate in the present case. Plaintiffs refute the defendants' arguments
4 in some detail below, but plaintiffs commend Babv Neal to the Court as a case that
5 succinctly sets forth our basic showing. As is shown in Babv Neal and below, the clear
6 weight of authority throughout the country upholds the certification of the proposed class
7 of foster children subjected to three or more placements that is sought here.

8 ARGUMENT

9 1. The Plaintiffs' Proposed Narrow Class Definition Of All Foster Children
10 At Risk Of Three or More Placements Is The Kind Of Class That
11 Defendants Admit Would Be Reasonably Manageable.

12 The defendants concede that "a class of children who had a specified number of
13 placements, such as five, would be a much smaller and more manageable class.. ." than
14 the original proposed class of all children in foster care. Opposition at 4, footnote 1. In
15 continuing to argue against certification of *a' class of all foster children*, however,
16 defendants have overlooked the fact that Plaintiffs no longer seek to certify such a broad
17 class, but instead ask the Court to certify exactly the kind of narrow class the defendants
18 suggest would be appropriate:

19 All children who are now (or who in the future will be) in the custody of the
20 Department of Health and Social Services foster care system who have been
21 placed by the Defendants in three or more placements and those children in
22 the foster care system who are at risk to be placed in three or more placements
by the Defendant.

23 Amended Memorandum In Support of Motion For Class Certification, at 5 (emphasis
24 added). As previously explained in the Amended Memorandum, Plaintiffs agree with

25 PLAINTIFFS REPLY MEMO IN SUPPORT OF
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defendants that this kind of narrow class more closely tracks the gravamen of this action:

1 “This amended class description more specifically defines and narrows the targeted class
2 of foster care children who are the subject . . . [of] the Complaint filed in this case.” Id.’

3 **2. The Proposed Narrow Class Meets All The Criteria of Civil Rule 23(a),**
4 **Including The Requirement That There Be A Common Issue Of Law Or**
5 **Fact And The Requirement That Claims of the Class Representatives Be**
6 **Typical of the Claims of the Class.**

7 The clear weight of authority throughout the country upholds the certification of
8 the class of foster children that is sought here. Decisions from the United States Courts
9 of Appeal in the Third and Second Circuits as well as many district court decisions in
10 other jurisdictions have all approved class certification in cases seeking injunctive relief
11 on behalf of children in state foster care programs. Baby Neal, 43 F.3d at 59-60, and
12 numerous cases cited there; Marisol v. Guiliani, 126 F.3d 372 (2d Cir. 1997); Jeanine B.
13 ex rel. Blondis v. Thomson, 877 F.Supp. 1268, 1287 (E.D.Wisc.1995) (certifying two
14 subclasses, one of children in foster care and one of children not in foster care about
15 whom the county had received reports of neglect or abuse, where plaintiffs challenge[d]
16 the operating practices of the . . . foster-care system, and generally allege[d] that the . . .
17 program is systematically depriving children of their legal rights.”); LaShawn A. v.

18
19
20 ‘ In their Opposition, defendants claim that by using the words “at risk” in the ‘proposed definition,
21 plaintiffs are trying to cover all foster children. Opposition, at p.2 and p. 4 n. 1. However, in their
22 Amended Memorandum, plaintiffs clearly state that the proposed narrow class is between 2400 and 3400
23 and is a subgroup of the approximately 10,000 children in foster care. Amended Memorandum, at p. 14

24 Furthermore, such at risk classes have been certified. See. e.g., Baby Neal for and by Ranter v.
25 Case 9, 43 F.3d 48 (3rd Cir. b ecause all of the plaintiffs, children in state care, were subject to the *risk*
26 of the deprivation of services, the differing degree and nature of injuries did not preclude class
certification); Pottinzer v. City of Miami, 720 F.Supp. 955 (S.D. Fla. 1989)(class certified of 5,000 homeless
persons living in a defined area of Miami who had been arrested or *might be* arrested in the future for conduct
arising out of their homeless condition on public-streets).

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1 Dixon, 762 F.Supp. 959, 960 (D.D.C.1991) (certified class included foster children under
2 the care of the DHS and children reported as abused or neglected, though not yet in the
3 care of the DHS); B.H. v. Johnson, 715 F.Supp. 1387, 1389 (N.D.Ill.1989) (class of all
4 children in the custody of a child welfare agency); David C. v. Leavitt, No. 93-C-206W
5 slip op. (D.Utah May 5, 1993) (certifying over adequacy-of-representation objections a
6 class of all children who are or will be in Utah's DHS custody or will be placed in a foster
7 home, a group home, institutional care or a shelter and children who are or will be known
8 to DHS by virtue of report of abuse or neglect); Jane T. v. Morse, No. S-359-86 WnC,
9 slip op. at 4, (Vt.Super.Ct., June 12, 1987); Doe v. New York City Department of Soc.
10 Svcs., 670 F.Supp. 1145 (SDNY 1997); Smith v. Organization of Foster Families, 43 1
11 U.S. 816, 822 n. 7, 97S.Ct. 2094,2098 n. 7, 53 L.Ed.2d 14 (1977) (perceiving no error in
12 district court's certification of foster parents, children, and intervening natural parents).
13 Most of these cases have certified classes much larger than the subclass of foster children
14 sought here. Despite the defendants' suggestions that it would be unusual to certify such
15 a class, this is not the case and this Court should likewise certify the class in this case.'

17 As set out in more detail in Plaintiffs' Amended Memorandum at 9, Rule 23(a)
18 requires that four criteria be met for class certification. Defendants do not contest two of
19 those requirements: That the class will be adequately represented (23(a)(4)), and that the

22 ² Once a prima facie case for class certification has been established as here, it shifts "to the party
23 opposing the class the burden to prove otherwise, and leaving the court in any event the duty not to reach
24 an adverse class determination except if justified "after a proper appraisal of all the factors enumerated on
 the face of the Rule itself." (citation omitted) Herbert B. Newberg and Alba Conte, *Newberg on Class*
 Actions, sec.7-17 at 7-61 (3rd ed. 1992).

1 proposed class is so numerous that joinder is impracticable (23(a)(1)).³ Defendants do
2 contest the other two criteria, but their arguments do not support denial of class
3 certification.

4 a. There Are Many Common Issues

5 Defendants suggest that because there are variations in the circumstances of foster
6 children who are moved through multiple placements there can be no “common issue of
7 law or fact” sufficient to support class certification. Opposition at 14 - 18. Defendants’
8 attempts-to show that there is no issue of law or fact common to the proposed class are
9 unavailing.

10 The plaintiffs need only show that, *despite individual factual patterns, their claims*
11 and those of the class are based on the same legal or remedial theories. Penn v. San Juan
12 Hospital, Inc., 528 F.2d 1181, 1188-1189 (10th Cir. 1975) (emphasis added); Wehner v.
13 Syntex Corp., 117 F.R.D. 641 (N.D. Cal. 1987). See also, General Telephone Co. v.
14 Falcon, 457 U.S. 147, 157, n.13, 102 S.Ct. 2364,2370 n.13 (1982).

15
16 “The commonality requirement will be satisfied if the named plaintiffs share at least
17 one question of fact or law with the grievances of the prospective class.” Baby Neal, 43
18

19 ³ According to the defendants recent answers to interrogatories, the proposed class of children subjected to
20 three or more placements numbers over 3,000. See Interrogatories and Answers (Appendix 1 to this brief),
21 Answers 2 and 3. This number is arrived at by adding all of the figures in the answer to number 3
22 beginning at the answer “three placements” and adding all the remaining figures to the bottom of the
23 answer. This answer apparently represents DSHS’s “snapshot” of children in foster care in February, 200 1,
24 and it is premised on the DSHS’s highly restrictive definition of a “placement” in answer 2. Plaintiffs do
25 not concede that this definition of placement is the appropriate one that should be used in this case, but
26 obviously even under this restrictive definition the proposed class is more than numerous enough to
support certification. See also statistical summaries of multiple placements in Dee Wilson report,
previously submitted.

The actual number of times a child is moved is probably far greater than listed in defendants’
answers. Whereas a “placement” is legally defined as a stay of more than thirty (30) days, defendants’

F.3d at 56, and authority cited there. The Plaintiffs exceed that minimum standard here.

1 All of the class members are factually similar in that they are or will be subject to the
 2 dependency laws and that they have had or will have three or more placements while
 3 dependent. All are or will be subject to DSHS practices regarding multiple placements and
 4 have suffered or will suffer through violations of DSHS duties relating to foster children.

5 Here, the Plaintiffs identified discrete legal theories, which are common to all
 6 members of a class of youth in foster care at risk of three or more placements. All class
 7 members, who by definition have been subjected to at least three placements, share in
 8 common the legal questions whether DSHS policies and practices have caused or
 9 exacerbated harm by increasing the number of placements or causing inappropriate
 10 multiple placements. See D.W. by M.J. on Behalf of D.W. v. Poundstone, 165 F.R.D.
 11 661 (M.D. Ala. 1996)(class of children committed to state mental health agency certified.
 12 Class allegations regarding right to treatment upon commitment to agency and disparate
 13 treatment of children over 12 are common issues). In addition, the specific questions
 14 raised about the alleged statutory violations go to the same question: Has DSHS caused
 15 harm or increased the harm from multiple placements by failing to adhere to its statutory
 16 duties to advise and support foster parents, create appropriate placements for children
 17 being shuffled through multiple placements, and provide for proper medical, mental
 18 health and other necessary care? At the very least, all class members have a significant
 19 and common interest in having the court define the DSHS' duty of care to children who
 20 are at risk of multiple placements.
 21
 22
 23

24 answers do not account for temporary stays of less than 30- days. A series of temporary stays may be as
 25 PLAINTIFFS' REPLY MEMO IN SUPPORT OF
 26 MOTION FOR CLASS CERTIFICATION - 7

1 In Babv Neal (copy attached to this brief), the court sets out in detail the proper
2 analysis for determining whether there exists a common issue sufficient to allow class
3 certification in a foster care case. In Babv Neal, the district court had denied class
4 certification, because of “its view that each of the plaintiffs had his or her own individual
5 circumstances and needs, and that the class thus could not complain about a single,
6 common injury.” 43 F.3d at 54. But the Third Circuit reversed the denial of class
7 certification, finding that “the claims alleged in plaintiffs’ complaint clearly meet the
8 requirements of Rule 23.. .” a. at 65.

9 On the question of whether a class should be certified even though there are
10 obvious individual differences in the situations of the children involved, the Third Circuit
11 correctly observed that the commonality requirement will be satisfied if they have one or
12 more issues in common, and further observed, in language directly applicable to this case:

- 13 - - “class members can assert such a single common complaint even if they
14 have not all suffered actual injury: demonstrating that all class members are
15 subject to the same harm will suffice.. .”
- 16
- 17
- 18 - “Challenges to a program’s compliance with the mandates of its enabling
19 legislation, even where plaintiff-beneficiaries are differently impacted by the
20 violations, have satisfied the commonality requirement.”
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- 22

23 Id. at 56 (citations omitted). These principles, supported in Babv Neal by numerous

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25 detrimental as multiple placements.
26 PLAINTIFFS REPLY MEMO JN SUPPORT OF
MOTION FOR CLASS CERTIFICATION - 8

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1 duty of adequate care; DSHS's duties to these children under specific state statutes
2 requiring adequate care and specific procedures; the dependency statute; and some
3 remaining issues under the Adoption Assistance and Child Welfare Act of 1980.⁴ The
4 case before this court just does not present nearly the kind of overly complex scenario in
5 J.B. - where the split Tenth Circuit held that the trial judge did not abuse discretion in
6 refusing to certify a very broad class on very broad issues.'

7 Even if J.B. were more factually similar to this case, it would not provide
8 substantial authority on which to deny class certification. The dissenting circuit judge in
9 J.B. pointed out the many errors of class action law that the district court had committed
10 in denying class certification that were overlooked by the majority, citing the numerous
11 cases plaintiffs rely on, including Babv Neal. 186 F.3d at 1297 - 1301. Even the
12 majority in J.B. suggested that its decision is in direct conflict with Babv Neal. Plaintiffs
13 recommend comparison of the basis of the two cases, and the others cited here and in
14 Babv Neal, from which it will be apparent that Babv Neal is both more solidly grounded
15 in class action law and more closely relevant to the present case.
16

17 Finally, the recently filed Motion to Intervene submitted on behalf of
18 Washington's Children's Alliance supports the certification of the class sought here. p
19

20 ⁴ The various duties DSHS owes are set out fully in Plaintiffs' Amended Brief on class certification at 6 -
21 8, and include: the duty to provide adequate health, mental health, educational, physical, and emotional
22 care to foster care children subjected to multiple placements: providing safe, stable, and permanent homes;
23 providing assessments, home visits, notifications and other specific duties set out in statutes and
24 regulations; provision of guardians ~~at this time~~ etc. all duties specifically required to be performed
25 by one agency, DSHS. 'Ibis presents nothing like the dauntingly complex scenario of J.B.

26 ' The Court in J.B. noted that the circumstances of the proposed class varied greatly: "Other than all being
disabled in some way and having had some sort of contact with New Mexico's child welfare system, no
common factual link joins these plaintiffs." The proposed class here, however, does not present this

1 Husserl, Inc v. Simnlicity Pattern Co, 25 FRD 264 (S.D.N.Y. 1960)(holding that common
2 questions existed when forty plaintiffs sought intervention).

3 **b. The Claims Of The Named Plaintiffs Are Twical**

4 Defendants also suggest that the claims of the named plaintiffs are not “typical of
5 the claims of the class” as is required by Civil Rule 23(a)(3). Again, Defendants are
6 incorrect. “The concepts of commonality and typicality are broadly defined and tend to
7 merge.” Baby Neal, 43 F.3d at 56. As with commonality, the typicality requirement does
8 not mandate identity of every class member’s situation, but rather a common core of legal
9 theory based on class members’ being subjected to similar practices by defendants:

10 “Factual differences will not render a claim atypical if the claim arises
11 from the same event or practice or course of conduct that gives rise to the claims
12 of the class members, and if it is based on the same legal theory.” *Foxworth [v.*
13 *Blinder, Robinson & Co./*, 980 F.2d at 923 [further citations omitted].

14 * * * * *

15
16 Indeed, even relatively pronounced factual differences will generally not preclude
17 a finding of typicality where there is a strong similarity of legal theories.
18 [Citations omitted.]

19
20
21 Baby Neal, 43 F.3d at 58.

22
23 As plaintiffs’ experts testified, and as is obvious, there are differences between all

24
25 variance of circumstances, involving only children who have come into contact with the State only through
26 PLAINTIFFS’ REPLY MEMO IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION - 11

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foster children who are subjected to multiple placements. However, those differences are not the kind that preclude class certification where, as here, the children show that they are all subject to the practices of a single agency that oversees foster placements and allege that those practices breach the agency’s statutory and constitutional duties. The defendants, despite months to conduct discovery, have offered not one shred of evidence from which this Court could find that the named plaintiffs are different fi-om other members of the class in any relevant way. The proposed class, based on the common fact that they are all subjected to multiple foster care placements and the common legal theory that DSHS does not perform its legal duties to mitigate and prevent these multiple placements, easily meet the commonality and typicality requirements of Rule 23.

Nor do the claimed differences. in practices between different DSHS regions change this, as Defendants try to suggest. DSHS oversees all of the regions and DSHS’s omissions, practices and policies clearly impact multiple placements in every region. There is nothing about the fact that DSHS chooses to divide itself into regions that affects whether the commonality and typicality requirements are met here.⁶ As stated in *Wulvers v. Reno*, 145 F.3d 1032, 1046 (g^{ti} Cir. 1998):

It would be a twisted result to permit an administrative agency to avoid nationwide litigation that challenges the constitutionality of its general practices simply by pointing to minor variations in procedure among branch offices and individual INS agents.. . (citing *Forbush v. J.C. Penney Co, inc.* 994 F.2d 1101.1106 (5* Cir. 1993).

the dependency statutes and who have been in multiple placements while in state care.
⁶ Defendants’ reliance on the district court opinion in *J.B.* to argue regional differences is once again misplaced. In *J.B.*, as explained above, multiple agencies, many of them statewide, were sued on a broad variety of legal theories. Here one agency is the defendant and there is no problem of addressing the duties of many agencies.

1 The proposed class in this case is entirely appropriate under the rules and should be
2 certified.

3 **3. The ProDosed Class Definition Is Based On Claims Pled And Theories Of**
4 **Which Defendants Have Had Notice.**

5 Defendants' claims that the basis on which plaintiffs seek class certification has
6 not been pled or is somehow a surprise to defendants are not well taken.

7 State law claims set forth with more particularity in the Amended Motion for
8 Class Certification should not come as a surprise to the defendants. Defendants' assertion
9 that Plaintiffs allegations concerning foster parents receiving misinformation and
10 inadequate support (Opposition at 11, footnote 9) "were not pled in their Complaint" is
11 clearly wrong. Paragraph 6.2 of the Second Amended Complaint states "**DSHS**
12 **breached its duty** by repeatedly moving the Plaintiff children to different placements
13 and **by failing to properly train, inform, assist and provide resources to foster**
14 **parents ...**" (emphasis added). These allegations encompass the overall question of
15 DSHS's policies and practices regarding multiple placements and the statutory duties set
16 out in more detail in Plaintiffs' Amended Memorandum at 5-8.

17 Ample notice of the state law claims was also provided to defendants when they
18 were provided with Dr. Conte's declaration. See, Section III. B. entitled "Violation of
19 Numerous State Laws" at **pp.** 7-17 Declaration of Jon Conte, Ph.D filed in support of
20 Motion for Class Certification (filed July 10,2000). That declaration was filed almost a
21 year ago along with the original Motion for Class Certification.

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25 PLAINTIFFS' REPLY MEMO IN SUPPORT OF
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1 Defendants also exaggerate the extent of the Court's rulings on the constitutional
2 and federal statutory claims. Paragraph 6.11 of the Second Amended Complaint alleges
3 Defendants' conduct violated the Due Process Clause of the Fourteenth Amendment to
4 the United States Constitution and rights under the Adoption Assistance and Child
5 Welfare Act of 1980, not limited to §675 (5)C of the Act --, which was the only section
6 the Court ruled upon Defendants' Motion for Summary Judgment. Even though
7 Plaintiffs' federal procedural due process claims were dismissed, there remains the
8 federal substantive due process issue of proper treatment of children in the state's
9 custody. &, Plaintiffs' Memorandum in Opposition to Motion to Dismiss Class Claims
10 at pp. 3-10. Additionally, the state statutory claims remain, many of which relate to the
11 requirement of statutory due process procedures.

12 Thus defendants have been on reasonable notice that the issues Plaintiffs
13 articulate more fully are still in the case. Because pleadings are to be liberally construed
14 to support substantial justice, further amendment is not necessary. However, if
15 defendants insist on having the exact words now used to describe these claims in an
16 Amended Complaint, plaintiffs can certainly submit another one.

17
18 **4. The Alleged Merits Of Plaintiffs' Claims And What Relief Might Be**
19 **Appropriate Are Not Proper Considerations At This Stage, Where**
20 **Plaintiffs Reauest Class Certification.**

21 **a. Merits awuments are impr..**

22 As Plaintiffs have set out in detail, Rule 23 is to be liberally interpreted to favor
23 class certification and, most importantly, courts determining class certification issues are
24

1 barred from inquiring into the merits as a consideration on class certification. See
2 extensive authority cited in the Amended Memorandum at 9 - 10.

3 Despite this clear authority, most of the defendants' arguments are thinly veiled
4 attempts to argue the merits of liability and relief at this stage. Throughout their
5 Opposition, defendants attempt to introduce a variety of defenses to the underlying
6 complaint. For example, they appear to blame everyone but themselves - foster children,
7 foster parents, and the juvenile court - for the repeated changes in placement. They
8 suggest that since the plaintiffs were harmed by the abuse or neglect of their natural
9 parents before entering care, that any further harm they suffer while in defendants'
10 custody should impose no liability upon them.

11 Given the law of class certification, Defendants' current attempts to argue the
12 merits - indeed to claim that multiple placements of foster children are caused by
13 everything except the policies and practices of the state agency specifically designated to
14 protect foster children - are inappropriate in responding to this motion. Their
15 protestations simply beg the ultimate question to be decided in the injunctive phase of
16 this case: Whether multiple placements of foster children are caused by DSHS policies
17 and practices and if so what relief should be granted. At this stage this court is prohibited
18 from considering the possible merits of Defendants' arguments, as the law of class
19 actions requires that the plaintiffs' allegations be taken as true at this stage. Blackie v.
20 Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976);
21 Biustrom v. Trust One Mortn. Corn, 199 F.R.D. 346 (W.D. Wash. 2001).
22
23
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25 PLAINTIFFS' REPLY MEMO IN SUPPORT OF
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b. The Scope Of Potential Relief Is Not At Issue Now

The defendants argue that the injunction plaintiffs seek is not specific enough. At this stage of the proceedings, plaintiffs are under no obligation to offer the exact terms of an injunction they will request after trial; that will depend on the evidence and the Court's rulings.

6 The cases defendants rely on in making these arguments are not class certification
cases at all. Opposition at 11-13. In citing Blessing v. Freestone, 520 U.S. 329 (1997)
8 defendants employ a truncated quotation to try to suggest that~ a class should not be
9 certified if plaintiffs make a request for injunctive relief that is somehow too broad.
10 Blessing dealt not **with** class certification but with whether the plaintiffs had sufficiently
11 identified their claims under a federal statute to even allow the Supreme Court to
12 determine whether plaintiffs had a private right of action under the statute. It was in this
13 context that the Court said, more completely:
14

15 In any event, it is not at all apparent that respondents sought any relief
16 more specific than a declaration that their "rights" were being violated and
17 an injunction forcing Arizona's child support agency to "substantially
18 comply" with all of the provisions of Title IV-D. We think that this defect
19 is best addressed by sending the case back for the District Court to
20 construe the complaint in the first instance, in order to determine exactly
21 what rights, considered in their most concrete, specific form, respondents
22 are asserting. Only by manPeably breaking down the complaint into
23 specific allegations can the District Court proceed to determine whether
24 any specific claim asserts an individual federal right.

25 520 U.S. at 346 (emphasis indicating text dropped in State's quotation). Blessing simply
26 has no relevance to the present motion.

PLAINTIFFS' REPLY MEMO IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION - 16

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1 The other cases the defendants cite are irrelevant as well. Lamb-Weston v.
2 McCain Foods, 941 F.2d 970 (9th Cir. 1991)(not a class action, but instead an ordinary
3 trade secret tort case; language about overly broad injunctions has no bearing on class
4 certification, as the court is specifically referring to “a geographically overbroad
5 injunction”, 941 F.2d at 973, restraining a retailer from selling a particular product
6 worldwide and emphasizes the uniqueness of an injunction in a trade secret case); E. & J.
7 Gallo Winery v. Gallo, 955 F.2d 1327 (9th Cir. 1992)(not a class action, does not refer to
8 class certification proceedings; court simply states, “Injunctions are not set aside under
9 Rule 65(d) unless they are so vague that they have no reasonably specific meaning.” 955
10 F.2d at 1345, and holds, that the injunction at issue did conform with Rule 65(d)). There
11 is nothing in these cases to help the Court on the present motion.

12 Defendants, having first said that plaintiffs’ request for an injunction is too vague,
13 then contradict themselves by claiming that they know exactly what plaintiffs will ask
14 for, and that the issuance of injunctive relief will require the Court to take over DSHS.
15 This speculation is misguided. It is true that if this Court certifies a class and if it finds at
16 trial that defendants have breached their legal duties to the class, the Court will be called
17 upon to remedy the breach. Assuming that the case is appropriate for class treatment, as
18 this one is, this is no more than the exercise of the Court’s constitutional duty to decide
19 cases. The shape of injunctive relief will depend upon what is presented at trial and what
20 the Court finds, but it will not require the Court to take over or run the foster care system.
21 This is not a receivership proceeding; it is a request for the Court to exercise its equitable
22 powers, properly cast in the form of a class action because the DSHS practices plaintiffs

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question affect many foster children. The fact that the Court may have to issue an injunction is no reason to deny class certification.

5. **The Class Itself Seeks No Damages, And The Fact That Named Plaintiffs Do Seek Damages Is Irrelevant.**

Defendants suggest that because the named Plaintiffs in this case have sought damages, this case is not appropriate for class certification under Civil Rule 23(b)(2)(the defendant had acted or refused to act on grounds generally applicable to the class making final -injunctive- relief appropriate). Opposition at 13. However, this argument is misplaced: The proposed class seeks no damages, only injunctive relief against DSHS policies and practices, and so is entirely suited to being certified as a so-called “(b)(2)” class.

The two cases defendants cite on this issue support the plaintiffs. Defendants incorrectly suggest that these cases say that (b)(2) certification “is not appropriate where declaratory or injunctive relief merely provides the basis for monetary damages.” Opposition at 13 (emphasis added). But the word “injunctive” has been improperly inserted into this sentence by the Defendants but not by any courts. The cited cases actually say that class certification under (b)(2) should be refused only where o& declaratory and monetary -- not injunctive -- relief is available. Eriks v. Denver, 118 Wn.2d 451, 466 (1992) (“The investors did not request, and the trial court did not grant, injunctive relief. The court did grant declaratory relief.. . Where the declaration merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate.”)(emphasis added); Nelson v. King County, 895 F.2d 1248, 1255 (9* Cir. 1990)(“We hold that it was

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not an abuse of discretion for the district court to refuse to certify a class after determining that the named plaintiffs possessed no standing to pursue injunctive relief (emphasis added). Plaintiff class in this case does seek injunctive relief against DSHS's policies and practices, a (b)(2) class is entirely appropriate.

6. **There Is No Basis For Delaviv Class Certification Until After Trial.**

Defendants' final, remarkable plea is that even if Defendants' other arguments against class certification are unavailing, the case is so complex that the court should wait "until after trial" to decide whether to certify a class. Opposition at 20 --21. There is no legal or logical basis for this request.

All of the cases Defendants cite in this section deal with the language in Rule 23(c)(1) stating that class certification questions should be decided "as soon as practicable after commencement" of the case, but none remotely suggests that "as soon as practicable" could possibly mean "after trial." In the only state case cited, the Washington Supreme Court said that under some circumstances venue and standing issues could be decided before class certification (but also said that class certification should have been reached first in that particular case). Washington Education Association v. Shelton School District, 93 Wn.2d 783, 788, 613 P.2d 769 (1980). In two of the federal cases cited, the holding was that a court could rule on a summary judgment motion before determining whether the case should proceed as a class action. Wright v. Schock, 742 F.2d 541 (9* Cir. 1984); Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976). In the other federal case cited, the federal district court certified a class well before trial but reserved the right to change the class definition later if the original

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1 definition proved too broad; the defendants objected, but the Court of Appeals found, not
2 surprisingly, that the district court could modify the class definition as circumstances
3 warranted. McLaughlin v. Wohlgemuth, 535 F.2d 251, 252 (3rd Cir. 1976). None of
4 these authorities supports a claim that class certification should abide until the end of a
5 trial on the merits

6 In addition to having no legal support, the Defendants' suggestion makes no
7 sense. Unless the parties know whether the case will be tried as a class action, they
8 cannot properly prepare. The evidence presented, who will be called as fact witnesses
9 and experts, indeed virtually every aspect of the case will be affected by whether the case
10 is a class action. The parties are entitled to know whether the case will be a class action
11 "as soon as practicable," and certainly well in advance of any trial.

12 Rather than refuse to certify now, plaintiffs suggest that this court follow the lead
13 of one of the cases defendants cite, McLaughlin v. Wohlmemuth. As plaintiffs have
14 clearly shown that this case meets the criteria for class certification, the Court should
15 certify the class as proposed and then revisit the class definition later if the defendants
16 can credibly show that it should be somehow narrowed. But at this juncture, there is no
17 such showing and defendants have offered no substantial reason why the requested class
18 should not be certified.

19 CONCLUSION

20 By attempting to divert this Court's attention to issues that are not relevant to
21 class certification and by focusing on the individuality of the named plaintiffs, defendants
22 try to prevent the Court from seeing the forest for the trees. Of course, each child, indeed

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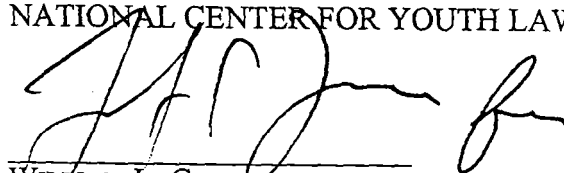
1 every human being, has unique experiences and attributes. If this alone barred class
2 actions then class certification would be unobtainable for anyone. Class certification,
3 however, requires only that the class members share a common question of law or fact.
4 All class members here have suffered from the same course of conduct - being subjected
5 to and harmed by the defendants' common course of conduct - shuttling them from one
6 temporary placement to another. In addition, they share common legal and remedial
7 theories - that defendants' conduct is due to violation of their rights under state law,
8 substantive due process under- the Fourteenth Amendment to the United state
9 Constitution, and federal statutory rights to an individualized and current case plan.
10 Accordingly, they are entitled to proceed in this action as a plaintiff class.

11 Respectfully submitted this 2nd day of June, 2001.

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Plaintiffs' Reply Memorandum in Support of Motion for Class Certification by the following indicated method or methods:

[x] by mailing full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorney(s) as shown below, the last-known address of the attorney(s), and deposited with the United States Postal Service at Bellingham, Washington on the date set forth below.

[] by causing full, true, and correct copies thereof to be hand-delivered to the attorney(s) at the last-known address listed above on the date set forth below.

[x] by faxing full, true, and correct copies thereof to the attorney(s) at the fax number(s) shown above, which are the last-known fax number(s) for the attorney(s) offices, on the date set forth below.

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DATED this 22nd day of June, 2001

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Connie Clement

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