

54493V

7/2/01

Honorable David A. Nichols

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SUBSTANTIVE DUE PROCESS

I. INTRODUCTION

In this lawsuit, Plaintiffs challenge the way in which our State's foster care system is administered. The gravamen of their complaint is that Plaintiffs, who were removed from their biological parents' care due to abuse or neglect, have been moved too many times. These allegations are patently insufficient to state a substantive due process claim. Every court that has been asked to create a similar constitutional right has declined. In light of the Supreme Court's repeated admonitions against broadening the reach of the substantive due process clause, this Court should not be the first. Additionally, as fully explained in Defendants' Motion for Partial Summary Judgment re: Procedural Safeguards, to the extent that Plaintiffs seek money damages against the State, DSHS, and/or Lyle Quasim under 42 U.S.C. 5 1983, Plaintiffs have failed to state a claim on which relief can be granted.

1 **II. RELIEF REQUESTED**

2 Defendants respectfully request that Plaintiffs’ substantive due process claims be
3 dismissed with prejudice. This motion is based on the records and files in this matter, the
4 attached memorandum of law, and the authorities cited therein.

5 **III. RELEVANT FACTS**

6 The facts in this case have been more fully stated in Defendants’ Motion for Partial
7 Summary Judgment re: -Procedural Safeguards and Opposition to Class Certification, and
8 will not be repeated.’ Here, it is sufficient to point out the basis of Plaintiffs’ substantive
9 due process claim. The only articulation of Plaintiffs’ substantive due process claim is
10 contained in their Memorandum in Opposition to Motion to Dismiss Class Claims. There,
11 Plaintiffs state that their substantive due process rights were violated because their
12 “psychological health and well-being” have been-injured by “defendants’ routine practice
13 of shuttling them from one place to another.” Id., p. 9. While this is clearly the thrust of
14 Plaintiffs’ claims, they have also made various other allegations, such as a lack of guardians
15 ad litem, caseworkers not visiting children every ninety (90) days, failure to assess children
16 within thirty (30) days of taking custody of them, and failure to fully inform foster parents
17 about the children placed in their homes.

18 Plaintiffs have not claimed that Defendants placed them, or the class members, in
19 homes Defendants knew posed a physical danger. To the contrary, Plaintiffs have made
20 clear in prior pleadings that they are not asking “this court to engage in a case by case
21 analysis of which placement is the appropriate one for [each]. . .child,” and that they are not

22 _____
23 ‘ The “facts” sections from Defendants’ Motion for Partial Summary Judgment re:
24 Procedural Safeguards and from Defendants’ Opposition to Class Certification are incorporated
25 herein by reference. The support for those facts can be found in the Declarations of Ann App and
Lyle Quasim, and attachments thereto, filed in support of Defendants’ Motion for Partial Summary
Judgment re: Procedural Safeguards, and in the Declaration of Kelsey Joyce Hooke and
attachments thereto, filed in support of Defendants’ Opposition to Class Certification.

1 claiming that each change in placement was improper or proximately caused them
2 damages. Plaintiffs Response to Defendants’ 12(b)(6) Motion to Dismiss Plaintiffs’
3 Federal Statutory Claims, pp. 47-48.

4 **IV. ARGUMENT**

5 **A. Summary Judgment Standard**

6 Summary judgment is appropriate where there is no genuine issue of material fact or
7 where reasonable minds could reach only one conclusion on that issue based upon the
8 evidence presented. Gossett v. Farmers Ins. Co., 133 Wn.2d 954,963,948 P.2d 1264
9 (1997). In considering a motion for summary judgment, the Court, “by examining the
10 pleadings and the evidence before it and by interrogating counsel, shall if practicable
11 ascertain what material facts exist without substantial controversy and what material facts
12 are actually and in good faith controverted.” CR 56(d). When a party moving for summary
13 judgment has demonstrated the absence of any genuine issue of material fact, and has
14 demonstrated an entitlement to judgment as a matter of law, the burden shifts to the
15 nonmoving party to set forth specific facts that would raise a genuine issue of material fact
16 for trial. Schaaf v. Hinfield, 127 Wn.2d 17,21,896 P.2d 665 (1995). “[T]he plain
17 language of Rule 56(c) mandates the entry of summary judgment.. .against a party who fails
18 to make a showing sufficient to establish the existence of an element essential to that
19 party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp.
20 v. Catrett, 477 U.S. 317, 322 (1986).

21 **B. Plaintiffs cannot state viable substantive due process claims.’**

22
23
24
25

’ The Court has already dismissed all Plaintiffs’ claims brought under the Washington
Constitution. Thus, only federal substantive due process rights are at issue in this Motion.

1 *1. There is no constitutionally protected right not to be “shuttled” from foster*
2 *care placements.*

3 To allege a violation of substantive due process, a plaintiff must allege state conduct
4 that “shocks the conscience.” Daniels v. Williams, 474 U.S. 327, 332 (1986). “Merely
5 negligent acts cannot, as a constitutional matter, do that.” S.S. v. McMullen, 225 F.3d 960,
6 964 (Sth Cir. 2000). A state’s “grossly negligent or even reckless” treatment of a foster
7 child is insufficient to create a substantive due process claim. Id. See also County of
8 Sacramento v. Lewis, 523 U.S. 833, 846-49 (1998) (articulating amorphous standard for
9 applying “shock the conscience” test as ordinarily requiring something more than deliberate
10 indifference or recklessness, and stating that “liability for negligently inflicted harm is
11 categorically beneath the threshold of constitutional due process”).

12 In the foster care context, a state can be held liable for a substantive due process
13 violation “only if without justification based on either financial constraints or on
14 considerations of professional judgment, state welfare workers and their supervisors place
15 the child in hands they know to be dangerous or otherwise unfit.” Bailey v. Pacheco, 108
16 F.Supp.2d 1214, 1220 (D. N.M. 2000).³ See also, e.g., Del A. v. Roemer, 777 F.Supp.
17 1297, 1319 (E.D. La. 1991) (“Liability is imposed only when a decision by the professional
18 is such a substantial departure from accepted professional judgment, practice, or standards
19 as to demonstrate that the professional actually did not base the decision on such a
20 judgment.”). The Bailey court made clear that courts are not to “second-guess” the
21

22 _____
23 ³ By separate motion, Defendants have moved for summary judgment based on financial
24 constraints controlled through the legislative power of appropriation. Those arguments are
25 incorporated herein by reference.

1 decisions of foster care professionals, and rebuffed the plaintiffs “persistent propensity to
2 argue her case under a negligence standard.” 108 F.Supp.2d at 1222, 1223.

3 As explained in Defendants’ Motion for Partial Summary Judgment re: Procedural
4 Safeguards, courts nationwide have uniformly remised to broaden this standard to include a
5 foster child’s right to a stable home. The Fifth Circuit expressly declined to establish a
6 right to a stable home in Drummond v. Fulton County Dep’t of Familv & Children’s
7 Services, 563 F.2d 1200, 1209 (Sth Cir. 1977) (en bane), *cert. denied*, 437 U.S. 910 (1978).
8 The Seventh Circuit held that there is “no clearly established right to a stable foster-home
9 environment” in K.H. v. Morgan, 914 F.2d 846, 854-55 (7^h Cir. 1990). The Maryland
10 Court of Appeals followed suit in In re Adoption/Guardianship No. 2633,646 A.2d 1036,
11 1047 (Md. App. 1994), and the Ninth Circuit recognized this weight of authority in Gibson
12 v. Merced County Dep’t of Human Resources, 799 F.2d 582,589 (gth Cir. 1986). See also
13 Del A. v. Roemer, 777 F.Supp. 1297, 13 19 (E.D. La. 1991) (“There is no clearly
14 established right to a stable foster home environment.”). There simply is no
15 constitutionally protected right to a stable home. Plaintiffs have no constitutional right not
16 to be “shuttled” from foster care placements.

17 Courts throughout the country have declined to create other, similar “rights” of
18 foster children. The District of New Hampshire declined to find a viable substantive due
19 process claim under allegations remarkably similar to those asserted here. Eric L. v. Bird,
20 848 F.Supp. 303 (D. N.H. 1994) was a class action lawsuit challenging New Hampshire’s
21 foster care system. The court rejected the plaintiffs’ purported constitutional right to
22 “reasonable stability in foster care placement.” *Id.* at 306. The court explained that the
23
24
25

1 state's "placement of children with successive foster parents [was not] so devoid of
2 justification as to give rise to a substantive violation of the Due Process Clause." Id. at 307.
3 Substantive due process challenges to Louisiana's foster care system were rejected in a
4 class action lawsuit in Del A., supra. There, the court summarized current law as
5 containing no right to a stable foster home environment, no right to "uninhibited personality
6 development," and no right to "attachments to particular foster families." 777 F.Supp. at
7 13 19. The court then concluded "that plaintiffs' claims that their emotional well-being has
8 been harmed" did not give rise to a constitutional claim. Id, See also B.H. v. Johnson, 715
9 F.Supp. 1387 (N.D.111. 1989) (holding there was no substantive due process right to
10 "parental and sibling visitation, stable placements in the least restrictive setting possible,
11 and adequate caseworkers.") A constitutional challenge to New York City's foster care
12 system suffered a similar fate in Mark G. v. Sabol, 247 A.D.2d 15,27,31 (Sup. Ct. N.Y.
13 1998), *afd*, 717 N.E.2d 1067 (Ct. App. N.Y. 1999) (acknowledging "the tremendous
14 problems facing the child welfare system," but holding "even giving plaintiffs the benefit of
15 all favorable inferences, nothing alleged suggests such total indifference on defendants' part
16 to plaintiffs' physical and emotional safety as to give rise to a substantive due process
17 claim.").

18
19
20
21 Bailey, supra, involved a three-year-old girl who suffered serious sexual, physical,
22 and emotional abuse at the hands of her foster parents. The Bailey court stated that
23 substantive due process claims could not arise out of judgment errors in "improper
24 placement decisions," "failure to professionally review, supervise, or plan for the child,"
25 "failure to provide necessary psychological care," or "failure to provide particular services

1 or treatment.” 108 F.Supp.2d at 1222, 123 1. Such errors of professional judgment do not
2 give rise to constitutional claims, which can be stated only if, without consideration of
3 professional judgment, a child is knowingly placed in danger. Id. at 1220, 1222.

4 Additionally, “foster children are not constitutionally entitled to any particular treatment
5 services, to certification as special needs, or not to be over placed in a home.” Id. at 1237.⁴
6

7 Similarly, in S.S. v. McMullen, supra, the Eighth Circuit rejected a foster child’s
8 constitutional claims where the state returned her to her father, knowing that her father
9 allowed her to have contact with a known pedophile. 225 F.3d at 962. The Court held that
10 there were no viable claims because the harm was inflicted while the child was living with
11 her biological father, following a long line of cases with similar holdings. Id. at 963.

12 However, the Court went on to say that, even if the claim were not foreclosed, the state’s
13 conduct, although possibly grossly negligent or even reckless, was insufficient to establish a
14 constitutional claim. Id. at 964. A substantive due process claim requires a far greater
15 “abuse of power” than the misconduct alleged, even if sufficient to state a claim under state
16 tort law. See also Nicini v. Morra, 212 F.3d 798 (3rd Cir. 2000) (holding there was no
17 substantive due process claim where plaintiff was sexually assaulted while in Department
18 custody, and Department was at most negligent in failing to discover abuser’s criminal
19 history); Andrea L. v. Children & Youth Serv., 987 F.Supp. 418 (W.D. Pa. 1997) (holding
20
21
22
23

24 ⁴ If Plaintiffs’ substantive due process claims are also based on the State’s failure to provide
25 requested psychological care, such claims are precisely those that were rejected in Bailey. As the
Bailey court made clear, such decisions are exactly the type of decision where the courts should not
second-guess the social workers’ judgment.

1 that agency's conduct did not give rise to substantive due process claim where foster child
2 became pregnant by foster parents' son despite agency's knowledge of sexual relationship).

3
4 Plaintiffs have not alleged Defendants "without justification . . . place[d] [Plaintiffs]
5 in hands they knew to be dangerous or otherwise unfit." Rather, they have alleged that
6 system-wide deficiencies result in the psychologically harmful "shuttling" of foster
7 children. As in New Hampshire, the state's "placement of children with successive foster
8 parents [is not] so devoid of justification as to give rise to a substantive violation of the Due
9 Process Clause." Eric L., 848 F.Supp. at 307. As in Louisiana, the Plaintiffs' "claims that
10 their emotional well-being has been harmed" does not give rise to a constitutional claim.
11 Del A., 777 F.Supp. at 1319. Like foster children in New Mexico, Plaintiffs cannot base
12 substantive due process claims on judgment errors resulting in "improper placement
13 decisions" or "failure to provide necessary psychological care." Bailey, 108 F.Supp.2d at
14 1222, 123 1. Like the foster children in New York, "nothing alleged suggests such total
15 indifference on defendants' part to plaintiffs' physical and emotional safety to give rise to a
16 substantive due process claim." Mark G., 247 A.D.2d at 3 1. Although Plaintiffs have
17 perhaps articulated a negligence claim, they have not alleged facts sufficient to implicate
18 the substantive due process clause.
19
20

21 ***2. Creating the right which Plaintiffs request would violate the Supreme Court's***
22 ***instruction to the lower courts not to broaden the reach of the substantive due***
process clause.

23 The Supreme Court has repeatedly cautioned courts not to broaden the scope of the
24 Fourteenth Amendment's substantive due process clause. "[R]ecent jurisprudence restricts
25 the reach of the protections of substantive due process primarily to liberties 'deeply rooted

1 in this Nation's history and tradition." Armendariz v. Penman, 75 F.3d 1311, 1319 (gth
2 Cir. 1996) quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977). Such liberties
3 include the rights to have children, marital privacy, bodily integrity, contraception, and
4 abortion. Washington v. Glucksberg, 521 U.S. 702,720 (1997). The alleged right to
5 protection against emotional harm caused by foster home moves is not "deeply rooted in
6 this Nation's history and tradition," and is not akin to the rights heretofore protected by
7 substantive due process. The United States Supreme Court has cautioned against invoking
8 the substantive due process clause where specific protections in the Bill of Rights are not
9 involved. Collins v. Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the
10 Court has always been reluctant to expand the concept of substantive due process because
11 guideposts for responsible decisionmaking in this unchartered area are scarce and open-
12 ended."). In the interest of containing the scope of substantive due process, the Supreme
13 Court also requires that a substantive due process right be carefully described. Washington
14 v. Glucksberg, 521 U.S. 702, 721 (1997).

17 In recognizing the confines of substantive due process, courts have emphasized that
18 a substantive due process claim requires far more than a state law claim. See, e.g., Archie
19 v. City of Racine, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc) ("A state ought to follow
20 its law, but to treat a violation of state law as a violation of the Constitution is to make the
21 federal government the enforcer of state law."). See also Justice Philip Talmadge,
22 Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court
23 Systems, 22 Seattle U. L. Rev. 695, 704 (1999) ("[The courts'] protective role does not
24 allow the courts to 'constitutionalize' every controversy."). The Eighth Circuit heeded the
25

1 Supreme Court's warning in the foster care realm in *S&*, *supru*, stating, "We do not see
2 how we could well hold those acts [returning child to home where she would have contact
3 with known pedophile] actionable without violating the Supreme Court's caveat against
4 making 'of the Fourteenth Amendment a font of tort law to be superimposed upon whatever
5 systems may already be administered by the States.'" 225 F.3d at 963, *quoting Paul v.*
6 *Davis*, 424 U.S. 693, 701 (1976). ~~It is~~ *It is* against allowing Plaintiffs to
7 assert their novel claim.

9 None of the cases cited by Plaintiffs in previous briefing support the expansion of
10 the substantive due process clause that they request. Some state merely that foster children
11 have a right to be free from physical harm, and that the state can be liable if it knowingly
12 places them in danger-a contention which is not disputed and not relevant. *See Camp v.*
13 *Gregory*, 67 F.3d 1286 (7th Cir. 1995) (stressing that substantive due process encompassed
14 only narrow class of cases, which included case where social worker did nothing to find
15 placement for child who was killed while residing with guardian who told worker she could
16 not provide a safe home for him); *Norfleet v. Arkansas Dept. of Human Serv.*, 989 F.2d 289
17 (5th Cir. 1993) (finding viable claim where child died while in foster care due to lack of
18 medical attention); *Yvonne L. v. New Mexico Dept. of Human Serv.*, 959 F.2d 883 (10th
19 Cir. 1992) (finding viable claim where plaintiff was raped and sodomized by another foster
20 child if state knew or suspected harm when placing her there); *Meador v. Cabinet for*
21 *Human Resources*, 902 F.2d 474 (6th Cir. 1990) (finding viable claim where plaintiffs
22 alleged they were sexually abused by foster parent known by state to be abusive); *Taylor v.*
23 *Ledbetter*, 818 F.2d 791 (1st Cir. 1987) (holding that plaintiff, who was beaten until
24
25

1 comatose by foster parent, must show state had actual knowledge of or deliberately failed to
2 discover abuse to recover); Doe v. New York City Dept. of Social Serv., 649 F.2d 134 (2nd
3 Cir. 1981) (finding claim where agency failed to investigate allegations that plaintiff was
4 severely physically and sexually abused by her foster father); Hebein v. Young, 37 F.Supp.
5 2d 1035 (N.D. Ill. 1998) (finding viable claim where caseworkers knew plaintiff was in
6 physical danger in her placement.); Marisol A. v. Giuliani, 929 F.Supp. 662 (S.D.N.Y.
7 1996) (holding there is no right to “least restrictive, optimal placement,” but that plaintiffs
8 alleged sufficient facts of harm where they endured extreme conditions while in state
9 custody, such as sexual abuse in a placement); Lewis v. Neal, 905 F.Supp. 228 (E.D. Pa.
10 1995) (finding viable claim where foster child was beaten to death in foster home); Taahira
11 W. v. Travis, 908 F.Supp. 533 (N.D. Ill. 1995) (finding viable claim where child was beaten
12 and raped by another foster child, whom agency knew had history of sexual assault);
13 Wendy H. v. City of Philadelphia, 849 F.Supp. 367 (E.D. Pa. 1994) (finding viable claim
14 where plaintiff was vaginally and anally raped by foster parents’ son and her brother and
15 complained of abuse to caseworkers who failed to investigate). But see DeShanev v.
16 Winnebago County Dept. of Soc. Servs., 489 U.S. 189,201 (1989) (affirming dismissal of
17 due process claim asserted by former foster child killed by his father after being returned by
18 county to father’s custody, stating that “the State does not become the permanent guarantor
19 of an individual’s safety by having once offered him shelter.”)

20
21
22
23 Each of these cases involved physical harm. In each case, the court held that the
24 state agency involved could be held liable only if it knowingly placed the children in harm.

25 Each case is simply inapplicable here. Plaintiffs here allege that they were psychologically

1 harmed by “defendants’ routine practice of shuttling them from one place to another.” This
2 falls far short of the foster children’s right to be free from physical harm that the courts
3 have recognized. Plaintiffs’ allegations regarding the frequency of caseworker visits, lack
4 of guardians ad litem, and other similar challenges also plainly are not tantamount to the
5 physical abuses suffered by the foster children in the above cases.
6

7 Other cases Plaintiffs have cited in support of their substantive due process claim
8 are simply inapposite. Hudson v. McMillian, 503 U.S. 1 (1992) (discussing Eighth
9 Amendment’s cruel and unusual punishment clause where prisoner alleged he was severely
10 beaten by prison guards); Benfield v. McDowell, 241 F.3d 1267 (10th Cir. 2001)
11 (addressing Eighth Amendment cruel and unusual punishment issues raised by prisoner
12 who feared for his life after state official labeled him a “snitch”); Sharp v. David Special
13 Commitment Center, 233 F.3d 1166 (9th Cir. 2000) (holding that civilly-committed
14 individuals have right to mental health treatment); Abevta v. Chama Valley Ind. School
15 Dist., 77 F.3d 1253 (10th Cir. 1996) (holding that sixth grade student repeatedly called
16 “prostitute” by teacher had no substantive due process claim because teacher’s conduct was
17 not “a brutal and inhuman abuse of official power literally shocking to the conscience.”);
18 Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992) (addressing whether Oregon’s
19 allocation of foster care funds violated equal protection); Ohlinrzer v. Watson, 652 F.2d 775
20 (9th Cir. 1980) (holding prisoners had right to mental health treatment);⁵ White v. Rochford,

21
22
23
24 * This line of authority supports the federal court’s intervention in the McNeil Island case
25 involving the Special Commitment Center for sexual predators, to which the Court has previously
analogized this case. As the above authorities indicate, however, very different and far more well
established constitutional rights are involved in prison or civil commitment cases than those claimed

1 592 F.2d 38 1 (7th Cir. 1979) (finding viable claim where child was hospitalized after police
2 officers left children alone in vehicle on cold Chicago night after arresting vehicle's driver).

3 No court has recognized a substantive due process claim to be free from emotional
4 harm caused by a state's "routine practice of shuttling [foster children] from one place to
5 another." In fact, every court that has been requested to create rights such as this has
6 declined to do so. Given the Supreme Court's requirement that a substantive due process
7 right be carefully described, were the Court to hold that such a right exists, it would be
8 creating a new substantive due process claim-something the Supreme Court has
9 repeatedly cautioned against.

10
11 **D. To the extent that Plaintiffs seek damages under 42 U.S.C. §1983 for their**
12 **substantive due process claims, such claims cannot be maintained against the State,**
13 **DSHS or Defendant Quasim.**

14 *1. As fully explained in Defendants' Prior Motion for Partial Summary*
15 *Judgment re: Procedural Safeguards, the State Of Washington And DSHS Are*
16 *Not "Persons" Subject To Liability For Damages Under Section 1983.*

17 The law is well established that a state and its agencies are not "persons" subject to
18 suit for damages under 42 U.S.C. § 1983. Will v. Michigan Dep't of State Police, 491 U.S.
19 58,71 (1989) ("neither a State nor its officials acting in their official capacities are
20 'persons' under § 1983"). Such claims fail to state a cause of action and should be
21 dismissed. See, e.g., Edgar v. State, 92 Wn.2d 217, 222 (1979), *cert. denied*, 444 U.S.
22 1077 (1980) ("the State is not suable under section 1983 for acts of its agents subjecting the
23 plaintiff to deprivation of his civil rights"); Spurrell v. Block, 40 Wn.App. 854, 864-65, *rev.*

24
25 to be involved in this case. The cases arising in these entirely different legal and factual contexts
are thus inapposite.

1 *denied*, 104 Wn.2d 1014 (1985) (dismissing claims against the State of Washington and
2 DSHS because these entities are not subject to suit under section 1983). To the extent that
3 Plaintiffs seek damages under Section 1983 for substantive due process claims against the
4 State of Washington and/or DSHS, these claims must be dismissed. Plaintiffs’ Section
5 1983 procedural due process damage claims against the State and DSHS were previously
6 dismissed for this reason.
7

8 ***2. Defendant Quasim Cannot Be Held Liable For Damages Under Section 1983.***

9 Also explained in Defendants’ previous summary judgment motion, it is equally
10 well established that state employees acting in their official capacities are not “persons”
11 subject to suit for damages under 42 U.S.C. § 1983. *will. supru*, 491 U.S. at 71. An action
12 under 42 U.S.C. § 1983 against a state employee can only proceed against the employee in
13 his or her personal capacity. Hafer v. Melo, 502 U.S. 21,27. (1991). In order to maintain an
14 action against an individual under 42 U.S.C. § 1983, the plaintiff must affirmatively produce
15 evidence that the named defendant personally participated in a constitutional deprivation. See
16 King v. Atiyeh, 814 F.2d 565,568 (9’ Cir. 1987). Liability under section 1983 cannot be
17 vicarious or premised on respondeat superior. Polk Countv v. Dodson, 454 U.S. 312,325
18 (1981).
19

20 Plaintiffs cannot produce any evidence supporting the personal liability of
21 Defendant Lyle Quasim, the former secretary of DSHS. Plaintiffs do not contest that Mr.
22 Quasim had absolutely no personal involvement in any of the named plaintiffs’ cases.
23 Thus, plaintiffs cannot bear their burden to show that Mr. Quasim personally participated in
24 any practice that plaintiffs point to as a deprivation of their civil rights.
25

1 To the extent Mr. Quasim is alleged to be individually liable, if at all, as a
2 supervisor for the alleged conduct of his subordinates, such claims also fail as a matter of
3 law. Additionally, any claim that the state defendants are vicariously liable under Section
4 1983 for the conduct of their alleged agents is meritless. Polk, 454 U.S. at 325.
5 Accordingly, as this Court previously ruled on Plaintiffs' Section 1983 procedural due
6 process claims, Plaintiffs' Section 1983 claims based on substantive due process should be
7 dismissed.
8

9 ***3. Even if Defendant Quasim were to erroneously be regarded as a "person" "***
10 ***subject to damages under Section 1983, he would be entitled to qualified***
11 ***immunity because Plaintiffs are unable to prove that he violated clearly***
established federal law at the time of his alleged misconduct.

12 "Qualified immunity protects all but the plainly incompetent or those who
13 knowingly violate the law." Saucier v. Katz, 2001 WL 672265 (U.S., June 18,2001).

14 A state official cannot be held liable under Section 1983 unless he or she acted with
15 deliberate indifference in violating the plaintiffs clearly established constitutional rights.

16 Harlow v. Fitzgerald, 457 U.S. 800 (1982); Youngberg v. Romero, 457 U.S. 307 (1982).

17 As the Fourth Circuit has cautioned, "The availability of immunity cannot be judged solely
18 by tragedies that later occur or by mistakes that later come to light.. . The question under
19 qualified immunity is thus whether fallible and imprescient human beings acted reasonably
20 on the law as it stood and on the facts as they were known at the time the action was taken."
21

22 White v. Chambliss, 112 F.3d 73 1, 739 (4th Cir.), *cert. den 'd*, 522 U.S. 913 (1997)

23 Courts have routinely found state officers to be immune from liability for harms
24 suffered in the foster care context. See, e.g., Id. (holding social workers were entitled to
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

qualified immunity because there was no clearly established duty to protect child from abuse after placement with foster parents); Lintz v. Skipski, 25 F.3d 304, 305-06 (6th Cir. 1994) (holding state workers immune from liability where foster child was placed in abusive home, both because foster child’s right to physical safety was not yet clearly established and because defendants’ actions were not unreasonable enough to constitute deliberate indifference); Caldwell v. LeFavor, 928 F.2d 331 (gth Cir. 1991) (holding social workers were immune from liability for removing child from father’s home and state without any notice and opportunity for hearing in emergency); Babcock v. Tyler, 884 F.2d 497 (gth Cir. 1989), *cert. den* ‘d, 493 U.S. 1072 (1990) (holding social workers were entitled to absolute immunity incident to child dependency proceedings, even where placement recommendations resulted in placing foster children in home where they were sexually abused); Myers v. Contra Costa County Dept. of Soc. Servs., 812 F.2d 1154 (9th Cir.), *cert. den* ‘d, 484 U.S. 829 (1987) (finding absolute immunity for social workers “for performance of duties authorized by statute” related to dependency proceeding); Bailey v. Pacheco, 108 F.Supp.2d 1214 (D. N.M. 2000) (finding social workers immune from liability for placing three-year-old girl in abusive foster home).

As shown above, not only was the constitutional right not to be “shuttled” among foster care placements not clearly established when Mr. Quasim allegedly violated it, it does not exist now. Furthermore, his involvement in Plaintiffs’ cases cannot be said to rise to the level of “deliberate indifference.” Mr. Quasim is entitled to qualified immunity. As the procedural due process claims which this Court previously dismissed, all substantive due process damages claims under Section 1983 against Mr. Quasim should be dismissed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

V. CONCLUSION

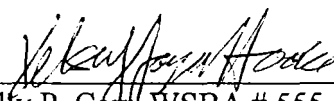
For the foregoing reasons, Defendants respectfully request that this Court order partial summary judgment dismissing Plaintiffs' substantive due process claims. Any remaining claims for damages under 42 U.S.C. § 1983 should also be dismissed.'

RESPECTFULLY SUBMITTED this 2nd day of July 2001.

ATTORNEY GENERAL'S OFFICE

Jeff Freimund, WSBA # 17384

CORR CRONIN, LLP



Kelly P. Corr, WSBA # 555
Kelsey JooygHooke, WSBA # 29280
Attorneys for Defendants

22000001aj111301

⁶ A proposed order is filed herewith.