

54493 X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
ii
26

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

JESSICA BRAAM, a minor child, by and)
Through her guardians, Dale and Vickie)
Braam; et al., >

Plaintiffs, >

No. 982 01570 1

vs.)

STATE OF WASHINGTON, et al., >

Defendants. >

MEMORANDUM IN
OPPOSITION TO
MOTION TO DISMISS
SUBSTANTIVE DUE
PROCESS CLAIMS

(David A. Nichols)

I. INTRODUCTION

Plaintiffs make two separate but related substantive due process claims on behalf of the class. The first claim alleges that child abuse and neglect victims placed in the state's custody are entitled to be free from harm and that such harm encompasses both physical injury and mental and/or psychological harm. The injury of which plaintiffs complain is caused primarily by defendants' pattern and practice of indiscriminately

ij

MEMO IN OPPOSITION TO MOTION TO DISMISS - 1

BRETT & DAUGERT, PLLC
ATTORNEYS AT LAW

300 NORTH COMMERCIAL + P O. BOX 5008
BEECHINGHAM, WA 98227-5008
TELEPHONE: (360) 733-0212 + FAX (360) 647-1902
© 2001

1 moving children from one placement to another like so much chattel.’ The second claim
2 asserts that foster children must be provided with health care while in state custody and
3 that their entitlement to such treatment includes a right to care for their serious mental
4 health problems.’

5
6 Each of these claims made under the Due Process Clause of the Fourteenth
7 Amendment to the United States Constitution is based upon the United States Supreme
8 Court’s decisions in *Estelle v. Gamble*, 429 U.S. 97 (1976), *Youngberg v. Romeo*, 457
9 U.S. 307 (1982), and *DeShaney v. Winnebago County Dep’t of Soc. Sews.*, 489 U.S. 189
10 (1989) and their progeny - cases which defendants fail to discuss in their brief. These
11 cases establish that a “professional judgment” standard applies when assessing state
12 defendants’ constitutional duties to children in foster care.³ That standard is violated
13 when the acts of defendants are such a substantial departure from accepted professional
14

15
16
17
18
19
20 i Plaintiffs also allege that multiple placements are the result of defendants’ violations of state law - e.g. the
21 failure to adequately inform foster parents about the history of children being placed in their homes, the
22 failure to maintain passports records for foster children and provide them to foster parents, the failure to
23 adequately train and support foster parents, and the failure of caseworkers to make in home visits at least
24 every ninety days.

25 ’ Defendants’ failure to provide mental health assessments and the care indicated by such assessments to
26 children in their custody is a direct and proximate cause of the multiple placements which cause the
emotional harm suffered by the plaintiff class. The interrelationship between mental health problems and
multiple placements is also affirmed **in Reducing: Multiple Placements - Revised**, Dee Wilson,
(November, 2000) (hereinafter ‘Wilson Report’). Wilson writes “children’s emotional/behavioral problems
increase the risk of multiple placements...” Wilson Rep&-t, p. 23.

³ Defendants’ Brief suggests that a “shock the conscience” standard or “deliberate indifference” is the
standard but in the next paragraph concedes that “professional judgment” is the applicable standard “[I]n
the foster care context.” Defendants’ Motion, p-4.

MEMO IN OPPOSITION TO MOTION TO DISMISS 12

BRETT & DAUGERTJLLC
A T T O R N E Y S A T - L A W

300 NORTH COMMERCIAL • p.O. BOX 5008
BELLINGHAM, WA 98227-5008
TELEPHONE. (360) 733-0212 • FAX (360) 647.1902
..i(.,,1: b?rtaw com

1 judgment, practice or standards as to demonstrate that the agency is not basing its
2 decisions on such judgment. ⁴

3
4 There is no dispute of fact that defendants' actions are a substantial departure
5 from accepted professional standards governing child welfare and health care. For years
6 defendants have deprived children in foster care of timely and adequate mental health
7 assessments and treatment. Defendants' own senior administrator wrote about the
8 widespread, unconscionable denial of such services in a report he authored several
9 months ago. During his deposition last month, Mr. Wilson confirmed that such
10 deprivation continues unabated. Similarly, there is irrefuted evidence that other acts and
11 omissions of defendants, including their practice of indiscriminately shuttling children
12 from placement to placement, causes plaintiffs harm. Though the nature of this harm is
13 primarily emotional, mental, and psychological, it is substantial and irreparable. In fact,
14 the harm inflicted upon plaintiff class members by defendants' practices is more long-
15 lasting and less subject to remediation than many of the physical harms that defendants
16 concede give rise to substantive due process violations..

17
18
19 Defendants' attempt to require a physical injury as the threshold for a substantive
20 due process violation must be rejected. It is not supported by the case law and would lead
21 to the absurd conclusion that convicted criminals - who may be subjected to any

22
23
24 ⁴ In 1997, the defendants substantiated or indicated after an investigation was completed 1595 complaints of
25 emotional or psychological abuse of children in Washington. Child Welfare League of America, National
Data Analysis System, (last modified May 22, 2001) <http://ndas.cwla.org/asD> (citing U. S. Department of
26 Health and Human Services, Administration on Children and Youth and Families, Child Maltreatment 1997:

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
26

punishment which is not cruel or unusual - are entitled to better care and treatment than child victims who cannot be subjected to any punishment whatsoever while in the state's custody. Indeed, Youngberg, DeShaney, and their progeny establish that child abuse victims in the state's custody are entitled to more considerate treatment than the incarcerated criminals who abused them.

Defendants' position that emotional injury is to be treated differently from physical injury is at odds with their own policies and practices. Each year, defendants intervene and intinge upon the constitutional rights of hundreds of parents who are suspected of inflicting emotional or psychological injuries on their children.⁵

Contrary to the defendants' assertion, the plaintiffs are not asking this Court to extend accepted substantive due process law. In fact, plaintiffs' claims rest on what courts universally have recognized is the very core of actionable substantive due process - the rights to safety and protection from harm, including mental and emotional harm and the right to health care while in the state's custody.

In the present case, there is an absence of a genuine issue of material fact on the substantive due process claims of plaintiffs. Those undisputed facts, however, support entry of summary judgment on behalf of the plaintiff class. Defendants' motion should therefore be denied.

Reports from the States to the National Child Abuse and Neglect Data System (Washington, DC: U.S. Government Printing Office, 1999).

In 1997, the defendants substantiated 1595 complaints of emotional or psychological abuse of children in Washington. (CWLA database "number of victims by maltreatment type").

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
26

II. STATEMENT OF FACTS

A. Indiscriminate Multiple Placements Harm Children

A November, 2000 analysis of data on the number of placements experienced by foster children in Washington indicate that 717 of the children in care less than two years were in three or more placements. The same report indicates that the percentages of children shuttled through three or more placements while in foster care increases for children in care more than two years but less than three years. Another 572 children out of that group of children were in three or more placements. Of all children in care as of May, 2000, a total of 2349 children were in three or more placements.⁶ This does not include approximately 1,000 more children in group care -bringing the total to more than 3,000 children. Reducing Multiple Placements, Dee Wilson, pp. 7-8, November, 2000. (hereinafter Wilson Report). (See Wilson Report attached to Declaration of Timothy C. Fan-is as Exhibit 4).

Defendants' administrators and employees unequivocally state that these multiple placements harm children in foster care. At her deposition, former DSHS Secretary Jean Soliz testified:

Q. You make a statement, "Many of these children are bounced from placement to placement with no say about where they live or with whom." In your view and based upon your experience, are children damaged by the multiple placement in foster care?

⁶ Many more children suffer multiple placements than these official statistics report. The underreporting is due to several factors including defendants' definition of 'placement' that excludes certain changes in the child's living arrangement and their exclusion of children in group care from the database.

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
26

A. Yes.

(Soliz Deposition, p. 13). (Exhibit 1) She described children living in the DSHS foster care as living in “misery” and states, “These children are in the worst position of any people in our society.” (Soliz Deposition, p. 47).

Current DSHS Administrator Dee Wilson in his November 2000 report described multiple placements of children as “emotionally devastating experiences.” (Wilson Report, p. 28). His report also cites:

[R]ecently published research suggesting that mental health problems of many children in foster care are the result, rather than the cause, of placement instability and other experiences in out of home care.

(Wilson Report, p. 18). Later in the same report he concludes that foster children’s mental health problems are compounded by experiences in care, including multiple placements or those problems are “almost entirely the result of experiences while in placement.” (Wilson Report, p. 28).

In June of 2001, Mr. Wilson testified:

I think that as a general rule moving kids around in care has a detrimental effect on them. I think that some placement moves are more impactful in a negative way than others. I don’t know that every placement move has an equally negative impact on children.

(Wilson Deposition, pp. 45-46). (Exhibit 2)

In June of 2001, the Washington State Institute for Public Policy (created by the Legislature) issued a report on Washington State’s foster children. The report echoes the conclusions of Mr. Wilson, documenting that¹

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
26

Children in foster care longer than three months often enter this system with psychological injuries and vulnerabilities.

Even for children with few impairments, being moved from setting to setting often increases their problems.

Washington State Institute for Public Policy, *Long-Term Foster Care in Washington: Children 's Status and Placement Decision-Making*, Lucy Berliner and David Fine, June 2001, p 2. (hereinafter referred to as WSIPP) (See WSDP Report attached to Declaration of Timothy C. Far-r-is as Exhibit 3)

DSHS reports confirm that children suffer substantial harm while in defendants' custody :

One of the primary concerns of Children's Services is that children are believed to move too fi-equently between foster homes, impairing the child's ability to develop relationships and trust.

(Report, p. 9).

Medical professionals attest to the harmful impact of multiple placements upon children. In their recent policy statement the American Academy of Pediatrics unequivocally concluded that "multiple placements are injurious." (Exhibit 3). [See Children's Brief in Opposition to Partial Summary Judgment, p.7 1.

Professor and child psychiatrist, Dr. Eric Trupin, Chairperson of Gov. Gardner's panel on foster care, reported in a DSHS commissioned report:

Because of the serious effects that disrupted, chaotic families have on the development of children, it is not surprising that mental and physical problems are pervasive. These children frequently have not received regular health care or preventative services. Health problems often persist and become chronic. *Those problems Ore compounded in fosterplacement by lack of coordinated medical care and the tendency for multiple placements of d\$.dt to manage children.*

1 Child psychiatrist, Dr. Ken Magid, widely respected author of the book, High
2 Risk, Children Without a Conscience, wrote:
3

4 [foster care] children are all children in serious trouble. They are products
5 of the foster care child adoption system in the U.S. Some are in trouble
6 because of past abuse and neglect, others because of delays in the adoption
7 process. They have all suffered attachment breaks. Bureaucratic delays are
8 causing these kind of breaks - children are becoming unattached at the
9 very processes designed to help them.

10 Some of the most problematic children are those who have lost their
11 ability to trust, to show affection and form lasting relationships.

12 (Magid, High Risk, p. 293). (Exhibit 4)

13 In his declaration in support of this reform litigation identifying the harm caused
14 by multiple placements Dr. Magid testified:

15 In summary, how important is the attachment process to healthy
16 development?

17 Attachment is the crucible from which all relationships develop and it is
18 the fundamental glue which holds those relationships together. Attachment
19 is a biological environmental process which involves our lifelong
20 meaningful connections with others. It organizes who we are, including
21 our felt security, our motivations, our expectations, our self regulations,
22 our morality, our cog-r&ions and virtually everything else that helps us love
23 and trust one another.

24 Prompt, tailor-made child placements with healthy caretakers helps
25 promote secure attachments, provided the child is given enough time to
26 form dependable, long lasting bonds that build competency, trust and love.
Multiple placements do not allow enough time to form secure attachment
bonds, placing a child or adolescent at higher risk for disrupted
attachments and psychopathology. And the longer time that it takes for a
maltreated child to be properly placed, the higher the probability that the
child will cement maladaptive relationship skills and thus never be placed.

(Magid Declaration, pp. 5-6) (Exhibit 5)

1 The damage caused by multiple placements is so well established that it is
2 identified as a cause of a Reactive Attachment Disorder in the Diagnostic and Statistical
3 Manual (DSM IV). This standard mental health treatise identifies the cause of Reactive
4 Attachment Disorder of Infancy or Early Childhood (DSM 3 13.89):
5

6 **Diagnostic Features:**

7 The essential feature of Reactive Attachment Disorder is markedly
8 disturbed and developmentally inappropriate social relatedness in most
9 contexts that begin before age 5 years and is associated with grossly
IO pathological care (Criterion A). By definition, the condition is associated
11 with grossly pathological care that may take the form of persistent
12 disregard of the child's basic emotional needs for comfort, stimulation,
13 and affection (Criterion C), persistent disregard of the child's basic
14 physical needs (Criterion CS) or repeated changes in primary caregiver
15 that prevent formation of stable attachments (e.g. frequent changes in
16 foster care). The pathological care is presumed to be responsible for the
17 disturbed social relatedness (Criterion D).

18 (*Diagnostic and Statistical Manual, DSMIV*, p. 116). (Exhibit 6)

19 Kathleen Westover M. A., a mental health therapist who was the director of the
20 DSHS program for foster care children, states:

21 There is simply no dispute among child development experts that a child is
22 damaged and injured when the child is placed in successive homes to live.
23 For proper child development, a child needs and requires permanency in
24 both home and caregivers. When a child is placed in multiple placements,
25 the child learns not to trust, not to bond to people.

26 (Westover Declaration, p. 6). (Exhibit 7)

From this evidence it is clear that social work professionals including defendants'
Dee Wilson and experts in children's mental health care agree that defendants' practices

1 inflict significant harm upon children in their custody. Defendants present no evidence to
2 refute the harmful impact of their practices upon plaintiff children.

3
4 **B. Defendants Fail to Provide Mental Health Care to Children in Foster Care**

5 In June, 2001, a study by the Washington State Institute for Public Policy, found
6 that the majority of children in foster care suffered from clinically significant behavioral
7 or mental health problems. Fifty one (51%) of children in Family Foster Care (Level I)
8 had clinically significant scores relating to behavioral/mental health problems. Seventy
9 eighty percent (78%) in Enhanced Family Foster Care (Level II/more disturbed) had
10 clinically significant scores. Eighty one (81%) of children in Therapeutic Care (Level IQ
11 had clinically significant mental health scores.
12

13 DSHS Administrator Dee Wilson offered sharp criticism of the State's failure to
14 provide "necessary" health care treatment.
15

16 Q- Let me begin with an open question. In your opinion do children
17 in the foster care system in the State of Washington receive
adequate mental health care for their mental illnesses?

18 A. I think they often don't.

19 (Wilson Deposition, pp. 106-108).

20 Mr. Wilson was clear that the State denies children "necessary" mental health
21 treatment.

22 Q. (By Mr. Farris) To be clear, Mr. Wilson, when you're referring to
23 the inadequacy of mental health care for children, you're talking
24 about mental health services that are necessary and important to the
child's health. Is that correct?

25 A. Emotional health, emotional deJ elopment and well-being.

26 Q. And the child's mental health as well?

A. Ill-i-huh.

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
26

(Wilson Deposition, pp. 101-102) (emphasis added).

Mr. Wilson and the WSIPP provide a clear picture of a world occupied by innocent victims of child abuse taken from their homes by the State and held in the state foster care system where they are routinely denied necessary health care services. Many of these children are sick when they come into the system and their illness is compounded by the acts and omissions of the defendants. Although they are sick, and some severely ill, the State refuses to provide the children with the necessary health care. Their health deteriorates and their behaviors exceed the abilities of untrained foster parents to properly care for them. So, these sick and untreated children bounce from placement to placement. The relationship between denial of mental health care and placement breakdowns is well known and acknowledged by defendants.

The problems result from both the defendants' failure to conduct assessments of children's mental health needs and, to provide the treatment necessary to address them. First, although the State knows that thousands of children coming into the foster care system are in need of mental health services, the State does not provide mental health assessments of children when they come into care. Mr. Wilson testified the defendants deny sick children assessments of their illnesses.

Q. Is it then true that many of these children do not receive mental health evaluations when they come into care. Is that correct?

A. Yes.

Q. And therefore, they have either undetected or undiagnosed mental health problems as they are then transferred into the foster homes. Is that correct?

[Objection]

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
26

A. I think that some do.

Q* And they're untreated as well at that time. Is that correct?

A. I think at some time that is true.

(Wilson Deposition, pp. 54-55).

Second, once the children's illnesses manifest themselves to foster parents or others, simply getting an assessment for a sick child is difficult. The WSIPP study noted:

It was noted by participants that there is no systematic assessment process within Children's Administration.

(WSIPP, p. 34).

Dee Wilson also confirmed that even getting assessments of these sick children is difficult.

Q. I just want to be clear about this. So if there is a child, for example, in Region 6 that is demonstrating aberrational or what a layperson would clearly consider to be significant mental health problem, is there a problem or a delay in even getting that child assessed or seen by someone to assess them?

A. Yes, particularly if the, if the office or if the social workers involved are trying to get the assessment done through the public mental health system, there might be a great delay. There might be an inability to make it happen at all.

....

Q. Do some children go unassessed who are exhibiting mental health problems?

A. I think from time to time. some children do go unassessed at some level of severity. I think that there are children whose mental health needs are not met from time to time.

(Wilson Deposition, pp. 105- 106).

Q. How widespread is the problem, let's take Region 6, with getting the child assessed?

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
26

A. Within the public mental health system, it's very extreme. It's a very difficult matter in most offices in Region 6, pretty much a rural region with lots of very small offices. The only well-funded RSN in Region 6 is Clark County in the Vancouver area. So for the most part outside of Vancouver and to a lesser extent Olympia, it's a very difficult matter in the public health care system to have a child assessed.

(Wilson Deposition, pp. 106-107).

Third, even sick children who are assessed and identified as needing mental health care are often denied "adequate" or "necessa\$" health care treatment. According to the WSIPP study, most mentally ill foster care children have not been receiving any mental health care.

Even though the majority of children in family foster care and enhanced family foster care were rated as moderately or severely impaired or having clinically significant behavioral problems, most had not received any mental health or support services in the previous month.

(WSIPP, p. 3)

Even for children rated with "severe behaviors," mental health services are largely denied.

One group of children -those in enhanced family foster care (Level III) - appeared the most mismatched. Although 44 percent were rated as having severe impairments that likely need intensive treatment, many had not recently received counsel or support services. The fact that a fourth of the foster parents have hired staff suggests that the children's behavior could not be managed in a regularly family environment.

(WSIPP, p. 24). The WSSIP study also found that severely impaired children are being denied residential treatment and, instead, are, placed in "enhanced family foster care" which is not staffed by health care professionals.

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
26

Participants discussed what they had experienced as a common scenario: a caseworker must place a difficult child but is anxious to avoid the expense of a group care setting. In these situation, the caseworker often starts by offering extra payment to a foster family to secure a bed, even though the family may not be equipped to care for the child. This often results in failed placements *and exacerbates the child's problems, eventually leading to the necessity of group care.*

(WSIPP, p. 35).

The study noted that children, who are placed in “enhanced family foster care” are not in an adequate placement for their health care needs.

Enhanced family foster care does not appear to be an adequate placement for children with severe impairments.

(WSIPP, p. 24).

For the sickest children who are lucky enough to get treatment, the wait is often months.

Q* Do you have children or are you aware of, children on waiting lists to get into residential treatment facilities?

A. Yes.

(Wilson Deposition, p. 119). Mr. Wilson admits the “the wait could be months”.

(Wilson Deposition, p. 120).

For the very sickest foster care children who are finally admitted to residential treatment, DSHS pressures providers to terminate mental health services even though the child still needs mental health care.

Once children arrive in the more intensive settings, the pressure is always to limit the length of care, not because the children do not need it, but to conserve resources.

(WSIPP p. 36).

1 Again and again, this study (as well as others) confirm that the State's failure to
2 provide necessary mental health care is damaging children.

3
4 The participants expressed frustration that the Children's Administration
5 and the legislature do not appear to appreciate that children who require a
6 more intensive setting have very severe emotional and behavioral
7 problems that will not be resolved by short-term, cheaper interventions.
8 And ironically, the children's difficulties are partially caused by the
9 multiple failed placements, as well as their original maltreatment and
10 parental rejection.

11 a

12 The reality of it is these people are scarred and damaged pretty severely,
13 and they'll be struggling with this their entire life. They are not going to
14 get over it in 18 months in group care and be all better.

15

16 It seems particularly unfortunate to these agency representatives that
17 children's conditions deteriorate as a consequence of state policies and
18 practices, yet the state is unwilling to change its policies.

19 (WSIPP, p. 36) (emphasis added),

20 Mr. Wilson agrees the State is injuring its children.

21 Q- (By Mr. Fan-is) Do you have a concern that the inadequacy of
22 mental health services for foster care children injures children
23 further?

24 A. [Objection]

25 A. Yes, I, yes, I do have a concern.

26 (Wilson Deposition, pp. 123-124)

It is not just a problem with the adequacy of health care treatment. Mr. Wilson
also criticized the quality of the care foster care children received.

Q. Let's talk about that. Could you be more specific about what your
concerns are about either the quantity or quality of mental health
services that foster care children receive?

A. The first concern is that you have a public health care system that
has adopted a managed-care approach to things, and what managed
care usually means in mental health is short-term care, six to eight

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
26

to 10 visits for most, for most problems, that if kids receive any kind of treatment, it's in that, it's in that kind of length. For children in foster care this iust isn't sufficient, and it's, we have kids who are very troubled, and a lot of times they need ongoing help. They need ongoing help for months or years, not sort of a short-term kind of intensive kind of basis. That's the first thing having to do with the managed care system. Many of the mental health centers in Region 6, I think it's probably true in other places, definitely true in Region 6, are paying entry level salaries which are no more than 20 to 30 thousand dollars a year, and they are hiring people who don't have a lot of experience and background. They're entry-level jobs. They don't have specialized knowledge regarding many of the kind of problems and conditions that our children exhibit, and therefore, there is very much of a question about the quality of mental health care that a child might receive even if they receive mental health care within the public mental health system, and then let's say that they do receive care from an entry level person who is making \$25,000 a year. It's a good guess that six months to a year to a year-and-a-half down the road this person is going to find a better job, and they leave. So now the child has formed a relationship with a therapist, and now the therapist leaves, and so practically in every way one. can describe it's a poor system, and that's an understatement.

(Wilson Deposition, pp. 106-107) (emphasis added).

Finally, Mr. Wilson and the Washington Institute Public Policy directly connects the State's failure to provide mental health care to being a cause of multiple placements.

Q. (By Mr. Farris) Reading your report, however, would it be fair to say that the reason that you express such concern about the inadequate mental health services with children is because children are being injured by not receiving mental health services?

[Objection]

A. The reason I raise it in the report is because I think it is one of the major causes of multiple placements within our system, the inability to stabilize children in care. You have to be able to do something about their mental health problems, and this is in group care or any other care. Kids disrupt out of BRS and foster care just

1 like they do out of any other kind of placements. So to be able to
2 stabilize that child in care is the reason for my concern.

3 (Wilson Deposition, p. 119).

4 According to the WSIPP study:

5
6 When foster placements fail, it is usually because children have behavioral
7 problems that become unmanageable for foster parents. This failure may
8 occur because children and families are not receiving the appropriate
9 services or because the child's problems require a more comprehensive,
10 therapeutic environment than is possible in a regular family home.

11 (WSIPP, p, 24).

12 III. ARGUMENT

13 A. Foster Children Have a Substantive Due Process Right to Protection From
14 Harm Which Includes Protection from Mental and Physical Injuries

i 15 The law is unequivocal. Children in the custody of defendant state child welfare
16 agencies have the right to protection from harm and to adequate and necessary medical
17 care. Virtually every court to consider these issues has recognized and upheld the right of
18 foster care children in the custody of the state to enforce such claims in actions brought
19 pursuant to 42 U.S.C. **section** 1983. The relief sought in these actions has included both
20 money damages and injunctive relief.

21 Defendants acknowledge that foster children have a substantive due process right
22 to protection from harm and appear to concede that they are also entitled to medical care.
23 Their sole argument is that the harm against which the Fourteenth Amendment protects
24
25
26

persons in state custody is limited to physical injury.⁷ Under their theory of substantive due process, state custodians of child abuse victims may inflict the same type of emotional injury upon children that justified the children's removal from the parents custody and do so with impunity. This assertion conflicts with well-settled due process case law and logic.

Serious injuries to a child's health that are primarily psychological and developmental and do not involve substantial physical injury are sufficient to violate substantive due process rights. Almost two decades ago, in *Hudson v. McMillan*, 112 S.Ct. 995 (1992), the Supreme Court held that serious physical injury was not a necessary element of a prison inmate's Eighth Amendment claim.* In his concurring opinion, Justice Blackmun wrote :

I do not read anything in the Court's opinion to limit injury cognizable under the Eighth Amendment to physical injury. It is not hard to imagine inflictions of psychological harm--without corresponding physical harm--that might prove to be cruel and unusual punishment. [citations omitted] As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of "pain," rather than "injury." Ante, at 998. "Pain" in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary. See *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). (recognizing Article III standing for "aesthetic" injury); *Brown v. Board of Education*, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954)

⁷ Some of the named plaintiffs have suffered "physical harm" - e.g. the rape of Ebony Hardin at age five while in defendants' foster home.

^a Though the prison cases are frequently based upon an Eighth Amendment analysis, it is clear that they are relevant to the inquiry here. As the Supreme Court stated in *Youngberg*, persons in state custody for their own protection are entitled to more considerate treatment.. *Child Welfare League of America, Standards of Healthcare Services for Children in Out-of-Home Care* §52.1-2.9 (1988).

1 (identifying schoolchildren's feelings of psychological inferiority from
2 segregation in the public schools). To be sure, as the Court's opinion
3 intimates, *ante*, at 1000, de minimis or nonmeasurable pain is not
4 actionable under the Eighth Amendment. But psychological pain can be
5 more than de minimis. Psychological pain often may be clinically
6 diagnosed and quantified through well-established methods, as in the
7 ordinary tort context where damages for pain and suffering are regularly
8 awarded. I have no doubt that to read a "physical pain" or "physical
9 injury" requirement into the Eighth Amendment would be no less
10 pernicious and without foundation than the "significant injury"
11 requirement we reject today.

12 *Hudson v. McMillan*, 112 S.Ct. at 1004.

13 Following *Hudson*, several lower federal courts have held that severe
14 psychological injury or a failure to meet the psychological needs of children in custody
15 implicates substantive rights under the Due Process Clause. As the District Court held in
16

17 *Marisol*:

18 Clearly, the state is required to protect children in its custody from
19 physical injury. This Court further finds that custodial plaintiffs have a
20 substantive due process right to be free from unreasonable and
21 unnecessary intrusions into their emotional well-being. As the United
22 States District Court for the Northern District of Illinois reasoned, "[a]
23 child's physical and emotional well-being are equally important. Children
24 are by their nature in a developmental phase of their lives and their
25 exposure to traumatic experiences can have an indelible effect upon their
26 emotional and psychological development and cause more lasting damage
27 than many strictly physical injuries." *B.H. v. Johnson*, 715 F.Supp. 1387,
28 1395 (N.D. Ill. 1989); see also *Aristotle P.*, 721 F.Supp. at 1009-10
29 (finding that "[t]he fact that the plaintiffs' injuries are psychological rather
30 than physical is of no moment" and that such injuries support substantive
31 due process claim); *Doe v. New York City Dep't of Social Servs.*, 670
32 F.Supp. 1145, 1175-76 (S.D. N.Y. 1987) (finding that defendants violated
33 plaintiffs' substantive due process rights by subjecting them to physical,
34 emotional, and psychological harm).

35 *Marisol v. Guiliani*, 929 F.Supp. 662, 675 (S.D. N.Y. 1996.)

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
26

The Seventh Circuit has agreed in a series of opinions going back two decades that the right to safety includes solely psychological injury once it reaches a certain level of severity. *K.H. v. Morgan*, 914 F.2d at 850 (“If... defendants must have known they were placing K.H. in a sequence of foster homes that would be destructive of her mental health, the ingredients of a valid constitutional claim are present.”); *Camp v. Gregory*, 67 F.3d 1286, 1293 (“The extension [of Due Process claim] to the case in which the plaintiffs mental health is seriously impaired by deliberate and unjustified action is”, we observed, “straight forward”) (citing *K.H.*, 914 F.2d at 848); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (“...protections of the Due Process Clause against arbitrary intrusions on personal security includes both physical and emotional well-being”); *Abeyta v. Chama VaZZey Independent School Dist.*, 77 F.3d 1253 (7th Cir. 1996) (actions which inflict only psychological damage may violate substantive due process); *See also, Andrea L. v. Children and Youth Sews. of Lawrence County*, 987 F.Supp. 418, 423 n. 3 (W.D. PA 1997).

The injuries to plaintiffs’ psychological health and well-being caused by defendants’ routine practice of shuttling them from one place to another are more severe and long-lasting than many physical injuries they might have suffered. Many bruises and broken bones heal with little residual disability. The injuries caused by defendants’ practices are no less violative of children’s civil rights because they affect their mental and not their physical health.

1 Recently, the Tenth Circuit held that the constitutional rights of prison inmates
2 “may be implicated not only to physical injury, but also by the infliction of psychological
3 harm.” *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir. 2001). Certainly, if
4 persons convicted of heinous crimes are entitled to treatment reasonably calculated to
5 improve their mental health, then children in state custody, some of whom have been the
6 victims of these same predators, are entitled to conditions of confinement and treatment
7 which will improve their mental health. For the children in the custody of the
8 Washington DSHS, those conditions and treatment do not exist.
9
10

11 Defendants seek to impose upon substantive due process analysis a limitation
12 similar to the limitation Congress imposed upon convicted prisoners through passage of
13 the Prison Litigation Reform Act (‘PLRA). Section 1997e (e) of the PLRA provides that
14 a prisoner cannot bring an action for mental injury without a showing of physical injury.
15 Despite Congress’ attempt to limit such actions, all the courts to consider the limitation
16 have held that prisoners alleging only psychological or emotional harm may seek
17 injunctive or declaratory relief. *Clarke v Staidler*, **112** F.3d 222, 227 n.8 (5th Cir.
18 1997)(suggesting that §1997e(e) might bar monetary relief but not injunctive relief);
19 *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997)(“ §1997e (e) only limits the relief to
20 which plaintiffs are entitled; it does not restrict their access to the courts to press claims
21 for which the substantive law provides an underpinning.”); *Davis v. District of Columbia*,
22 158 F.3d 1342, 1346 @.C.Cir. 1998)(holdyng §1997e(e) does not bar actions for
23 injunctions or declaratory judgments in which no allegations of prior physical injury are
24
25
26

1 made); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 808 (10th Cir.
2 1999)(holding that PLRA §1997e (e) did not limit mental injury suits for injunctive or
3 declaratory relief).
4

5 Defendants' attempt to require that any substantive due process claim must satisfy
6 the threshold of a physical injury must be rejected. *Youngberg, DeShaney* and their
7 progeny require that plaintiffs must demonstrate that acts of the state are outside
8 professionally accepted standards and cause harm to the plaintiff children. A study of the
9 state foster care system describes how DSHS professionals, against their own better
10 judgment and professional desires, often placed children in inappropriate, inadequate and
11 potentially dangerous placements' simply for fear of cost overruns.
12

13 Once children arrive in the more intensive settings, the pressure is always
14 to limit the length of care, not because the children do not need it, but to
15 conserve resources. (p3)

16 Participants discussed what they had experienced as a common scenario: a
17 caseworker must place a difficult child but is anxious to avoid the expense
18 of a group care setting. In these situations, the caseworker often starts by
19 offering extra payment to a foster family to secure a bed, even though the
20 family may not be equipped to care for the child. This often results in
21 failed placements *and exacerbates the child's problems, eventually*
22 *leading to the necessity of group care.*

23 The participants expressed frustration that the Children's Administration
24 and the legislature do not appear to appreciate that children who require a
25 more intensive setting have very severe emotional and behavioral
26

27 ' One group of children -those in enhanced family foster care (Level III) - appeared the most mismatched.
28 Although 44 percent were rated as having severe impairments that likely need intensive treatment, many had
29 not recently received counsel or support services. The fact that a fourth of the foster parents have hired
30 staff suggests that the children's behavior could not be managed in a regularly family environment.

(_____, p. 24).

MEMO IN OPPOSITION TO MOTION TO DISMISS ; 22

BRETT & DAUGERT, PLLC
A T T O R N E Y S A T L A W

300 NORTH COMMERCIAL + P.O. BOX 5008
BELLINGHAM, WA 98227-5003
TELEPHONE (360) 7330212 • FAX: (360) 647-1902
w:.- bre:lan corn

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
26

problems that will not be resolved by short-term, cheaper interventions. And ironically, the children's difficulties are partially caused by the multiple failed placements, as well as their original maltreatment and parental rejection.

....
The reality of it is these people are scarred and damaged pretty severely, and they'll be struggling with this their entire life. They are not going to get over it in 18 months in group care and be all better.

....
It seems particularly unfortunate to these agency representatives that children's conditions deteriorate as a consequence of state policies and practices, yet the state is unwilling to change its policies.

(WSIPP, p. 35-36) (emphasis added).

Sadly, the evidence as set forth in more detail in the statement of facts, accompanying exhibits and prior pleadings present uncontroverted evidence that children are suffering serious and permanent mental injury. ¹⁰ The cause of this injury is defendants' practice, effecting thousands of children. each year, of shuttling foster children Corn one placement to another. It is a practice that child welfare and medical professionals condemn and which runs contrary to professional judgment. As such, it arises to the level of a substantive due process violation for which plaintiff class are entitled to judgment as a matter of law.

B. Foster Children Have a Substantive Due Process Right to Adequate Health Care. Including Care for Their Mental Health Needs

¹⁰ Indeed, professional judgment that shuttling can do harm to children is so widely accepted in Washington that the State Legislature codified the fact. Washington, State law provides that "[p]lacement disruptions can be harmful to children by denying them consistent and nurturing support." RCW 74.13.310.

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
26

Once the state removes a child from the custody of his parents, it owes that child a duty of safekeeping that goes beyond protection from sexual molestation and severe physical injury. The state may not be deliberately indifferent to the child's serious medical needs. *Norfleet ex rel Nor-fleet v. Arkansas Dept of Human Sews.*, 989 F.2d 289, 293 (8th Cir. 1989).

State officials' responsibility to provide health care for child abuse and neglect victims in their custody extends to a duty to provide care that addresses their mental health needs. In a recent Ninth Circuit decision, the court denied the state's motion to dissolve an injunction requiring state officials to provide constitutionally adequate mental health treatment to convicted sexually violated predators who had been civilly committed. *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000). In refusing to lift the injunction, the court reaffirmed the holding in *Ohlinger v. Watson*, 652 F.2d 775,778 (9th Cir. 1980) that "the Fourteenth Amendment Due Process Clause requires states to provide civilly committed persons with access to mental health treatment." The *Sharp* court explained that:

The appropriate legal standard for analyzing the constitutionality of SCC's treatment program is set forth in *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980). *In Ohlinger*, we held that the Fourteenth Amendment Due Process Clause requires states to provide civilly- committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released. *Id.* ("Adequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely as a result of their mental illness...."). Because the purpose of confinement is not punitive, the state must also provide the civilly-committed with "more considerate treatment and conditjons of confinement than criminals whose conditions of confinement are'designed to punish." *Youngberg*, 457 U.S. at 322,102 S.Ct. 2452

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
26

Based on the numerous inadequacies noted by the district court, we find no error in the court's conclusion that, taken as a whole, SCC still does not provide the type of treatment program that is constitutionally required for civilly-committed persons--one that gives residents a realistic opportunity to be cured or improve the mental condition for which they were confined. *See Ohlinger*, 652 F.2d at 779; *see also U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931,936 (7th Cir.1975)(recognizing that “[a]1 too often the ‘promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits’”) (quoting *Cross v. Harris*, 418 F.2d 1095, 1107 (1969). Moreover, SCC residents were not receiving “more considerate treatment and conditions of confinement” than the inmates of MICC, as required by *Youngberg*, 457 U.S. at 322, 102 S.Ct. 2452. *Sharp v. Weston* 233 F.3d 1166, (9th Cir., 2000) p. 1173

Defendants' assertion that *Sharp* and similar prison cases are “simply inapposite,” (Defendants' Motion, p.12), conflicts with the United States Supreme Court's decision in *Youngberg*. *Youngberg* held that involuntarily civilly committed patients are “entitled to more considerate treatment and conditions” than criminals. *Youngberg*, 457 U.S. at 321-322. Certainly children in foster care are also entitled to more considerate treatment than the criminals in *Sharp*. *See, Yvonne L. v. New Mexico Dep 't of Human Services*, 959 F.2d 883, 894 (10th Cir. 1992); *Kafa B. v. Dane County*, 555 N.W.2d 630 (Wise. 1996).

Professional standards adopted by the Child Welfare League of America with support of the American Academy of Pediatrics require an early, comprehensive assessment of children entering foster care.” The uncontradicted evidence demonstrates that such basic assessments are not being conducted for many children in care. As a

” Washington state law implicitly adopted this standard by requiring evaluations of children entering foster care within --- days of entering care. RCW.. . Compliance data (Wilson documents or deposition)??

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
26

result, plaintiffs’ health care needs are unidentified, treatment delayed or denied and the child’s health to deteriorates.

Defendants know that 50% to 80% of children coming into the foster care system are in need of mental health services¹², but fail to provide mental health assessment to children when they first enter care.¹³ The current DSHS administrator confirms that for this reason, many children “have either undetected or undiagnosed mental health problems as they are then transferred into the foster homes.” (Wilson Deposition, pp. 54-55).

Once children’s illnesses manifest themselves to foster parents, getting an assessment is still difficult. There is delay and many times assessments simply don’t happen. Administrator Wilson explains: “[I]f the social workers involved are trying to get the assessment done through the public mental health system, there might be a great delay. There might be an inability to make it happen at all.” (Wilson Deposition, p. 105) Wilson goes on to say that “[S]ome children do go unassessed at some level of severity” and that ultimately “. . . outside of Vancouver and to a lesser extent Olympia, it’s a very difficult matter in the public health care system to have a child assessed.” (Wilson Deposition, pp. 106,107).

¹² The Washington State Institute for Public Policy, June 2001 study found that the majority of children in foster care suffered from clinically significant behavioral or mental health problems. Fifty one (51%) of children in Family Foster Care (Level I) had clinically significant scores relating to behavioral/mental health problems. Seventy eight percent (78%) in Enhanced Family Foster Care (Level II/more disturbed) had clinically significant scores, And, eighty one (81%) of children in Therapeutic Care (:Level III) had clinically significant mental health scores. (-----p 13).

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
26

Many children needing treatment receive nothing, despite efforts by their caseworkers to get them assessed and placed. Equally tragic, the WSIPP study confirmed that for those who do receive treatment, many receive inappropriate treatments.¹⁴ Indeed, over 44% of those in enhanced foster care settings are considered in inappropriate placement by the WSIPP study. According to DSHS professionals, inappropriate treatment can exacerbate a child’s problem and lead to the necessity of more intensive services in the future.”

Again and again defendants have acted not only against accepted national professional standards, but against the recommendations of its own professional

¹³ Wilson Dep. 54. WSIPP study at 34(“IT was noted by participants that there is no systematic assessment process within Children’s Administration.”)

¹⁴ ---p24 (noting that 44% of children in enhanced family foster care are considered severely impaired and that “[e]nhanced family foster care does not appear to be an adequate placement for children with severe impairments.”)

* Participants discussed what they had experienced as a common scenario: a caseworker must place a difficult child but is anxious to avoid the expense of a group care setting. In these situations, the caseworker often starts by offering extra payment to a foster family to secure a bed, even though the family may not be equipped to care for the child. This often results in failed placements *and exacerbates the child’s problems, eventually leading to the necessity of group care.*

The participants expressed frustration that the Children’s Administration and the legislature do not appear to appreciate that children who require a more intensive setting have very severe emotional and behavioral problems that will not be resolved by short-term, cheaper interventions. And ironically, the children’s difficulties are partially caused by the multiple failed placements, as well as their original maltreatment and parental rejection.

....
The reality of it is these people are scarred and damaged pretty severely, and they’ll be struggling with this their entire life. They are not going to get over it in 18 months in group care and be all better.

....
It seems particularly unfortunate to these agency representatives that children’s conditions deteriorate as a consequence of state policies ?uid practices. yet the state is unwilling to chance its policies.

1 employees. Plaintiffs are not asking this court to “second guess” the professionals. The
2 professionals in this case agree and DSHS employees acknowledge that plaintiff class
3 members are deprived of adequate mental health care and as a result suffer serious and
4 lasting harm. Consequently, summary judgment on plaintiffs’ substantive due process
5 claim for failure to provide adequate health care should be granted.
6

7 **C. AUTHORITIES CITED BY THE STATE EITHER DO NOT DEAL WITH THE CLAIMS**
8 **OF FOSTER CARE CHILDREN AND THE STATE’S ARGUMENTS THAT**
9 **FOSTER CARE CHILDREN ENJOY NO SUBSTANTIVE DUE PROCESS RIGHTS.**

10 The State cites a number of cases for the proposition that foster care children have
11 no substantive due process rights. These cases simply do not support the State. In fact,
12 many of the cases specifically state that foster care children do have substantive due
13 process protections. The other cases simply do not involve the claims of foster care
14 children. Most of the cases do not even relate to the claims of foster care children that
15 they are harmed by foster care systems.
16

17 The State cites *Drummond v Fulton County*, 563 F.2d 1200 (1978), yet
18 *Drummond* had nothing to do with the harm caused by the foster care system. Rather, it
19 involved issues of who was entitled to adopt a child. (“The Drummonds and counsel for
20 Timmy contend that the state denied them equal protection of the laws because of the
21 extent to which race was considered in making the adoption decision.”)
22

23 Similarly, the State cites *In Re Adoption/Guardianship No 2633*, 645 A.2d 1036
24 (1994), yet this case has nothing to do with foster care children being harmed by foster
25

26 ~ 1 b d w D 1 S M 1 S S ~ - 2 8 **BRETT & DAUGERT, PLLC**
A T T O R N E Y S A T L A W

300 NORTH COMMERCIAL 4 p.o. BOX 5008
BELLINGHAM, WA 98227-5006
TELEPHONE- (360) 733-0212 + FAX: (360) 647.1902
www.brettlaw.com

2 care systems. (“Foster parents who had petitioned to adopt foster child brought civil
3 rights action challenging adoption of child by same-race family.”).

4 In *Gibson v. Merced County*, 799 F.Supp 582 (1986) dealt with the claim of a
5 foster parent to retain a foster child in the home - not claims of harm inflicted by the
6 foster *care* system. Even in *Gibson*, the Ninth Circuit all but “assumed” that foster care
7 children has a substantive due process right from harm but found no claims in that case of
8 any harm to the child. *Gibson*, 799 F.Supp. at 590.

9
10 In the cases cited by the State that *do* relate to foster care children alleging harm,
11 the courts recognized the children *do* have substantive due process rights.

12 In *Charlie H. vs. Whitman*, 83 F.Supp.2d 476 (D.N.J. 2000), the court recognized
13 the right to bring a claim for substantive due process.

14 a. Substantive Due Process

15
16 Plaintiffs allege that the “Fourteenth Amendment of the United States
17 Constitution guarantees to each child in state custody the substantive due
18 process right to be free from harm and the right to conditions of custody
19 reasonably related to the purpose of custody.” Compl. at 1 57.
20 Specifically, Plaintiffs allege that the “right to be free from harm
21 encompasses the right to treatment in accordance with reasonable
22 professional standards, and the right to the services necessary to prevent
23 children from deteriorating physically, psycholotically or otherwise while
24 in state care, including but not limited to safe, secure foster care
25 placements, appropriate monitoring and supervision, case planning and
26 management, permanency planning and medical, psychiatric,
psychological and educational services.”

Specifically, Plaintiffs allege the deprivation of the following rights: i)
right to protection from harm; ii) right not to be harmed, “physically,
emotionally, developmentally, or othehwise--while in state custody;” iii)
right not to remain in state custody “unnecessarily;” iv) right to be housed
in the “least restrictive, most appropriate and family-like placement” while

1 in state custody; v) right to treatment; vi) right to treatment related to the
2 cause of their confinement; and vii) right to receive care, treatment and
3 services consistent with “competent professional judgment.”

4 *Chadie H. v. Whitman*, 83 F.Supp.2d at 504) (emphasis added). The Court held that
5 these claims, which largely mirror the claims in this case, were actionable as violations of
6 children’s rights substantive due process rights.

7 Indeed, courts have recognized the right of children “who have been
8 involu_ntarily.placed.in the custody of [the state] may state a claim for
9 violation of their substantive due process rights based upon their right to
10 freedom from harm under the fourteenth amendment of the United Stat&
11 Constitution.” *Baby Neal v. Casey*, 821 F.Supp. 320, 335 (E.D. Pa. 1993).

12 *Charlie H. v. Whitman*, 83 F.Supp.2d at 507 (D.N.J. 2000).

13 The State cites *Mark G. v. Sabol*, 717 NE 2d 1067 (N.Y. 1999) describing the
14 holding of the case as:

15 even giving plaintiffs the benefit of all favoiable inferences, nothing
16 alleged suggest such total indifference on defendants part to plaintiff
17 physical and emotional safety as to give rise to a substantive due process
18 claim.

19 (Defendants’ Brief, p. 6).

20 In fact, *Mark G* the majority simply said that the children had not sufficiently pled
21 a substantive due process claim and remanded the claim. The dissenting opinion noted
22 the correct law:

23 . .the State owed a duty [of substantive due process] to provide such
24 persons “adequate food, shelter, clothing, and medical care” (*Youngberg v.*
25 *Romeo*, 457 U.S. at 324, 102 S.Ct. 2452). In such a setting an actionable
26 claim is made out if and when a decision by the State through its
professional administrators with resAect to such services “is such a
substantial departure from accepted professional judgment, practice, or

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
26

standards as to demonstrate that the person responsible actually did not base the decision on such a judgment”

Mark G., 247 A.D.2d at 724-25.

In *Del A. v Ropetier*, 777 F.Supp 1297 (1991), the court recognized that foster care children do have a substantive due process rights.

Section 1983 creates a cause of action for deprivations of these due process liberty interests. To state a cause of action for violation of the Due Process Clause under Section 1983, the plaintiffs must assert a recognized liberty or property interest within the purview of the Fourteenth Amendment to the United States Constitution of which they were recklessly or intentionally deprived by a person under color of law.

...
Because the State has established a custodial relationship with plaintiffs, they have a right to adequate food, shelter, clothing, and medical care. In addition, plaintiffs have a right to freedom from bodily restraint and any training necessary to ensure their safety and to facilitate their ability to function free from bodily restraints. This responsibility begins once a child is removed to State custody and remains even after the child is placed in a foster setting.

The State also cites Judge Posner in *K.H. v Morgan*, 914 F.2d 846 (1990), for the proposition that “there is no clearly established right to a stable foster-home environment”. However, when harm is involved, Judge Posner was clear.

Were she [the foster care child] an imprisoned criminal, the state’s lack of attention to her medical and psychological needs while in the state’s custody might well be classified “cruel and unusual punishment.” The Second Circuit in *Doe v. New York City Department of Social Services*, 709 F.2d 782, 790 (2^d Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), noted that the state might have even greater accountability for its actions toward foster children than toward prisoners because, as the Supreme Court has noted, those who have not been convicted of a crime are “entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” &, 709 F.2d at 790 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)). The

1 most significant applicable Supreme Court case is the Court's decision of
2 some eight years ago in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct.
3 2452, 73 L.Ed.2d 28 (1982). As the majority recognizes: "*Youngberg v.*
4 *Romeo* made clear, years before the defendants in this case placed K.H.
5 with an abusing foster parent in 1986, that the Constitution requires the
responsible state officials to take steps to prevent children in state
institutions from deteriorating physically or psychologically."

6 *K. H. v. Morgan*, 914 F.2d at 856.

7 Finally, the State cites *Eric L. v. Bird*, 848 F.Supp 303 (1994) for the proposition
8 that:

9 The court explained that the state's placement with successive foster
10 parents [was not] so devoid of justification as to give rise to a substantive
11 violation of the Due Process Clause.

12 (Defendants' Brief, p. 6).

13 What the State fails to disclose to the Court is that the Court ruled in favor of the
14 children and found substantive due process rights.

15 Individuals in state confinement enjoy "constitutionally protected interests
16 in conditions of reasonable care and safety...." *Youngberg v. Romeo*, 457
17 U.S. 307, 321-22, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (addressing
18 constitutional rights of individual involuntarily committed to state
custody). Although the state has no affirmative constitutional duty to
19 protect children who are in the custody of their parents, the Supreme Court
has suggested that children in foster care may be in a situation "sufficiently
20 analogous to incarceration or institutionalization to give rise to an
affirmative duty to protect." *DeShaney v. Winnebago County Dep't of*
21 *Social Services*, 489 U.S. 189, 201 n. 9, 109 S.Ct. 998, 1006 n. 9, 103
L.Ed.2d 249 (1989). Several circuits have in fact extended the substantive
22 due process rights recognized in *Youngberg* to children in foster care. See,
23 e.g., *Nor-eet v. Arkansas Dep't of Human Services*, 989 F.2d 289 (8th Cir.
1993) (surveying cases fi-om the Second, Sixth, Seventh, and Eleventh
24 Circuits). The Court of Appeals for the\First Circuit has not yet addressed
25 the issue.

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
26

This court finds persuasive the principles adopted in other circuits extending Youngberg to the foster care context. At this juncture, it appears that plaintiffs have stated facts sufficient to support a claim that their rights to “reasonable care and safety” while in foster care have been violated. Accordingly, defendants’ motion to dismiss this claim is denied.

Eric L. v. Bird, 848 F.Supp. at 307.

Defendants misstate or mischaracterize the holdings in many of the cases cited in support of their motion. The Defendants argument is horribly skewed. They concede, that sexual offenders who are in the custody of the state (fi-om committing felonies) are entitled to substantive due process rights. (The Ninth Circuits affirming Judge Dwyer’s decision in *Sharp v. @’&ton, supra*, that sexual offenders at McNeil Island have the right to mental health treatment. Yet, the State argues that children who are also in the custody of the state (and often victims of these offenders) don’t have at least the same rights? Defendants attempt to bolster their arguments by citing cases involving children in the custody of their parents is of no avail here where the rights of foster children are at issue. A review of defendants’ authorities reveals that, to use defendants’ own words, they “are simply inapposite.”

IV. CONCLUSION

The State’s argument is essentially that it can involuntarily deprive a child of their family, deny seriously ill children in its custody necessary mental health care, place them in the same homes/bedrooms as sexual offenders to be raped or assaulted, force them to sleep in DSHS offices, move them from pillar ;to post like so much chattel, and ultimately

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
26

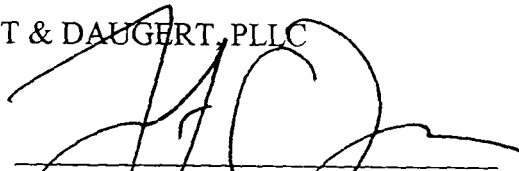
inflict serious injury upon them - and children have no right to complain. In seeking summary judgment, the State asks this Court to essentially sanction this outrage.

When state officials take a child abuse or neglect victim into custody, the Due Process Clause of the Fourteenth Amendment imposes upon the child's state custodians the duty to protect the child from harm and a duty to provide timely and adequate medical care including mental health treatment. Foster children are entitled to more considerate treatment than that which is constitutionally adequate for convicted prisoners. The uncontradicted evidence in this case demonstrates that defendants fail to provide constitutionally adequate care to the plaintiff class. The overwhelming evidence in this case that defendants deprive plaintiffs of adequate health care and inflict irreparable mental injury upon them through a series of practices and violations of law, warrant denial of defendants' motion¹⁶

DATED this 19th day of July, 2001.

BRETT & DAUGERT, PLLC

By


Timothy C. Farris, WSBA #7264
Cynthia Novotny, WSBA #26655
Of Attorneys for Plaintiffs

¹⁶ Plaintiff class seeks only declaratory and injunctive relief for violation of their substantive due process rights. Since they do not seek damages for violations of these rights as to defendants, including former secretary Quasim, we do not respond to the damages section of Defendants' Motion.