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The Honorable David A. Nichols

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

JESSICA BRAAM, etc., et al,

Plaintiffs,

vs.

STATE OF WASHINGTON, etc., et al.,

Defendants.

NO.98-2-01570-1

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State claims the constitutional principle of separation of powers requires this Court to enter summary judgment and dismiss this case in its entirety. Yet to reach this conclusion, the State turns the principle of separation of powers on its very head.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT - 1
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1 The plaintiff children request only that this Court exercise its constitutional authority,
2 and perform its Constitutional duty, to enforce rights conferred by law. They ask only that the
3 Court do what is “the very essence of judicial duty,” *Marbury v. Madison*, 5 U.S. (1 Cranch)
4 137, 178 (1803): “to say what the law is” and enforce it, regardless of whether an “act of the
5 legislature” purports to stand in its way. *Id.*

6 Here, no such act exists, and in any event, the plaintiff children don’t ask this Court to
7 make social policy. Nonetheless, the State once again conjures up the specter of this Court
8 being pressed into service as the “super-administrator” of the foster care system. This Court
9 properly cast this threat aside only weeks ago. It should do so again. The children don’t ask
10 this Court to sign up for a tour of duty with DSHS.

11 Rather, they ask this Court to validate a very simple proposition: Foster children have a
12 number of rights, under the Constitution, under federal and state statutes, and at common law.
13 These rights protect foster children from harm due to State indifference and neglect, and their
14 purpose is to maximize the opportunity for foster children to find a stable and permanent home.

15 The State’s opening gambit is to deny that foster children have any enforceable rights
16 whatsoever. It can only do so, however, by caricaturing the children’s complaint as a request
17 for the judicial enactment of a complex social program to create a permanent home for each
18 and every foster child. The State carefully ignores the litany of constitutional rights foster
19 children have, rights that entitle foster children to things like adequate health care and shelter
20 and that protect them from harm through deliberate State indifference. Even prisoners have
21 these rights. The State then tries to dilute clear and unequivocal federal and state statutory
22 mandates for foster care into pie-in-the-sky dreams without teeth. These mandates include
23 things like fully informing prospective foster parents of material facts concerning a child so that
24 the parents can make an informed decision whether to take the child into their home. Finally,

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26 PLAINTIFF’S OPPOSITION TO DEFENDANT’S
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1 the State glosses over the Legislature's recognition, through its waiver of sovereign immunity,
2 that the State is liable if it fails to honor their common-law obligations to foster children in its
3 care, such as the duty to act with reasonable care.

4 It is the violation of these various legal mandates, the children argue, that causes
5 unnecessary multiple placements of foster children. For example, when children don't receive
6 adequate mental health services, they can be extremely difficult to place in any home. When
7 foster parents aren't fully informed of a foster child's needs, they may take in a child unsuitable
8 to them and their care-giving abilities, ensuring that the placement will be unsuccessful and that
9 the child will rotate to other homes. These multiple placements are unquestionably and
10 indisputably harmful to children. Even the State doesn't seriously suggest otherwise. The
11 State focuses instead on its own incomplete rendition of what causes multiple placements.

12 Amazingly, the State first tries to shift the blame from DSHS to the Legislature by
13 suggesting multiple placements are caused by a deliberate policy decision of the Legislature not
14 to spend the money needed to eliminate them. According to the State, the Legislature simply
15 refuses to fund things like adequate mental health care for foster children that would address at
16 least some of the causes of multiple placements. If the State has a legal obligation to provide
17 these things, however, it must do so regardless of the Legislature's desire to save money.
18 Moreover, the State's argument has troubling implications. If, after all, it is proven that
19 thousands of foster children are harmed by State mishandling, indifference, and neglect, the
20 State seems to suggest that this Court should attribute this harm to a conscious and deliberate
21 policy choice by the Legislature. The logical conclusion of this argument is that every harm a
22 foster child suffers in State custody -- every injury, every blow, every trauma, every illness,
23 every indignity, every abuse, every horror - is the result of a willful and deliberate policy
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22 foster child suffers in State custody -- every injury, every blow, every trauma, every illness,
23 every indignity, every abuse, every horror - is the result of a willful and deliberate policy
24 decision of the Legislature. Far from undermining the children's claims of governmental

1 indifference to their plight, this provides powerful support to the children’s case,

2 Perhaps recognizing this unpalatable implication of its argument, the State tries to avoid
3 it by contending it can’t do anything about multiple placements anyway, because multiple
4 placements are indisputably caused **by** factors outside its control. The State’s own documents
5 and employees disagree, as does the testimony the State offers in support of its motion. This
6 Court can only accept the State’s argument by resolving factual disputes and drawing
7 inferences in the State’s favor, something this Court cannot do on a request for summary
8 judgment.

9 Like it or not, the State owes clear, express, unequivocal duties to foster children, and it
10 hasn’t proven otherwise in this motion or shown entitlement to any immunity for its failure to
11 perform its duties. The State’s duties arise from the Constitution, they arise from statute, they
12 arise from regulations, and they arise from the common law. The children simply ask this
13 Court to ensure that the State complies with the law and honors and protects the rights of the
14 thousands of innocent foster children who are in its trust.

15
16 **II.**
THE CHILDREN REQUEST ONLY THAT THE STATE FOLLOW THE LAW

17 The State’s effort to avoid a trial on the merits begins with the mischaracterization of
18 the children’s complaint. It claims the “gravamen” of the complaint “is that the executive and
19 legislative branches of government have not done enough to find new ‘permanent’ homes for
20 children who are judicially removed from their biological parents’ homes due to abuse or
21 neglect.” (Defs.’ Mem. Supp. Summ. J. at 1:4-7.) It caricatures the relief the children seek as
22 “having the judicial branch order additional public funding and program changes to reduc;
23 ‘multiple placements’.” (lil. at 1:9-1 0.)

1 This Court clearly has a better understanding of the children's claims than the State
2 professes to have. At the recent hearing on class certification, this Court cogently described
3 this suit as an "action where a group of people who are under state care allege that the state is
4 basically mishandling them." (Farris Decl., Ex. 1 (Transcript of Court's Ruling on Class
5 Certification at 3).) The Court went on to observe that "plaintiffs at this stage of the process
6 have made a prima facie case that the system is broken. It needs fixing, and in the meantime,
7 children are being directly and permanently harmed by the failure of the system." (IL!)

a Among the rights the children seek to vindicate here are:

9 0 their right, under the Due Process Clause of the United States and Washington
10 Constitutions, not to be injured while in State custody due to the State's deliberate indifference;

11 0 their right, under the Due Process Clause of the United States and Washington
12 Constitutions, to adequate medical treatment, and particularly mental health treatment, while in
13 State custody;

14 • their right, under the Due Process Clause of the United States and Washington
15 Constitutions, to a safe, secure, and otherwise adequate shelter and services sufficient to
16 prevent their deterioration while in State custody;

17 0 their right, at common law, not to be injured while in State custody due to the
18 State's negligence;

19 0 their right, at common law, to adequate medical treatment, and particularly
20 mental health treatment, while in State custody;

21 0 their right, under RCW 74.14A.050(3), to an evaluation of their long-term care
22 needs within 30 days of entry into foster care;

23 • their right, under WAC 388-73-212(6), to be placed in a foster home where the
24 foster parents have been provided with sufficient information about the child, especially

1 behavioral and emotional problems, to make an informed decision to accept the child into their
2 home;

3 . their right, under WAC 388-73-212(7), to have a case worker contact them in
4 their foster home not less than once every ninety days;

5 0 their right to proper “passports” under federal law;

6 . their right, under 42 U.S.C. §§671(a)(16) & 675(1), to have their case plan
7 updated with each new placement; and

8 o their “right to a safe, stable, and permanent home” under RCW 13.34.020.

9 (See Plaintiffs’ Third Amended Complaint, to be filed shortly.) These constitutional, statutory,
10 and common-law rights are just that, rights. They aren’t suggestions by the Legislature to
11 DSHS that DSHS is free to disregard if it think it has better things to do. They’re not vague,
12 nebulous -- and unenforceable -- statutory aspirations, shades without substance or reality.
13 Rather, these are legal requirements that are not qualified or conditioned upon adequate
14 funding, as the State suggests. This Court can and should enforce them.

15 The State complains that the relief the children seek is inappropriate. First, the State
16 argues, the children want this Court to order it “to change every foster child’s written care plan
17 each time a foster child’s placement is changed.” (Id. .at 2:7-8.) Then State opposes this relief,
18 not because it would be ineffective, but because it “would increase paperwork.” (Id. at 2:8.)
19 As though the drafters of the Constitution quaked at the thought our government might have to
20 fill out a form to save a life or comply with the law.’

21 Second, the State complains, the children want this Court to require “additional judicial
22 hearings prior to every change of placement.” (Zcl. at 2:8-9.) The State objects because i’t
23 “would require more expenditures of resources.” (I(/. at 9-1 0.) This complaint, too, is

24 _____
’ If this is typical of the State’s defense on the merits, it’s no s~nall wonder they want to avoid a trial.

1 irrelevant if the State is, in fact, violating the children's rights. As will be discussed below, and
2 as *Marbury v. Madison* reminds us, the government is not above the law. This means the State
3 may not violate the law, even if it happens to save money (or cut down paperwork).

4 The State's complaint that coming into compliance with the law will necessarily cost
5 more money is also undercut, at least to some extent, by the recent testimony of the former
6 Secretary of DSHS, Jean Soliz. Ms. Soliz testified:

7 Q. Is it a correct understanding of what you're telling me that it's not just
8 money; it's also management that's causing problems in the foster care system?

9 A. I think -- Well, I don't know the status of management now. I know that
10 that was true when I came into the agency.

11 (Farris Decl., Ex 2 (Soliz Dep., Vol. 2, at 49-54).) Ms. Soliz proceeded to go into great detail
12 about the types of things the State failed to do properly that had nothing to do with the amount
13 of funding DSHS received. (*Id.*)'

14 Whatever the case, the plaintiff children clearly pursue something considerably
15 different than a nebulous "right" to a permanent home at State expense. They certainly seek
16 something other than pure paperwork. They ask this Court to vindicate their rights.

17 The State threatens, as it did in opposing class certification, that if this Court tries to
18 vindicate those rights, it will be forced to take over the State's foster care system. "The Court
19 should decline plaintiffs' request to have it become the super-administrator of our State's child
20 welfare system," they warn, "under the disingenuous suggestion that all that is needed to

21
22 ' Among the problems Ms. Soliz identified that had nothing to do with inadequate funding were the
23 following: (1) the failure to use a computerized intake system to track foster children; (2) the improper
24 redirection of funds earmarked for foster care to other uses; (3) the failure to update a policy manual so
25 it could be understood and followed; (4) the absence of management and quality control in certain
26 DSHS offices due to the failure to sanction poor performance; and (5) the absence of any system ;or
preventing the payment of exorbitant fees for provider care.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT - 7

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1 completely eliminate multiple foster care placements are some vague, unfunded mandates.”
2 (Mem. at 40.)

3 The State rests this contention in part upon the above-described mischaracterization of
4 the children’s claims. The State further bases this assertion upon its claim that any injunction
5 would violate the doctrine of separation of powers, a claim that is debunked in Section V(A)
6 below. That Section demonstrates that under the Constitution, this Court has the clear power --
7 and duty -- to say what the law is. Once it has done so, Article IV, section 6 of the Washington
8 Constitution confirms this Court’s power to order parties to comply with the law.³ Interpreting
9 this provision, our Supreme Court has held:

10 Thus, by the constitution, and independently of any legislative enactment, the
11 judicial power over cases in equity has been vested in the courts, and, in the
12 absence of any constitutional provisions to the contrary, such power may not be
13 abrogated or restricted by the legislative department. . . . The writ of injunction
14 is the principal, and the most important, process issued by courts of equity, it
15 being frequently spoken of as the “strong arm of equity.” . . . While utmost care
and caution are to be observed in the exercise of the jurisdiction, and while the
relief sought is to be granted only upon a clear showing of necessity in order to
afford immediate protection of a complainant’s right, yet- when these essentials
have been satisfied, it is the duty of the court to exercise its equity power and
grant the necessary relief.

16 *Blanchard v. Golden Age Brewing*, 188 Wash. 396,415-16,68 P.2d 397 (1936). The Supreme
17 Court’s enactment of Civil Rule 6.5 further confirms the constitutional authority of this Court to
18 require compliance with the law. The Legislature, far from contesting this Court’s authority to
19 do so as the State implies, has expressly recognized this Court’s authority by statute. See
20 Chapter 7.40, RCW.

21 The State’s threat seems **based** on a fundamental misunderstanding of what injunctive
22 relief would look like. This Court, if it determines DSHS is violating constitutional or statutoj
23 mandates, does not need to “become the super-administrator” of the child welfare system in

24 ³ Article IV, Section 6 extends the jurisdiction of superior courts to “cases in equity.”

1 The starting point is the rule itself, which provides for the grant of a summary judgment
2 motion “if the pleadings, depositions, answers to interrogatories, and admissions on file,
3 together with the affidavits, if any, show that there is no genuine issue as to any material fact
4 and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). That means
5 summary judgment is not a vehicle for trying issues of fact, *Thomas v. C.J. Montag & Sons,*
6 *Inc.*, 54 Wn. 2d 20, 26, 337 P.Zd 1052 (1959) and that this Court is not permitted to weigh the
7 evidence. *Fleming v. Smith*, 64 Wn. 2d 181, 185, 390 P.2d 990 (1964). Its function is to
8 determine whether a “genuine issue of material fact” exists, and not to resolve factual issues
9 their merits. *Balise v. Underwood*, 62 Wn. 2d 195, 199391 P.2d 966 (1963).

10 As the rule states, this Court must look to whether there is a genuine issue of *material*
11 fact. A fact is “material” if it is one upon which the outcome of the case depends, in whole or
12 in part. *E.g.*, *Atherton Condominium Ass’n v. Blume Dev. Co.*, 115 Wn. 2d 506, 516, 799 P.2d
13 250 (1990); *Balise*, 62 Wn. 2d at 199. A plaintiff, therefore, cannot avoid summary judgment
14 by pointing to disputes concerning immaterial facts. By the same token, however, a defendant
15 can point to all of the undisputed facts it wants, but if the facts aren’t material to the case, the
16 defendant’s effort is unavailing.

17 As the movant, the State carries the burden of showing the absence of a genuine issue of
18 material fact, regardless of whether the children ultimately have the burden of proof at trial, and
19 the State is “held to a strict standard.” *E.g.*, *Scott v. Pacific West Mountain Resort*, 119 Wn. 2d
20 484, 502-03, 834 P.2d 6 (1992); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770
21 P.2d 182 (1989). In considering whether the State has met its burden, this Court must consider
22 all of the material evidence, and all inferences from the evidence, most favorably to the
23 children, since they are the non-moving parties. *E.g.*, *Scott*, 119 Wn. 2d at 502; *McKee v.*
24 *American Home Products*, 113 Wn. 2d 701, 705, 782 P.2d 1045 (1989). Summary judgment

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1 may be granted only if reasonable people could reach but one conclusion from the evidence.
2 *E.g., Scott*, 119 Wn. 2d at 502; *McKee*, 113 Wn. 2d at 705.

3 Certain issues are particularly unsuitable for summary judgment. When the
4 reasonableness of a party's act is a question of fact that is material to the litigation, the grant of
5 summary judgment is improper. *Morris v. McNicol*. 83 Wn. 2d 491, 495, 519 P.2d 7 (1974).
6 Even where the evidentiary facts are not in dispute, if different inferences or conclusions can be
7 drawn as to ultimate facts such as intent, knowledge, good faith, or negligence, summary
8 judgment is not warranted. *Preston v. Duncan*, 55 Wn. 2d 678, 681-82, 349 P.2d 605 (1960);
9 *Money Savers Pharmacy, Inc. v. Kofler Stores (Western) Ltd.*, 37 Wn. App. 602, 608, 682 P.2d
10 960 (1984).

11 Under these rules, it is obvious that the State's protests about the lack of issues of
12 material fact are far off the mark. Instead of presenting the version of the facts that is least
13 favorable to their case, as is required, the State has offered -- based largely on speculation
14 rather than proof -- the most favorable set of facts it can come up with, and then asked this
15 Court to draw the most favorable inferences it can possibly-draw from those facts. The State
16 may wish to ask the Court or the jury to draw these favorable inferences at trial, but it may not
17 do so on a motion for summary judgment.

18
19 **IV.**
STATEMENT OF FACTS IN DISPUTE

20 The State's statement of facts focuses on four discrete subjects. These are: (1) the
21 process of generating DSHS budgets for foster care; (2) each individual plaintiffs experience
22 in foster care; (3) the State's alleged efforts to comply with the law; and (4) the supposed
23 causes of multiple foster care placements.

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A. The State Budget Process.

The State writes a great deal about the budget process. It points out limits that either the Legislature or the voters have placed on State expenditures for foster care. As will be seen, however, there are not expenditure limits on the statutory duties on which the children rely and, in any event, the duty to obey the law trumps the desire of the Legislature or the voters to save money. This renders the State’s discussion of the legislative budget process wholly immaterial.

B. The Experiences of the Named Plaintiff Children.

The State devotes two and one-half pages to a summary of the histories of each of the thirteen named plaintiff children. Having done so, the State never returns to this subject in its brief.

The materiality of this history goes unexplained. How these children’s personal histories bear on the Constitutional separation of powers in our State government remains a mystery. Is the fact, for example, that Eryk Hardin’s father was reportedly alcoholic somehow relevant to the Constitutional power of the judiciary? If so, the State never explains how.

The State’s presentation of these “histories” is puzzling for another reason. Much of their brief is devoted to a discussion of the complexities of foster care. Yet for all that complexity, the State finds it feasible to summarize each child’s history in a single paragraph, generally in a mere two sentences. How can the issue of foster care be so complex if the experiences of children in it are so simple?

This Court need not answer that question at this juncture, of course. It suffices to note that the State’s attempt to summarize the history of the individual children is immaterial. This Court should disregard them at this stage,

1 **C. The State’s Failure to Comply with the Law and Their Mismanagement of**
2 **Foster Care.**

3 The children, as this Court well knows, allege that the State routinely fails to comply
4 with its legal obligations to foster children. As a result, the children allege, thousands of foster
5 children have experienced multiple foster care placements, which invariably lead to emotional
6 and other harm. The State doesn’t deny these allegations in this motion. To the contrary, the
7 State *admits* that it fails to comply with the law and that it mismanages the foster care system
8 with respect to every single *member* of the plaintiff class. This admission is the collective
9 result of three separate statements the State makes in its motion.

10 First, the State claims the undisputed facts show that “DSHS complies with the law and
11 properly administers the State’s foster care system as to over eighty (80) percent of the children
12 placed into foster care.” (*Id.* at 2:19-21.) The State bases this claim on the following testimony
13 by Dr. Jon Conte of the University of Washington concerning his declaration in support of class
14 certification:

15 Q. (By Mr. Freimund) The next sentence in this declaration is, quote, “The
16 conditions in the DSHS foster care system exist because DSHS does not and
cannot comply with state law because it mismanages the system.”

17 Now, again, Just so we’re clear, we’re talking about this less than 20 percent of
18 the total foster care children in which you’re speaking of there?

19 A. Yes.

20 (Freimund Decl., Ex.1 (Conte Dep. Vol. 1 at 82:2-10.) In other words, the State concedes the
21 accuracy of Dr. Conte’s testimony that “DSHS does not and cannot comply with state law
22 because it mismanages the system” with respect to nearly “20 percent of the total foster cari:
23 children.”

1 Second, the State claims it is undisputed that “ninety percent of all foster children had
2 no more than two out-of-home placements,” once again citing Dr. Conte’s testimony. (Mem. at
3 3: 18-19.) In other words, the State concedes, for purposes of this motion, that ten percent of all
4 foster children in its care suffered three or more out-of-home placements.

5 Finally, the State contends, again based on Dr. Conte’s testimony, that no matter what it
6 does, five percent of all foster children will experience unnecessary multiple placements. (rd.
7 at 3:24-25.) Dr. Conte, however, didn’t say that. Here’s what he actually said:

8 Q. And would you agree in the real world that probably no matter what you
9 did you would never attain perfection where there would never be multiple
placements?

10 A. It depends on how you define perfection. Let’s say it’s 20 percent of kids.
11 *If* you reduce the number from 20 percent to 5 percent, for the 15 percent of
12 kids who no longer are at risk for multiple placement that’s perfection. There
13 still are 5 percent of the total number of kids, or whatever it *would be*, who are
14 having multiple placements. *And of that 5 percent or so, some* probably, no
matter what you could do, you’d have multiple placements. I don’t think
anybody is recommending or believing that we’re going to ever prevent multiple
placements for some kids.

15 (Freimund Decl, Ex. 2 (Conte Dep. Vol. 2 at 55:21 - 56:11) (emphasis added).) As the
16 emphasized text indicates, Dr. Conte’s five percent figure was a hypothetical.⁴ Additionally,
17 Dr. Conte referred to “multiple placements,” not “three or more” placements. Nowhere did Dr.
18 Conte say it is unavoidable that five percent (or any other percentage, for that matter) of foster
19 children will experience “three or more” placements. Thus, the State’s effort to convince this
20 Court that half of the ten percent of children who experience three or more placements will do
21 so, no matter what the State does, is unsupported by Dr. Conte’s testimony.

22 These three statements by Dr. Conte, upon which the State so heavily relies, collectively
23 demolish the State’s position on summary judgment. According to Dr. Conte (and, hence,

24 ⁴ Further diluting the impact of this statement is the fact that Dr. Conte indicated that only “some” of
25 this hypothetical five percent would unavoidably experience multiple placements.

1 according to the State), “DSHS does not and cannot comply with state law because it
2 mismanages the system” with respect to nearly “20 percent of the total foster care children.” In
3 addition, ten percent of foster children experience three or more placements. This means
4 “DSHS does not and cannot comply with state law because it mismanages the system” with
5 respect to all of the foster children in the plaintiff class. Why? Because the class consists of
6 ten percent of all foster children, while the State mismanages affairs for nearly twice that many
7 children. For purposes of the present motion, the Court must infer, for the State offers no
8 evidence to foreclose this inference, that all members of the plaintiff class fall within the nearly
9 twenty percent who are victims of the State’s failure to comply with the law and their
10 mismanagement.⁵

11 Thus, the State concedes for purposes of this motion that “DSHS does not and cannot
12 comply with state law because it mismanages the system” with respect to nil of the foster
13 children in the plaintiff class. That admission concedes this motion.

14 **D. The Cause of Multiple Placements.**

15 The children claim the State’s various violations of the rights of foster children lead to
16 unnecessary multiple placements. In its motion, the State claims it is undisputed that “many”
17 of the causes of multiple placements are “sociopolitical forces outside of DSHS’s control.”
18 “Many,” of course, isn’t the same thing as “all.” It isn’t even “most.” Nowhere does the State
19 identify the percentage of children who’ve suffered multiple placements due to these forces.
20 By its own words, therefore, the State at this stage supports stage an inference that the State’s
21 own actions have caused multiple placements.

22 _____
23 ⁵ Perhaps the State will argue on reply that the children who make up the twenty percent Dr. Conte
24 discusses are completely different from the children who belong to the plaintiff class. If so, they’ve
25 provided no evidence to support that position. Since this is a summary judgment motion, the children
26 are entitled to the inference most favorable to them, which is that “DSHS does not and cannot comply
with state law because it mismanages the system” with respect to every one of them.

1 Even more tellingly for summary judgment purposes, the State makes no mention of
2 evidence pertaining to any individual child. For example, the State seeks to pin the blame for
3 some multiple placements on “legitimate efforts to comply with legislative mandates to exhaust
4 all reasonable efforts to “reunify children with their biological parents.” (Mem. at 4: 15-18.)
5 Which placements? Which children? The State doesn’t say.

6 The State claims many foster children experienced multiple placements solely due to
7 so-called “legal drift.” (Mem. at 4: 19-23.) Which children? The State doesn’t say.

8 The State argues that many foster children experience multiple placements “for
9 reasonable reasons” such as the fact that they ran away. (Mem. at 4:23 to 5:4.) Which
10 children? The State doesn’t say.’

11 Age, we’re told, is also a factor that “sometimes” causes multiple placements. (Mem. at
12 5:5-7.) For which children? How frequently? The State never says.

13 “Child characteristics” like gender and ethnicity, we’re assured, “increase the risks” of
14 multiple placements. (Mem. at 5:8-14.) So do “parental drug use” and “pre-existing severe
15 behavioral problems.” (Id.) That may be true, but what does it prove?

16 No one blames the State for parental drug use or pre-existing behavioral problems, of
17 course. The point of this lawsuit, however, is that the State has an obligation to do something
18 more than just shrug its shoulders when these and other factors threaten the well-being and
19 health of children in its custody. Doctors don’t create disease either, but we still expect them to
20 treat it properly.

21
22
23 ’ In fact, running away and “legal drift” may very well be a result of DSHS’s mishandling of individual
24 cases. Children have been known to run away from bad homes, after all. This intensely factual
25 question goes wholly unmentioned by the State. Without any evidence on the subject, this Court must
26 infer that the State itself is responsible for at least some instances of running away and legal drift.

PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT - I6

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1 The State's own brief clearly leaves open the inference that multiple placements are
2 caused by its own failure to comply with its legal obligations to foster children. This inference
3 concerning a crucial issue in this action is enough to preclude summary judgment.

4 But there's more. Other evidence contradicts the State's rosy view of its own
5 responsibility for what happens to foster children in its care. There's the above-quoted
6 testimony from Jean Soliz, of course. There's also a written report released only last month by
7 the Washington State Institute for Public Policy. That report made the following findings:

- 8 • "Children in foster care longer than three months often enter this system with
9 p.psychological injuries and vulnerabilities, as well as behavioral problems."
- 10 • "Behavior problems can create difficulties in a child's placement and ultimately
11 lead to multiple placements. Multiple placements are also associated with worse
12 outcomes for children."
- 13 • "Even for children with few impairments, being moved from setting to setting often
14 increases their problems."
- 15 • "Given the harm associated with multiple placements, the clear ideal is connecting
16 children with the most appropriate setting at the onset of their foster care
17 experience, taking into account their psychological and physical needs."
- 18 • "Foster parents are not always fully informed- about the children's history or
19 problem behaviors."
- 20 • "A substantial majority of children in family foster care did not receive services.
21 The more surprising finding was the low receipt of services by children in enhanced
22 family foster care. Children in this care category are supposedly differentiated from
23 those in basic care because of higher service and supervision needs, yet most had
24 not received mental health or other services."
- 25 • "When foster placements fail, it is usually because children have behavioral
26 problems that become unmanageable for foster parents. This failure may occur
because children and families are not receiving the appropriate services or because
the child's problems require a more comprehensive, therapeutic environment than is
possible in a regular family home."
- "Enhanced family foster care does not appear to be an adequate placement for
children with severe impairments."
- "For children in family foster care, the median number of prior placements was 3."

1 (Fan-is Decl., Ex. 3, at 2, 3, 22, 24 & 40.) Toward the end, this report asks: “What steps could
2 increase the likelihood of placement success?” It answers:

- 3 o “Structured assessments can assist placement decisions.”
- 4 · “Foster parents need to be fully informed about children’s history and
5 emotional/behavioral problems before a placements, particularly in situations where
6 the placement goal is long-term stability.”
- 7 · “Prior to all but temporary placements, foster parents need to be specifically
8 informed regarding the expectations for their participation in treatment to alleviate
9 children’s behavioral problems.”
- 10 • For many children in long-term foster care, caregivers report severe impairments
11 and yet indicate that relatively few of these children are receiving services intended
12 to address and resolve behavioral and psychological issues.” When children have
13 significant problems in functioning, caseworkers should make affirmative efforts to
14 ensure that mental health and support services are supplied. It is especially
15 important to try to preserve a placement that is in jeopardy because of the
16 deleterious effects of failure on children. These services might include mental
17 health counseling, intensive family preservation services, respite, foster parent
18 support groups, or mentoring for the children.”

13 (Id. at 43.)

14 These findings are flatly inconsistent with the State’s effort to wash its hands of the
15 matter. They are, however, consistent with the conclusions of Dee Wilson, a DSHS employee.
16 After documenting the causes of multiple placements, he recommended, among other things,
17 that the State “improve mental health services for children in out of home care,” explaining that
18 it was “urgently necessary to increase the capability of parents, foster parents, and foster
19 parents and relatives to cope with children’s emotional/behavioral problems.” (Farris Decl., Ex.
20 4, at 27.) Anticipating the State’s professed impotence to do anything about multiple
21 placements, Mr. Wilson offered this apt response:

22 It is not enough for child welfare staff to feel regret when children are rejected
23 by caregivers following out of home placement. A child welfare system must
24 take proactive steps to reduce the possibility of these emotionally devastating
25 experiences. Concretely, this means providing adequate training, supervision
26 and support for foster parents and unpaid relative caregivers. All too often,

1 foster parents wait until they are desperate before asking for and receiving help.
2 In addition, the lack of close supervision of foster parents caring for children
with serious mental health problems is unconscionable.

3 (rd. at 28-29.) Mr. Wilson concluded, “Foster parents and relatives caring for children with
4 serious emotional and behavioral problems need high quality, ongoing mental health services.”
5 (Id. at 29.)

6 Mr. Wilson offered a chilling assessment of the State’s willingness to provide these
7 services, one that contrasts sharply with the State’s portrayal of itself in its summary judgment
8 motion. “Mental health services,” he concluded, “are too important to be left in the control of
9 an indifferent administrative structure.” (Id.)

10 **V.**
11 **THE PRINCIPLES OF SEPARATION OF POWERS AND DISCRETIONARY**
12 **IMMUNITY DO NOT MANDATE DISMISSAL OF THIS ACTION**

13 The State casts its motion as one premised upon the doctrine of separation of powers. In
14 truth, little of the motion is directly devoted to that subject, because it is emphatically the
15 province of the judiciary to say what the law is and to vindicate the Constitutional, statutory,
and common-law rights of citizens of a free Republic.

16 The State therefore turns its attention away from true separation of powers doctrine, and
17 instead directs the bulk of its attention to an argument that the children have no statutory or
18 common-law rights for this Court to vindicate. Notably, the State ignores the children’s
19 constitutional rights in this motion; suffice it to say that even if the children lacked any
20 enforceable statutory or common-law rights, they still have enforceable rights under the United
21 States and Washington Constitutions.

22 But even if only statutory or common-law rights were involved, the State’s argument
23 would not be well taken. The State says the children have no statutory rights because the
24 statutes upon which the children rely are expressly conditioned upon sufficient legislative

1 funding. As will be seen, this is just plain wrong.

2 The State says the children have no common-law rights, because how they treat foster
3 children is purely discretionary. It isn't a tort for government to govern, the State says. True
4 enough, but that presumes the government is following the applicable laws: It is a tort to
5 negligently injure a child in your care, or to refuse basic medical treatment to that child, while
6 ignoring statutes expressly designed to protect that child.

7 **A. The Separation of Powers Doctrine Does Not Shield The State From Liability**
8 **for Breaches of the Constitutional, Statutory, and Common-Law Rights of**
9 **Foster Children.**

10 The State contends this Court should dismiss this case because to do otherwise is to
11 violate the constitutional doctrine of separation of powers. The premise of the State's argument
12 is that the children are asking this Court to order the Legislature to spend more money on foster
13 care. This premise, however, isn't true. As set forth above and in the Third Amended
14 Complaint, the children seek to vindicate a series of Constitutional, statutory, and common-law
15 rights, and invoke this Court's constitutional duty to make sure those rights are enforced.

16 Case after case, beginning with *Marbury v. Madison*, confirms that this Court not only
17 has the authority, but the **duty**, to say what the law is.' In *Seattle School District v. State*, 90
18 Wn. 2d 476, 585 P.2d 71 (1978), our Supreme Court rejected a separation of powers argument
19 similar to the one the State makes here and expressly held:

20 This duty *must* be exercised *even when an interpretation serves as a check on*
21 *the activities of another branch of government* or is contrary to the view of the
22 constitution taken by another branch. Once it has been determined that the
23 court has the power or the duty to construe or interpret words or phrases in the
24 constitution and to give them meaning and effect by construction, it becomes a
25 judicial issues rather than a matter to be left to legislative discretion. i

26 ' Indeed, under *Marbury* and its progeny, this authority goes so far as to Invalidate a statute, a drastic
remedy the children don't seek here.

1 *Id.* at 504 (emphasis added; citations omitted). Accordingly, “[o]nce it is determined that
2 judicial interpretation and construction are required, there remains no separation of powers
3 issue. . . . In such a case and after a judicial determination therein, the legislature must
4 subsequently act within the confines of the judicial interpretation.” *Id.* at 504-05.⁸

5 The State implies that a different result obtains where a mere statutory right is at issue.
6 This isn’t the first time the State has made, and lost, this argument. In *Washington State*
7 *Coalition for the Homeless v. Department of Social & Health Services*, 133 Wn. 2d 894, 949
8 P.2d 1291 (1997), DSHS “argue[d] that the trial court had no authority to interfere with
9 discretion of the Department in its development of the comprehensive plan required under the
10 provisions of RCW 74.13.” *Id.* at 9 12, 949 P.2d at 1301-02. Our Supreme Court rejected that
11 argument in language that directly applies to this case:

12 In the Department’s view, the trial court’s interference in an agency function
13 constituted a violation of the separation of powers doctrine Courts will not
14 interfere with the work and decisions of an agency of the state, so long as
15 questions of law are not involved, and so long as the agency acts within the
16 terms of the duties delegated to it by statute. However, where the acts of public
17 officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong
18 basis, then the courts may interfere to protect the rights of individuals. . . .

19 *Id.* at 9 12- 14. Accordingly, the Supreme Court held the trial court properly ordered DSHS to
20 perform its statutory duty:

21 We find nothing in the statute that would deny plaintiffs an injunctive and
22 declaratory remedy requiring compliance with the statute. Permitting the
23 plaintiffs to bring an action to enforce the statute through an injunction action
24 and pursuant to the Uniform Declaratory Judgments Act is consistent with the
25 underlying purpose of the statute.

26 ⁸ The *Seattle School District* court anticipated the State’s argument here that because it is doing all it can
with the money it has, this Court may not interfere. “[I]n oral argument, [the State] maintained the
judiciary should refrain from acting *unless things become bad enough*. Clearly, these arguments are not
addressed to a ‘separation of powers’ question. Rather, they are directed at *judicial restraint*. To
acknowledge that the judiciary may act in compelling or exigent circumstances is to concede that it
actually has the power to act. That being true, there is no ‘separation of powers’ issue.” *Id.* at 505
(emphasis in original).

1 Here, the Department was not acting within the temls and duties delegated to it
2 by RCW 74.13.031(1). The trial court's order, requiring DSHS to perform its
3 duty according to professionally accepted procedures and standards, did not
4 interfere with the Depai-tment's ability to use its discretion in creating a
5 reasonable, adequate plan that would satisfy the requirements of RCW
6 74.13.031(1).

7 Id. at 913-14.”

8 To try to get around cases like *Washington State Coalition for the Homeless* that are
9 directly on point, the State likens this case to *City ofEllen.shzgw v. State*, 118 Wn. 2d 709, 718,
10 826 P.2d 1081 (1992) *Hillis ll. Depnrtnent ofEcology*, 131 Wn. 2d 373, 932 P.2d 139 (1997),
11 and *Pannell v. Thompson*, 91 Wn. 2d 591, 589 P.2d 1235 (1979).” The State claims these
12 cases stand for the proposition that courts can never require the State to comply with the law
13 where it would cost the State money, an argument our Supreme Court has previously dismissed
14 as “ndive.”¹¹

15 ⁹ The State dismisses *Washington State Coalition for the Homeless* as an anomaly. (Mem. at 28:14.)
16 Perhaps it's all the State can do, since there's a four-year-old case by the highest court in the jurisdiction
17 that is directly on point and directly adverse to its position. The basis for the State's attempt to dismiss
18 the Supreme Court's recent ruling, however, is nothing short of bizarre. The State says this Court
19 should not follow *Washington State Coalition for the Homeless*, as though this Court had that option,
20 because that decision is inconsistent with an earlier case by the Court of Appeals, when of our Supreme
21 Court is hardly bound by rulings of intermediate appellate courts.

22 ¹⁰ The State also suggests that III I-e *J.H.*, 75 Wn. App. 887, 880 P.2d 1030 (1994), requires the dismissal
23 of this case. *J.H.*, however, was quick to explain that its holding did not mean, contrary to the State's
24 argument here, that courts lack the authority to order the Department to comply with its statutory duty:
25 “The court has indisputable authority over the parties, as well as statutory authority to require that an
26 individualized service plan proposed for a dependent child do a better job of meeting critical needs.”
J.H., 75 Wn. App. at 895.

” “The naive argument that the cost to the state . . . would have a serious effect on the fiscal problems of
the state, should be addressed to the legislature and not to the court.” *Conant v. State*, 197 Wash. 21, 29,
84 Pac. 378 (1938) (finding the state responsible for relief assistance to 123,000 elderly poor persons in
the state.) *See supra* note 1 I (and accompanying text). In *Bresolin v. Morris*, 86 Wn. 2d 241, 543 P.2d
325 (1975) the Court ordered DSHS to provide mandatory drug treatment for prison inmates,
notwithstanding the lack of funding. The Court ordered DSHS to seek funding from the legislature and
to report to the Court monthly on the progress of its efforts:

[I]t is obvious that money will be required to meet the . . . deficiencies of the institution, and
there is no reason to belie-e that, subject to the overall financial needs and requirements of the

1 Each of these three cases, moreover, is easily distinguishable. In each case, the plaintiff
2 expressly sought payment of a government benefit or transfer of a public resource without
3 identifying a constitutional or statutory right to the payment or transfer.

4 In *City of Ellensburg*, the city demanded that the State pay for its fire protection
5 services. The City claimed a statutory, but not constitutional, right to this handout. The
6 Supreme Court held that municipal governments have no statutory right to fire protection
7 services at State expense. The City, in other words, identified no right the State had violated.

8 Likewise, in *Hillis*, a private individual demanded that the Department of Ecology more
9 quickly process a permit to allow him to appropriate groundwater, a public resource owned by
10 the State. Like the City of Ellensburg, Hillis sought a public benefit, public groundwater, on a
11 timetable convenient for him. Yet he did not “claim[] that an individual has a constitutional
12 right to appropriate public groundwater.” *Hillis*, 131 Wn. 2d at 389. Moreover, the Court
13 found that “[t]here is no statutory right to groundwater without a permit” *id.* and that
14 “[a]lthough Ecology does have a statutory duty to investigate water rights applications for
15 public water, *no time limit is stated in that statute.*” *Id.* at 388 (emphasis added).

16 *Pannell v. Thompson* involved yet another attempt to receive a public benefit where no
17 statute required it. In *Pannell*, the plaintiffs sued for additional welfare benefits. Like
18 Ellensburg and Hillis, they did not claim any constitutional right to these additional benefits.
19 Instead, they based their claim on the Legislature’s statutory directive to DSHS to “establish
20 standards of assistance . . . compatible with a minimum necessary for decent and healthful
21 subsistence.” There was no question that DSHS had complied with the Legislature’s mandate
22 and established the standards.

23
24 state, the Legislature will be unwilling to appropriate necessary funds.
25 Id. at 251.

1 The trouble, however, was that in the budget appropriations process, the Legislature did
2 not appropriate funds so that DSHS could actually pay benefits in accordance with those
3 standards. Nor did the statute expressly *rep&e* the State to pay benefits in accordance with
4 those standards.

5 So the plaintiffs in *Pannefl* argued that such a right should be implied, obligating the
6 Legislature to appropriate funds to make those payments in accordance with DSHS standards.
7 Making no mention of separation of powers, the Supreme Court rejected the argument. In so
a doing, the Court did nothing unremarkable; it simply refused to imply a statutory right to be
9 paid certain welfare benefits where the statute expressly conferred no such right.

10 In each of the three cases upon which the State places such great reliance, the downPJ1
11 of the plaintiff wasn't the doctrine of separation of powers. Rather, it was the absence of a
12 constitutional or statutory right to the relief sought. The focus of each of these cases, therefore,
13 was simply an issue of statutory construction: Did the plaintiff have a statutory right to the
14 relief sought or not?

15 That's the real issue here, too: Do the children have a statutory right to the relief they
16 seek?*" If they do, the doctrine of separation of powers poses no barrier to this action. And if
17 they don't, then the separation of powers issue is moot. As the next section demonstrates, the
ia Legislature has clearly and unequivocally vested the children with certain basic rights, all of
19 which have the goal of securing their ultimate right to a stable and permanent home, and none
20 of which is conditioned upon the availability of funds.

21
22 **B. The Rights the Children Seek to Enforce Are Rihts, and Not Mere Aspirations
Contingent Upon the State's Appropriations Process.**

23 " Another issue, of course, is whether the children have a constitutional right to the relief they seek.
24 Because the State ignores this issue, summary judgment on the children's constitutional claims is
improper.

1 The State portrays the various statutory rights upon which the children rely as mere
2 aspirations that are unenforceable. Their only support for this proposition is the fact that each
3 and every one of these statutory rights is precatory, contingent upon the outcome of the
4 Legislature’s annual appropriations process.

5 Admittedly, the Legislature *has* chosen to condition certain duties upon the availability
6 of funds. For example, the State cites RCW 74.13.109, which says the amount of adoption
7 support subsidies available to adoptive parents is limited to the “appropriations available from
8 the general fund.” Other statutes the State cites at pages 32 and 33 of its brief have similar
9 limiting language, and appear in the margin. ³

10 The State’s choice to cite these statutes is misleading, for without exception, these are
11 not the statutes under which the children bring this action. Rather, the children allege
12 violations of the following:

- 13 • RCW 13.34.020 (duty to provide basic nurturing which includes the right to a
14 safe, stable, and permanent home);
- 15 0 RCW 74.14A.050(2) (duty to develop programs that are necessary for the long-
16 term care of children and youth that effectively address the educational, physical, emotioI?al,
17 mental, and medical needs of children and youth in foster care);
- 18 . RCW 74.14A.050(3) (duty to evaluate children entering foster care within 30
19 days to determine their long-term care needs);
- 20 . WAC 388-73-212(6) (duty to provide sufficient information about the foster

21 _____
22 ” See RCW 74.13.150 (“the adoption support reconsideration program is limited to making
23 disbursements “within funds appropriated for the purpose”); RCW 74.13.320 (“No more than fifty
24 thousand dollars...may be expended annually for recruitment materials” for new foster parents); RCW
25 74.13.340 (“Within available resources, the department shall provide a foster parent liaison position in
26 each departmental region.”); RCW 74.14B.080(2) (DSHS shall provide liability insurance to foster
parents, but “the total moneys expended shall not exceed five hundred thousand dollars per
biennium.”).

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1 child and the child's family to foster parents to enable them to make an informed decision
2 regarding whether or not to accept a child in their home);

3 . WAC 388-73-212(7) (duty to require caseworkers to be in frequent contact with
4 foster children);

5 . 42 U.S.C. § 671(a)(16) & 675(l) (duty to revise a child's case plan to take into
6 account the new placement after a child is moved from one home or facility to another); and

7 . 42 U.S.C. §675 (5)(C) (duty to provide notice and an opportunity to be heard to
8 the plaintiff children prior to changing their placement).

9 (See Third Amended Complaint.) Nowhere in any of these statutory mandates is there
10 language conditioning the right proclaimed upon State appropriations or the availability of
11 funds.

12 Yet the State makes absolutely no mention of any of these statutes in its brief.
13 curiously, the State also refers to the limiting language in RCW 74.14A.050(7), while failing to
14 quote its language, which clearly limits its application. Subsection (7) reads, "The department
15 is to accomplish the tasks listed *in subsections (4) through (6)* of this section within existing
16 resources."" *Id.* (emphasis added.) The state completely ignores the fact that the children
17 aren't proceeding under these subsections, *but under subsections (1) through (3)*, to which the
18 limiting language in subsection (7) expressly does not apply."

19 Thus, even if the State is correct that such express limiting language could relieve a
20 state agency of an underfunded duty, it is inescapable that the omission of such limiting
21

22 ⁴ These three subsections set forth DSHS's duty to report to the legislature about the level of dependent
23 child assessments

24 " These three subsections relate to developing guidelines regarding services, developing long-term care
25 programs, and evaluating dependent children to identify children who would benefit from the section's
26 services.

1 language in a statute creates a duty to comply with the law regardless of funding. The rules of
2 statutory construction support this analysis: the omission of words from a statute must be
3 considered intentional on the part of the legislature. *State v. Baxter*, 45 Wn. App. 533, 540
4 (1986). If a statute is unambiguous, **its** meaning is to be derived from the language of the
5 statute alone. See *Geschwind v. Flanagan*, 121 Wn. 2d 822, 841, 854 P.2d 1061 (1993);
6 *Cherry v. Municipality of Metro. Seattle*, 116 Wn. 2d 794, 499, 808 P.2d 746 (1991).

7 The State's implication that the Court should write into the statutory mandate some sort
8 of budgetary restriction is also contrary to law. The Washington Supreme Court has never
9 rewritten a statute by inferring such a limit. As previously pointed out, it is the judiciary's
10 responsibility to enforce codified law despite an agency's purported lack of funds. Furthermore,
11 an unambiguous statute is not subject to judicial construction, and the court will not add
12 language to a clear statute even if it believes the Legislature intended something else but failed
13 to express it adequately. See *Geschwind*, 121 Wn. 2d at 841; *Adams v. Department of Soc. &*
14 *Health Sews.*, 38 Wn. App. 13, 16, 683 P.2d 1133 (1984). Indeed, the predecessors to RCW
15 74.13.03 1(l), the section which lays out the general duties of DSHS, formerly contained some
16 limiting language: "to receive and expend all funds made available." Under *Baxter*, the
17 omission of that limiting language in the current version of the statute emphasizes that the
18 Legislature intended for DSHS to have a duty to comply with the law regardless of funding
19 availability.

20 Thus, the State cannot show that the statutes on which the children rely contain
21 budgetary limitations and conditions. And so **the** State has failed to demonstrate that these
22 statutes do anything other than what they expressly say they do: create enforceable rights.

23 The preceding paragraphs have assumed the State is correct in claiming that limiting
24 language in an appropriation **can eviscerate a statutory duty**. This Court need not indulge that

1 assumption, however, for it is wrong. The Washington Supreme Court has refused to limit a
2 statutory duty, even in those instances where the Legislature attempted to directly impose a
3 limit in budget language. Thus, for example, in *Flinders v. Morris*, 88 Wn. 2d 183, 191, 558
4 P.2d 769 (1977) the Court held that “An appropriations bill may not constitutionally be used
5 for the enactment of substantive law which is in conflict with the general law as codified.”⁶
6 Only codified law, in short, can limit a duty in codified law. If legislative budgetary language
7 cannot limit a statutory duty, then this Court certainly should not infer a limit in this case in the
8 complete absence of such limiting budget language.

9 **C. The State Is Not Shielded From Liability In This Case by the Discretionary**
10 **Immunity Doctrine.**

11 The State argues that discretionary immunity precludestort liability against the State in
12 this case, claiming that “policy decisions exercised at the highest levels of the executive branch
13 should be treated the same as legislative and judicial decisions.” (Men-r. at 35.) However, the
14 doctrine of discretionary immunity does not shield the State from potential liability under the
15 claims actually made by the children in this case.

16 Notably, even if the State were correct that discretionary immunity applies in this case
17 regarding liability for damages, the case could not be dismissed because the class is requesting
18 an injunction. There is no immunity of the type the State invokes that would allow the State to
19 avoid injunctive relief, which is the only relief requested by the class this Court recently
20 certified.

21 However, even as to damages issues regarding the individual named plaintiffs, the
22 State’s argument is not well taken. The Legislature has waived the State’s sovereign immunity-

23 ⁶ See also *State v. Thompsot~*. 95 Wn. 2d 753, 630 P.2d 925 (1981) (cort prohibited DSHS from relying
24 on budget provision to reduce the amount of reimbursement set by statute for nursing home providers);
25 *Washington Education Association v. Strfe*, 93 Wn. 2d 37, 604 P.2d 950 (1980) (cort voided a budget
26 provision that sought to limit salary increases for teachers provided for by statute)

1 from tort liability. I⁷ Courts recognize a narrowly-circumscribed exception to this rule in
2 limited instances involving “high level discretionary acts exercised at a truly executive level.”
3 *Chambers-Castanes v. King County*, 100 Wn. 2d 275, 281, 669 P.2d 451 (1983). Under the
4 doctrine, a governmental entity’s actions at a basic policy level is immune from suit, but as is
5 shown in more detail below, the exercise or implementation of that basic policy is not. See
6 *Stewart v. State*, 92 Wn. 2d 285, 294, 597 P.2d 101 (1979) (concluding that once a
7 governmental decision is made, that decision must be implemented without negligence);
8 *Chambers-Castanes*, 100 Wn. 2d at 294 (citing *An&us v. State*, 541 P.2d 1117, 1120 (Utah)
9 (“The decision to build the highway and specifying its general location were discretionary
10 functions, but the preparing of plans and specifications and the supervision of the manner in
11 which the work was carried out cannot be labeled discretionary functions.”).

12 In raising its immunity argument by way of a summary judgment motion, the State is
13 essentially suggesting that there is nothing the children allege except actions that are clearly
14 immune under this doctrine. This suggestion is mistaken. The children challenge the State’s
15 failure to follow statutory and constitutional mandates in implementing the foster care program,
16 and the State’s negligence in implementation of that program. These simply are not the kind of
17 high-level policy decisions that implicate discretionary immunity.

18 1. *The Children Challenge the State’s Failure to Follow Statutory Guidelines In Making*
19 *Placement Decisions.*

20 The children do not directly challenge “broad policy decisions” made by the
21 Legislature, or even broad policy decisions entrusted to DSHS. Instead, the children claim that,
22 but for the failure of the State to follow specific constitutional, statutory and regulatory

23 _____
24 I⁷ “The state of Washington, whether acting in its governmental or proprietary capacity, shall
25 be liable for damages arising out of its tortious conduct to the same extent as if it were a private
26 person or corporation.” RCW 4.92.090.

1 mandates, children in foster care would receive treatment and services to which they are
2 entitled, and many unnecessary, harmful multiple foster care placements would be prevented.
3 The children simply ask that the Department follow legal mandates in implementation of the
4 foster care system. They allege that the failure to do so precludes the establishment of the safe,
5 stable, and permanent homes the Legislature, as a matter of policy, has determined are needed
6 for the health of foster children.

7 The children's claims include an allegation that the State has failed to adequately
8 develop programs that "[e]ffectively address the educational, physical, emotional, mental, and
9 medical needs of and youth.. ." in foster care, as required by RCW 74.14A.050 (2). Since the
10 children's statutory (not to mention constitutional) rights to adequate treatment while in foster
11 care are at issue, the State can hardly contend that it has "discretion" to override such
12 legislative directives for adequate treatment. The children also allege violations of other
13 mandates, for example, the requirement to properly evaluate children entering care (RCW
14 74.14A.050(3)), and to revise children's case plans once in care (42 U.S.C. §5 (a)(16) and 675
15 (1)). As another example, the children claim that DSHS has failed to follow its own regulations
16 mandating services and disseminating information necessary for the health, safety, and welfare
17 of the children who are wards of the State (WAC 388-73-212 (6)). The Children allege that
18 these failures have led to inappropriate and multiple placements, which have proximately
19 caused the Children and many other youth in the system to suffer mental and emotional harm.

20 The State's implementation of these statutory mandates are operational, not
21 discretionary in the sense required to invoke immunity. The State lacks discretion to decide
22 whether to evaluate children as required or to provide for mental health care or other needed
23 treatment. These are not broad policy matters, they are specific actions required by law and are
24 not subject to immunity. This is made clear in relevant authority the State has overlooked. In

1 *Babcock v. State*, 116 Wn. 2d 596, 809 P.2d 143 (1991), the Washington Supreme Court held
2 that while individual caseworkers placing foster children may be granted a qualified immunity
3 in some circumstances, they “cannot claim even a qualified immunity when they fail to follow
4 statutory procedures.”” Likewise, in *Estate of Jones 1’ State*, 15 P.3d 180 (2000) (parallel
5 citation unavailable), the State was not accorded discretionary immunity for its negligent
6 supervision of a juvenile offender. The court noted:

7 Because discretionary immunity only pertains to the exercise of discretionary
8 acts at a basic policy level, it does not cover the State’s supervision of Dodge as
9 alleged by the Estate. Indeed, discretionary immunity does not cover negligent
10 supervision as a matter of binding precedent.

11 *Id.* at 187 (footnotes omitted).

12 The authority cited by the State supports this fundamental principle that there is no
13 immunity in the presence of a failure to follow the rules. For example, in *Taggart v. State*, 118
14 Wn. 2d 195, 822 P.2d 243 (1992), the court found that the parole board was entitled to a quasi-
15 judicial immunity for release decisions, but made clear that if the board failed to make a
16 considered decision consistent with governing statutes, or even failed to follow its own
17 *procedures*, immunity was not available. 118 Wn. 2d at 209; *see also Cougar Business*
18 *Owners Association v. State*, 97 Wn. 2d 466, 647 P.2d 481 (1982) and *Karr v. State*, 53 Wn.
19 App. 1, 765 P.2d 3 16, *review denied*, 112 Wn.2d 1011 (1989) (courts upheld the declaration of
20 emergencies regarding the Mount St. Helens eruption by the highest executive officer, but only
21 after carefully considering whether the governor closely followed detailed statutory
22 requirements); *Bergh v. State*, 21 Wn. App. 393, 585 P.2d 805 (1978) (high-level executive
23 decision by the Director of the Department acting pursuant to, and in compliance with:

24 ¹⁸The *Babcock* court was discussing a claim of qualified immunity in the context of a section
25 1983 claim, but the basic principle is applicable here: There is no immunity if statutes are not
26 followed.

1 statutory regulations).

2 There is simply no basis for summary judgment on discretionary immunity grounds
3 when violations of statutory and regulatory duty are alleged, as they are here.¹⁰

4 2. *There Is No Entitlement To Immunity for Negligent Administration.*

5 The individual children also claim that DSHS acted negligently in failing to prevent the
6 children's unnecessary multiple foster care placements. These allegations of negligent
7 administration of mandated programs are not subject to immunity. Negligence in these actions
8 is not essential to the realization of any broad policy decisions that DSHS is legally entitled to
9 make.

10 The Washington Supreme Court, in *Babcock v. State*, adjudicated a similar claim of
11 immunity by DSHS for foster care placement decisions made by a caseworker, and held that
12 even though a caseworker might be found immune if the worker followed all statutes and
13 mandated procedures, DSHS could not be immune in the same case from a claim of negligent
14 supervision. The court, in declining to extend even a qualified immunity to DSHS, reasoned
15 that "the Legislature made it clear that it did not intend to supercede or abridge the remedies
16 provided in RCW 4.92 [the waiver of sovereign immunity for torts]." 116 Wn. 2d at 620. The
17 court stated that "[s]ound policy considerations justify granting caseworkers some immunity.
18 We must, however, do so in a manner which does not deprive those wronged by DSHS's
19 actions of a remedy which the Legislature contemplated they would have" (referring to RCW
20 4.92). *Id* at 620. This Court similarly should decline to preclude a remedy for the children
21 here, when negligent actions by DSHS and its agents are so clearly alleged.

22 _____
23 "Perhaps this is why in many cases analogous to the present case, in which DSHS has been
24 held liable or potentially liable for its employees failure to follow statutory mandates, DSHS
25 has apparently not even suggested on appeal that discretionary immunity applies. See, e.g.,
26 *McKinney v. State*, 134 Wn. 2d 388, 396-400, 950 P.2d 461 (1998), and cases cited, discussing
liability for breach of statutory duties.

1 Again, the cases cited by the State support this analysis. The first case to fully analyze
2 the discretionary immunity the State seeks, *Evangelical United Brethren Church v. State*, 67
3 Wn. 2d 246, 407 P.2d 440 (1965), makes clear that claims of negligence are well within the
4 waiver of sovereign immunity in RCW Chapter 4.92. According to *Evangelical*, in order to
5 hold government officials liable, “Negligent conduct, within accepted tort concepts, must be
6 present.. . it is necessary to determine where, in the area of governmental processes, *orthodox*
7 *tort liability stops and the act of governing begins.. .*” 67 Wn. 2d at 253 (emphasis added).
8 The court suggested a four-part inquiry as an initial step in determining whether qualified
9 immunity might apply. See 67 Wn. 2d at 255. The court found that *four questions must be*
10 *unequivocally answered in the affirmative* for the challenged act to be given immunity, and
11 noted that if one or more of the questions called for or *merely suggested* a negative answer,
12 further inquiry would be necessary. *Ici.* at 255. Application of this inquiry may therefore be a
13 mixed question of law and fact. *Id.*

14 The Washington Supreme Court further refined the discretionary immunity exception to
15 tort liability in *King v. City of Seattle*, 84 Wn. 2d 239 (1974), stating that in order to fall within
16 the exception, the act must not only involve a basic policy determination, but must also be the
17 product of a considered policy decision; a conscious weighing of risks and advantages. 84 Wn.
18 2d at 246. The State bears the burden of showing that this conscious balancing of risks and
19 advantages actually occurred. *Id.*

20 The Washington Supreme Court in *Stewart v. State*, *supra*, applied these decisions and,
21 although *Stewart* is a highway design case, the court’s analysis shows precisely why the State
22 can make no claim of immunity from the Children’s allegations of negligence. In *Stewart*, thi:
23 court held that negligence in the *design* of a highway bridge was *not* essential to the
24 accomplishment of the policy decision to *build* the bridge and therefore was not subject to

1 qualified immunity. The court found that the allegations of negligent implementation of the
2 bridge design failed the first two aspects of the *Evangelical* inquiry as refined by King.” The
3 court resoundingly rejected the State’s claim that negligence in implementation - the design of
4 the bridge -- was shielded by immunity:

5 The State argues that adoption of a design necessarily involves a judgmental
6 choice. The King test requires more. There was no showing by the State that it
7 considered the risks and advantages of these particular designs, that they were
8 consciously balanced against alternatives, taking into account safety,
9 economics, adopted standards, recognized engineering practices and whatever
10 else was appropriate. The issues arising from the evidence as to negligent
11 design should have been submitted to the jury.

12 92 Wn. 2d at 294 (citations omitted).

13 For just these reasons, the Children’s allegations of negligent *implementation* of
14 legally required programs, services, and acts must be submitted to the jury. The State has as
15 yet made no showing of any specific decisions regarding evaluation, treatment, or monitoring
16 of foster care children, nor has the State said otherwise how it is exercising due care for foster
17 children subjected to multiple placements. There is no basis in *Evangelical* or its progeny for a
18 grant of summary judgment based on immunity to shield the State from a trial on these
19 allegations.

20 3. *Even If Some DSHS Policy Decisions Could Theoretically Be Implicated, The State Has Not*
21 *Shown Entitlement To Immunity On Summary Judgment.*

22 As is shown above, the children’s claims of violation of constitutional and statutory
23 mandates, and negligent implementation and supervision, are clearly not subject to
24 discretionary immunity. There is little else the children’s claim. but even if the children’s
25

26 The first two of the inquiries are whether the challenged act or omission “necessarily
involve[s] a basic governmental policy, program, or objective” and whether the challenged act
or omission is “essential to the realization of or accomplishment” of the policy or program.
Neither were present in the implementation of the decision to build the bridge.

PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT - 34

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1 claims would somehow implicate actual high-level DSHS policy decisions that administrators
2 are legally entitled to make, the State has not, at this stage, proven a right to immunity.

3 The State argues that coming up with ways to create, fund, and monitor programs
4 requires the exercise of basic policy evaluation, judgement, and expertise at the highest level of
5 state government. (See Mem. at 37.) However, while DSHS may not be able to fund
6 significant new programs without Legislative enactment, DSHS is statutorily mandated to
7 monitor and implement programs and treatment for foster children. This is not basic policy;
8 instead, as shown above, it is the implementation of the policy set forth by legislatively created
9 programs.²¹

10 The State does claim that DSHS has tried to obtain funding for some programs that it
11 believes would assist in providing services for foster care. But the cases regarding
12 discretionary immunity demonstrate that DSHS can only claim discretionary immunity for
13 high-level executive decisions that are challenged by plaintiffs. The Children do not contest or
14 question that funding was sought, and the State can hardly claim immunity for *all* actions it
15 takes regarding foster care just because DSHS sought more funding.²² Instead, immunity is

16
17 ²¹ This implicates inquiry 3 from *Evangelical*, which asks whether the decision requires the exercise of
18 basic policy evaluation, judgment, and expertise on the part of the government agency involved.

19 The “failure to fund” highway cases the State cites do not lead to a different conclusion. In
20 *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990), a decision had been made to
21 construct a median barrier, but had not yet been implemented, The Appellant conceded that the
22 State’s decision to install the barrier was immune, but contended that the delay in constructing
23 the barrier was negligence. 57 Wn. App. 478, 481. The court disagreed, because the
24 Legislature had specifically appropriated funds to build the median, but the appropriation was
25 not available until after the accident took place so the median could not have been built before
26 the accident. *Id.* at 482. The Children are not asking DSHS to do things not authorized by
27 Legislature. On the contrary, the Children are asking that legal mandates be followed and the
28 foster care system be administered with due care to prevent harm to children. In *McCluskey v.*
29 *Hanclorff-Shermnn*, 125 Wn. 2d 1, 882 P.2d 157 (1994), the State was permitted to present an
30 argument *at trial* that the legislature had not authorized funding for improving a highway and
31 thus it could not be held liable for its state of disrepair. 125 Wn. 2d at 7. But the State

1 available only if DSHS can meet its heavy burden to show an entitlement to immunity. On this
2 record, the State has made no showing sufficient for immunity to be granted as to any actions
3 the Children contest.

4 The State also argues that placement decisions are immune from tort liability under the
5 discretionary immunity doctrine as they involve a basic governmental function, citing
6 *Evangelical* and *Eldredge v. Kamp Kaches Youth Services*, 90 Wn. 2d 402, 583 P.2d 626
7 (1978). (See Mem. at 38.) But as is clear from the discussion above, such decisions are not
a even arguably immune under the discretionary immunity doctrine unless made by a high
9 official in a considered way and in conformity with legal mandates. The State has not
10 presented evidence about who made the specific placement decisions in this case, and so there
11 is simply no factual basis on which this Court could decide whether any such decision is
12 immune. *Compare Evangekd* (high-level decisions to determine level of security at juvenile
13 correctional facility and to place juvenile in particular housing at that facility were immune,
14 other actions would not be immune); *EM-edge* 90 Wn. 2d at 408-09 (“juvenile authorities” who
15 were not parties decided to assign boy to private camp and might be cloaked with immunity,
16 but private camp on contract with the State could not claim immunity in the implementation of
17 the assignment). In the complete absence of proof about who made placement decisions
ia relevant to the present case, there is no arguable basis for discretionary immunity.

19 The State has not borne its heavy burden to show unequivocally at this stage, as is
20 required under the *Evangelical* test and the cases that have refined it, that high-level policy
21 decisions that DSHS is entitled to make are at issue here. As is shown above, DSHS does not

22
23 abandoned its discretionary immunity claim at trial, so there was no appellate decision on
24 immunity. ~/(cCiztsi\$ thus does not in any way support a claim for discretionary immunity on
summary judgment.

25
26 PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JIJJGMENT - 70
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1 have the discretion to fail to follow legal mandates, or the discretion to implement its programs
2 negligently. The State does not demonstrate, as required under *King*, *Stewart*, and *Chanzbers-*
3 *Custanes*, evidence of other actually considered decisions exercised at a truly executive level
4 that DSHS claims were made to fail to provide the services and treatment the Children allege
5 are missing, or even to make the placement decisions as to individual children. If the State can
6 make such a showing at trial, at that point they could arguably renew their claim to
7 discretionary immunity as to specific high-level policy decisions. But as is clear under all of
8 the authority starting with *Evangelical*, without this showing, summary judgment is not
9 appropriate.

10 **VI.**
11 **CONCLUSION**

12 The children ask this Court to order the State to comply with the law, laws reflected in
13 the federal and State Constitutions and in federal and state statutes. They don't ask this Court
14 to make social policy. *Marbury v. Madison* and countless other cases affirm this Court's
15 authority - and obligation - to say what the law is and require compliance with it.

16 The State admits, for purposes of this motion, that it violates the law with respect to
17 each and every one of the plaintiff children. The State offers absolutely no proof that its
18 violations of law don't harm foster children by causing unnecessary multiple placements.

19 Instead, the State tries to wash its hands of the affair. Chastising the foster children for
20 their audacity to suggest otherwise, the State contends the children have no enforceable right to
21 proper care or treatment while in State custody.

1 In making this argument, the State ignores the fact that the children do have enforceable
2 rights under the Constitution. Summary judgment as to the children's constitutional claims is
3 improper.

4 Next, the State denies that the children have enforceable rights under statute because its
5 statutory obligations are all expressly conditioned upon legislative whim and funding. None of
6 the statutes under which the children seek relief are so conditioned. Summary judgment as to
7 the children's statutory claims is improper.

8 Finally, the State claims immunity for failure to follow statutory mandates toward the
9 children in its care, and that it has no liability for its negligent mishandling of the foster
10 children. The State has no such immunity. Summary judgment as to the children's claims is
11 improper,

12 RESPECTFULLY SUBMITTED this 19th day of July, 2001,

13
14 **BRETT & DAUGERT, PLLC**

15
16 By 

17 Timothy C. Farris, WSBA # 7264
18 Attorneys for Plaintiffs