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THE HONORABLE DAVID A. NICHOLS

SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

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

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. 98-2-01570-1

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: AMERICANS WITH
DISABILITIES ACT, NATIONAL
REHABILITATION ACT, AND
WASHINGTON LAW AGAINST
DISCRIMINATION

I. INTRODUCTION

As the court is aware, this lawsuit involves Plaintiffs' challenge to the entire administration of the State's foster care system. The crux of Plaintiffs' complaint is that Plaintiffs, who were removed from their biological parents' care due to abuse or neglect, have been moved too many times, and/or received insufficient mental healthcare while in State custody. These allegations are not sufficient to state claims under the Americans With Disabilities Act ("ADA"), National Rehabilitation Act ("RHA"), or the Washington Law Against Discrimination ("WLAD"). Plaintiffs have failed to even allege that they were discriminated against or treated differently than non-disabled foster children. They do not suggest that they were unable to participate in existing DSHS programs. Rather, they have requested this Court to provide them with more, new, and better programs. Such requests are simply not actionable under any of the above statutes. Furthermore, Plaintiffs do not even suffer from recognized disabilities.

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
RE: AMERICANS W/ DISABILITIES ACT, NAT'L REHABILITATION
ACT. & WASHINGTON LAW AGATNST DISCRIMINATION - 1

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II. RELIEF REQUESTED

Defendants respectfully request that Plaintiffs' claims under the ADA, 42 U.S.C. 9 1201 et seq., RHA, 29 U.S.C. §794 et seq., and WLAD, RCW 49.60, et seq., be dismissed with prejudice. This motion is based on the records and files in this matter, the attached memorandum of law, the authorities cited therein, the accompanying Declaration of Kelsey Joyce Hooke, and the attachments thereto.

III. RELEVANT FACTS

The Court is familiar with the facts in this case, which have been fully stated in previous briefing. Here, it is sufficient to discuss only those pertinent to Plaintiffs' ADA, RHA, and WLAD claims. Plaintiffs allege that they suffer from "emotional, behavioral, mental, or physical handicaps or disabilities." Second Amended Complaint, p.4. The only specific "disability" identified is Reactive Attachment Disorder ("RAD"), and Plaintiffs fail to identify which class representatives suffer from RAD or any other "disabilities." Id. at 7. Plaintiffs have alleged that Defendants failed to provide them with "reasonable accommodations," in violation of the ADA and RI-IA. However, the only "reasonable accommodation" they have identified is "a stable and permanent home." Id. at 4. The basis for Plaintiffs' claim under the WLAD is unclear, as they have not alleged discrimination.

' The "facts" sections from Defendants' Motion for Partial Summary Judgment re: Procedural Safeguards, Motion for Partial Summary Judgment re: Separation of Powers and Discretionary Immunity, Reply in Support of Motion for Summary Judgment re: Substantive Due Process, and Opposition to Class Certification are incorporated herein by reference; The support for those facts can be found in the Declarations of Ann App and Lyle Quasim, and attachments thereto, filed in support of Defendants' Motion for Partial Summary Judgment re: Procedural Safeguards, the Declaration of Kelsey Joyce Hooke and attachments thereto, tiled in support of Defendants' Opposition to Class Certification, the Declaration of Jeff Freimund and attachments thereto, filed in support of Defendants' Motion for Summary Judgment re: Separation of Powers and Discretionary Immunity, Declaration of Carole Holland and attachments thereto, filed in support of Defendants' Motion for Summary Judgment re: Separation of Powers and Discretionary Immunity, and Declaration of Ann App tiled in support of Defendants' Motion for Summary Judgment re: Substantive Due Process.

1 Notably, Plaintiffs have not and cannot produce any facts showing that disabled
2 foster children were denied any DSHS benefits received by foster children without
3 disabilities. There is no evidence that DSHS treated Plaintiffs differently because of their
4 disabilities.

5 As Plaintiffs' requested accommodation is a "permanent home," it bears repeating
6 that foster children are moved from placements for a variety of reasons, most of which are
7 beyond DSHS's control. Some placements changes are made at the foster parents' or
8 children's request, or because the children have run away. See Deposition of Dr. Jon
9 Conte, attached in relevant part to Declaration of Kelsey Joyce Hooke ("Declaration of
10 Hooke") as Exhibit A, Vol. 1, p. 52, ll. 3-8; p. 60, l. 2 - p. 61, l. 25; p. 72, l. 24 - p. 73, l.
11 24; p. 84, ll. 4-8. Age also contributes to difficulty in finding permanent homes because
12 potential parents are reluctant to adopt older children or adolescents. I& p. 106, l. 6 - p.
13 107, l. 3; p. 109, ll. 11-22. A child's gender, ethnicity, or pre-existing severe behavioral
14 problems also increase the risk of multiple placements. Conte dep., Vol. 2, p. 5, l. 11 - p. 6,
15 1.6; p. 12, ll. 14-24; p. 15, l. 16 - p. 19, l. 16; p. 21, l. 15 - p. 23, l. 13; p. 40, l. 20 - p. 42, l.
16 6; p. 56, l. 18 - p. 57, l. 1. "Legal drift," which can occur when parents appeal court orders
17 terminating parental rights, or courts grant continuances in dependency proceedings, is
18 another cause of multiple placements. Conte dep., Vol. 2 at p. 60, l. 18 - p. 67, l. 18. Each
19 of these causes is beyond DSHS's control. Thus, as Conte testified, approximately five
20 percent of foster children will experience multiple placements regardless of any potential
21 reform. Conte dep., Vol. 2, p. 55, l. 21 - p. 56, l. 17.

22 Plaintiffs' experts have testified that multiple placements could not be reduced, let
23 alone eliminated, without significant, costly changes. At a minimum, additional funding
24 would be required to: (1) enhance recruitment, retention, and training of foster parents to
25 have a more viable and diverse pool of foster care placement settings, (2) increase the

1 amount foster parents are paid, (3) increase child welfare staff to make their caseloads and
2 other functions, such as recruitment, training, visitations, and court testimony, more
3 manageable, (4) provide more professional assessments of foster children, (5) provide more
4 treatment and other services following assessments, and (6) provide more staff for guardian
5 ad litem programs, or other child advocates in the dependency process. Deposition of Jean
6 Soliz, attached in relevant part to Declaration of Hooke as Exhibit B, p. 9,11. 6-17; p. 15,1.
7 22 -p. 16,1. 14; p. 21,11. 1-12; p. 24,11.2-11; p. 25,1. 15 -p. 27,1. 21; p. 45,1. 3 -p. 46,1.
8 6; p. 48,11. 19-25; p. 61,1. 25 -p. 62,1. 10; p. 65,11. 4-13; p. 67,1. 2 -p. 68,1. 16; p. 72,1.
9 20 -p. 73,1. 24; p. 85,1. 4 -p. 86,1. 18; p. 88,1. 21 - p. 89,1. 8; p. 90,1. 14 - p. 93,1. 4;
10 and p. 96,1.4 - p. 98,1. 19. See also Conte dep., Vol. 2 at p. 47,1. 2 1 - p. 5 1,1. 9; p. 53,1.
11 21- p. 75, 1. 3. For years, Defendants have repeatedly requested these changes.

12 Unfortunately, the Legislature has consistently refused such requests in whole or in part.

13 Id.

14 It also bears repeating that DSHS did find each named Plaintiff a “permanent
15 home.” All were either adopted or placed in long-term guardianships. See Declaration of
16 Ann App tiled in Support of Defendants’ Motion for Partial Summary Judgment re:
17 Procedural Safeguards.

18 IV. ARGUMENT

19 A. Summary Judgment Standard

20 Summary judgment is appropriate where there is no genuine issue of material fact or
21 where reasonable minds could reach only one conclusion on that issue based upon the
22 evidence presented. Gossett v. Farmers Ins. Co., 133 Wn.2d 954,963,948 P.2d 1264
23 (1997). In considering a motion for summary judgment, the Court, “by examining the
24 pleadings and the evidence before it and by interrogating counsel, shall if practicable
25 ascertain what material facts exist without substantial controversy and what material facts

1 are actually and in good faith controverted.” CR 56(d). When a party moving for summary
2 judgment has demonstrated the absence of any genuine issue of material fact, and has
3 demonstrated an entitlement to judgment as a matter of law, the burden shifts to the
4 nonmoving party to set forth specific facts that would raise a genuine issue of material fact
5 for trial. Schaaf v. Highfield, 127 Wn.2d 17,21,896 P.2d 665 (1995). “[T]he plain
6 language of Rule 56(c) mandates the entry of summary judgment.. .against a party who fails
7 to make a showing sufficient to establish the existence of an element essential to that
8 party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp.
9 v. Catrett, 477 U.S. 317,322 (1986).

10 **B. Plaintiffs’ ADA and RHA claims should be dismissed because they are not**
11 **disabled, were not denied a DSHS benefit, and, even if they were, they did not**
12 **request a reasonable accommodation that would allow them to receive that**
13 **benefit.**

14 *1. Plaintiffs are not “disabled” within the meaning of the ADA and RHA.*

15 Under the ADA, disability is defined as “a physical or mental impairment that
16 substantially limits one or more of the major life activities of an individual.” 42 U.S.C. 5
17 12102(2)(A). This definition is used for analysis of RHA claims as well. See, e.g.,
18 Thompson v. Williamson County, 219 F.3d 555, 557 n.3 (6th Cir. 2000). Examples of
19 major life activities include “caring for oneself, performing manual tasks, walking, seeing,
20 hearing, speaking, breathing, learning, and working.” Taylor v. Southwestern Bell Tel. Co.,
21 251 F.3d 735, 739 (8th Cir. 2001), *quoting* 29 CFR §1630.2(i). The regulations
22 implementing the RHA further explain that “only physical and mental handicaps are
23 included. Thus, environmental, cultural, and economic disadvantage are not in themselves
24 covered.” 45 C.F.R. pt. 84, app. A, at 355.
25

1 Here, the sole “disability” that Plaintiffs have alleged is RAD. They have not
2 identified which Plaintiffs allegedly suffer from this condition. Although their Second
3 Amended Complaint vaguely asserts that Plaintiffs suffer from mental, emotional, physical,
4 and behavioral disorders, Plaintiffs have failed to produce any facts supporting these
5 claims. Plaintiffs have produced no evidence that RAD, or any other condition,
6 substantially interferes with their major life activities. There is no evidence that RAD
7 precludes Plaintiffs from caring for themselves (to the extent that similarly aged children
8 can), performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and
9 working.
10

11 Courts have repeatedly refused to recognize mental and emotional conditions such
12 as RAD as disabilities under the ADA or RHA. See, e.g., Taylor, 251 F.3d at 739 (finding
13 that depression was not disability); Doval v. Oklahoma Heart, Inc., 213 F.3d 492 (10th Cir.
14 2000) (holding that plaintiff who was withdrawn, could not remember names, had difficulty
15 making decisions and learning, and had sleeping problems was not disabled); Anderson v.
16 North Dakota State Hosp., 232 F.3d 634,637 (Sth Cir. 2000) (finding that phobia of snakes
17 and resulting hysteria that prevented plaintiff from returning to workplace where snake had
18 been seen was not disability); Greer v. Emerson Elec. Co., 185 F.3d 917 (Xth Cir. 1999)
19 (holding that depression and anxiety were not disabilities); McGuinness v. University of
20 New Mexico, 170 F.3d 974 (10th Cir. 1998) (holding anxiety disorder was not a disability);
21 Soileau v. Guilford of Maine, 105 F.3d 12 (1st Cir. 1997) (finding that depressive disorder
22 affecting plaintiffs ability to get along with others was not disability). Moreover, even
23 physical disabilities do not render a finding that plaintiffs are disabled under the ADA and
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1 RHA if they do not “substantially” affect “major” life activities. See, e.g., Chenowith v.
2 Hillsborough County, 250 F.3d 1328, 1329 (1st Cir. 2001) (finding that epilepsy causing
3 inability to drive to work for at least six months was not a disability under ADA or RHA).
4 No court, in a published opinion, has held that R4D constitutes a disability under the ADA
5 or RHA.
6

7 The Washington Supreme Court has recognized that mental and emotional
8 conditions are not disabilities. Citing the regulations implementing the PHA (quoted
9 above), the Supreme Court has held that abused and neglected children “are not
10 handicapped because abuse and neglect are environmental and cultural factors.”
11 Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782,791,903 P.2d 986
12 (1995). The court acknowledged that “[t]hese factors may undoubtedly produce physical or
13 mental effects,” but held that “these effects do not in every case limit the victim’s
14 participation in major life activities.” *Id.* The Supreme Court has also noted that scholars
15 have criticized the criteria for diagnosing R4D and other, similar “disorders.” T.B. v. CPC
16 Fairfax Hospital, 129 Wn.2d 439,462 n.2,918 P.2d 497 (1996) (noting that classification
17 systems have “been criticized as unreliable and invalid,” and quoting medical doctor as
18 stating that, under such systems, a “modern psychiatrist” could plausibly diagnose literally
19 any person as “abnormal or ill”).
20
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22 The “disorders” of which Plaintiffs complain are precisely those described by the
23 Sunderland court. The Plaintiffs were undoubtedly abused and/or neglected by their
24 biological parents. These factors may have “produce[d] physical or mental effects.”
25

1 Sunderland, 127 Wn.2d at 791. However, these effects do not “limit [Plaintiffs’]
2 participation in major life activities,” precluding a finding of disability. I&

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4
5 **2. *Plaintiffs cannot establish a prima facie case under either the ADA or the***
6 ***RHA because they have not alleged that they were denied any DSHS***
7 ***benefit because of their alleged disabilities.***

8 The sections of the ADA and RHA applicable to the plaintiffs’ action are the
9 provisions governing public entities, Title II of the ADA, 42 U.S.C. § 12132, and § 504, and
10 the RHA, 29 U.S.C. § 794. Because of the substantially identical language of these
11 provisions,² the basic elements of claims under Title II of the ADA and the RHA are the
12 same and the two statutes have been held to impose the same standards on public entities.
13 Nelson v. Miller, 170 F.3d 641,649 (6th Cir. 1999); Doe v. Pfrommer, 148 F.3d 73, 82
14 (2nd Cir. 1998); Urban v. Jefferson County School District R-1, 89 F.3d 720,727 (10th Cir.
15 1996); Callings v. Lontiew Fibre Co., 63 F.3d 828, 832 n.3 (8th Cir. 1995).

16 ²The language of these provisions is largely the same. Title II of the ADA provides:

17 No qualified individual with a disability shall, by reason of
18 such disability, be excluded from participation in or be denied
19 the benefits of the services, programs, or activities of a public
20 entity, or be subjected to discrimination by any such entity.

21 42 U.S.C. § 12132. Section 504 of the RHA similarly provides that:

22 No otherwise qualified individual with a disability in the
23 United States . . . shall solely by reason of her or his
24 disability, be excluded from the participation in, be denied the
25 benefits of, or be subjected to discrimination under any
program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a).

1 To prove a violation of Title II of the ADA or § 504 of the RI-IA, Plaintiffs must
2 prove that: (1) they have disabilities as defined in each statute; (2) they are “otherwise
3 qualified” for the benefit or program which was denied; and (3) they were denied the
4 benefit on the basis of their disability. Kaltenberger v. Ohio College of Podiatric Medicine,
5 162 F.3d 432,435 (6th Cir. 1998); Dempsey v. Ladd, 840 F.2d 638,640 (9th Cir. 1987).
6 The purpose of Title II of the ADA and § 504 of the RHA is to eliminate discrimination
7 against disabled individuals and require evenhanded treatment of the disabled and non-
8 disabled, not to require special services or affirmative assistance to the disabled. Bowen v.
9 American Hospital Association, 476 U.S. 610,640, 106 S.Ct. 2101,2119,90 L.Ed.2d 584
10 (1986); Smith v. Robinson, 468 U.S. 992,1018, 104 S.Ct. 3457,3471,82 L.Ed.2d 796
11 (1984); Southeastern Community College v. Davis, 442 U.S. 397,410-11,99 S.Ct. 2361,
12 2369,60 L.Ed.2d 980 (1979). Thus, a claim must fail if there is no allegation that the
13 plaintiffs were treated differently than those without disabilities. See, e.g., Lincoln Cernac
14 v. Health & Hospitals Com., 147 F.3d 165, 168 (2nd Cir. 1998) (dismissing ADA claim
15 where the complaint had “no allegation that any of the children involved are being denied
16 any care available to children without disabilities”); Acklev v. Arizona, 98 F.3d 461,462
17 (gth Cir. 1996) (“There can be no discrimination against severely disabled persons who
18 comprise the group of class plaintiffs if no other group receives any, much less more
19 advantageous, benefits from the state program.”); Komblau v. Dade County, 86 F.3d 193,
20 196 (1st Cir. 1996) (dismissing ADA claim because plaintiff failed to “show she was
denied a public benefit”).

21 Neither Title II of the ADA nor § 504 of the RI-IA requires a defendant to provide or
22 develop special services or programs to assist the disabled. Bowen, 476 U.S. at 640; Smith,
23 468 U.S. at 1018; Southeastern Community College, 442 U.S. at 410-11. See also
24 Rodriguez v. City of New York, 197 F.3d 611,618 (2nd Cir. 1999). The United States
25 Supreme Court has held and reaffirmed that §504 of the RHA, which has language

1 rights); Lincoln Cernac, 147 F.3d at 168 (2nd Cir. 1998) (dismissing claims arising out of
2 closure of facility treating disabled children because “the disabilities statutes do not
3 guarantee any particular level of medical care for disabled persons, nor assure maintenance
4 of service previously provided”); Rodriguez, 197 F.3d at 618-19 (holding there is no cause
5 of action under ADA or RI-IA for failure to provide safety monitoring services to mentally
6 disabled); Nelson v. Miller, 170 F.3d at 653 (holding blind voters had no cause of action
7 under ADA or RHA for failure to provide voting aid); Urban v. Jefferson County School
8 District R-1, 89 F.3d at 728 (finding no cause of action under ADA+RI-&r-failure to
9 take affirmative steps to allow disabled student to attend neighborhood school); Greater Los
10 Angeles Council on Deafness, Inc. v. Community Television, 719 F.2d 1017, 1023 (9th Cir.
11 1983) (ruling there is no cause of action under 5 504 against broadcasting companies for
12 failure to take affirmative action to caption or provide sign language in all broadcasts);
13 Ciamna v. Massachusetts Rehabilitation Commission, 718 F.2d 1, 5-6 (1st Cir. 1983)
14 (holding there is no cause of action under 5 504 for inadequacy of rehabilitation services).

15 ADA and RHA claims challenging New Jersey’s foster care system were dismissed
16 for this reason in Charlie H. v. Whitman, 83 F. Supp. 2d 476,500-502. Like Plaintiffs here,
17 the New Jersey foster children did not allege that they were treated differently than non-
18 disabled children, or that they were denied access to the foster care system-essential
19 ingredients for ADA and RHA claims. Id. Rather, the plaintiffs sought “to receive any and
20 all services necessary for them to participate fully in the state foster care program despite
21 their handicaps and abilities,” a request the court described as “a novel approach to say the
22 very least.” Id. at 500. A challenge to “the substance of services provided” by the foster
23 care system is not actionable under the ADA or RHA. Id. at 501. The court specifically
24 rejected the suggestion that the plaintiffs had an ADA or RHA claim because they were
25 placed in “regular foster homes,” as opposed to other placements better suited to their
needs. Id. Similarly, the fact that the disabled children’s foster parents did not have

1 “training in caring for children with neurological and behavioral problems” was not
2 actionable, especially in light of the fact that foster parents of non-disabled children did not
3 have such training either. Id. The court further rejected claims arising from allegations that
4 the state “acknowledged that the children should be in a therapeutic foster home that could
5 provide specialized care, but failed to secure such a home for them or to otherwise provide
6 adequately for the children’s special needs,” and that the state “repeatedly rejected pleas for
7 services by foster parents.” Id.

8 In Dempsey, the Ninth Circuit’s issuance of an injunction
9 requiring Oregon to place a mentally handicapped individual in the facility his parents
10 requested. 840 F.2d at 641. The court sympathized with the plaintiff, but explained that:
11 “Dempsey does qualify as a person who ‘needs’ some kind of help somewhere. His parents
12 apparently cannot provide for him and he is something of a public ward. But it does not
13 follow that his parents can select his placement and send the bill to the State of Oregon.”
14 Id. at 640. The court recognized the state’s need to balance the interests of disabled
15 individuals and the integrity of its programs. Id. at 641. It held that a court “should not
16 usurp the agencies’ power to make placement choices unless there is clear proof of actual
17 discriminatory treatment.” Id.

18 Although Plaintiffs’ complaint does not say what DSHS benefits they seek, it is
19 clear that their claim is for additional programs and services and therefore fails to state a
20 claim under the ADA or RHA. As in Charlie H., Plaintiffs challenge the “substance of
21 services provided.” This was not sufficient to state ADA or RHA claims in New Jersey; it
22 is not sufficient in Washington. Plaintiffs have complained that DSHS did not place them
23 where their foster parents’ requested or provide specific therapy and services. These
24 precise complaints were held to be not actionable under the ADA and RHA in Dempsey
25 and Charlie H. The ADA and RHA do not provide foster children in Washington any more
protection than they do for foster children in New Jersey.

1 Plaintiffs can produce no facts showing that DSHS has denied any Plaintiff any
2 specific benefit because of a disability, or that DSHS has excluded any Plaintiff from any
3 specific program on the basis of his or her disability. Hence, they cannot meet the
4 requirements for an ADA or RI-IA claim. Because Plaintiffs' claims are for failure to
5 provide additional services for disabled children, not access to existing programs, they
6 cannot establish a claim under the ADA or RHA. Therefore, Plaintiffs' ADA and RHA
7 claims should be dismissed.

8 3. ***Moreover, even if Plaintiffs' claims were denied DSHS***
9 ***benefits, their claims must fail because their only requested***
10 ***accommodation-permanent homes-is anything but "reasonable."***

11 Under the ADA and RHA, a public entity must make only *reasonable* modifications
12 to its programs to avoid discrimination on the basis of a disability. The statutes do not
13 require modifications that would fundamentally alter the program. 28 C.F.R. 6
14 35.130(b)(7); 45 C.F.R. §84.12. A requested modification is not reasonable if it either
15 imposes "undue financial and administrative burdens" or requires "a fundamental alteration
16 in the nature of [the] program." Southeastern Community College v. Davis, 442 U.S. 397,
17 410,412 (1979). Plaintiffs have the burden to show that their proposed modifications are
18 reasonable. Wonn v. Regents of the University of California, 192 F.3d 807,816-8 17 (Sth
19 Cir. 1999). Modifications that are significantly difficult to implement in light of the effect
20 on expenses and resources or the impact upon the operation of the program are not required.
21 & 42 U.S.C. § 12111(10) (Title I definition of "undue hardship"). "More than moderate"
22 changes or substantial modifications are not required under Title II and the RA.
23 Southeastern Community College v. Davis, 442 U.S. at 405; Sandison v. Michipian High
School Athletic Assoc., 64 F.3d 1026, 1034, 1037 (6th Cir. 1995).

24 Finding permanent homes for all disabled foster children is not a reasonable
25 accommodation; it is a laudable goal that ignores every reality of foster care. First,
Plaintiffs have failed to suggest any feasible measures for finding each child a permanent

1 home. Second, they have failed to identify any timeline for finding children permanent
2 homes. In fact, DSHS did find each of the named Plaintiffs a permanent home. All were
3 either adopted or placed in long-term guardianships. It is thus unclear exactly what
4 Plaintiffs suggest when they request a “permanent home” for each child. However, it
5 appears that Plaintiffs demand that each disabled child be placed in a permanent home
6 immediately upon entering the foster care system. This is simply an unattainable goal, and
7 literally millions of dollars would be spent attempting to achieve it. Plaintiffs’ experts have
8 testified that many costly changes would be necessary to even reduce multiple placements,
9 let alone eliminate them. These changes are “substantial modifications.” Southeastern
10 Cornmunity College, 442 U.S. at 405. Plaintiffs’ experts have also testified that placement
11 changes are made for a variety of reasons that are beyond DSHS’s control, meaning that the
12 “accommodation” Plaintiffs request is also beyond DSHS’s control. An “accommodation”
13 that DSHS cannot make is certainly not reasonable. Attempting to comply with Plaintiffs’
14 request would both impose “undue financial and administrative burdens” and require “a
15 fundamental alteration in the nature of [the] program.” Id. at 410,412.

16 Hence, even if Plaintiffs had asserted that they were denied access to an existing
17 DSHS program because of their disabilities, their ADA and RHA claims fail because they
18 have not requested a reasonable accommodation.

19 ***4. Plaintiffs’ claims for money damages under the ADA and RHA are not***
20 ***cognizable.***

21 In Board of Trustees v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001), the Supreme
22 Court held that the Eleventh Amendment bars claims against states for money damages
23 under Title I of the ADA. Title II is essentially identical to Title I, except that Title I
24 addresses discrimination in employment, while Title II addresses discrimination in public
25 services. Thus, the Garrett Court’s reasoning applies equally well to claims brought under
Title II. The only published Court of Appeals decision addressing the issue since Garrett
reached the same decision. Thomnson v. Colorado, 2001 U.S. App. LEXIS 17637, *17

1 (10th Cir. Aug. 7,2001) (“Title II is not a valid abrogation of the states’ Eleventh
2 Amendment immunity.”). Several district courts have considered the issue in light of
3 Garrett and applied its holding to Title II. See Neiberger v. Hawkins, 2001 U.S. Dist. ? 1 J^g
4 LEXIS 9638 (D. Colo. July 9,2001); Doe v. Division or Youth & Family Servs., 148 1^z
5 F.Supp.2d 462 (D. N.J. 2001); Koslow v. Pennsylvania, 2001 U.S. Dist. LEXIS 11856, *4
6 (E.D. Pa. May 3 1,2001); Mincewicz v. Parker, 2001 WL 256162 (D. Conn. Feb. 26 2001).
7 Even prior to Garrett, the weight of authority already held that the Eleventh Amendment
8 bars claims against&a~es&gr money damages under Title II of the ADA. See, e.g.,
9 Popovich v. Cuyahona County Court, 227 F.3d 627 (6* Cir. 2000), *vacated in light of*
10 *granting of certiori in Garrett*; Brown v. North Carolina, 166 F.3d 698 (qth Cir. 1999);
11 Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999).

12 In so holding, the courts above followed clearly established Supreme Court
13 precedent. In determining whether Congress properly abrogated the states’ Eleventh
14 Amendment immunity under a statute, a court must consider whether Congress (1)
15 unequivocally expressed its intent to do so, and (2) acted within its constitutional authority.
16 Seminole Tribe v. Florida, 517 U.S. 44,55, 116 S.Ct. 114 (1996). Here, the first
17 requirement has been met. Garrett, 121 S.Ct. at 962 n.3. However, unless the state has
18 consented to suit, the second requirement is met only if Congress was properly acting to
19 enforce the Fourteenth Amendment. *Id.* As Washington did not consent to suit under the
20 ADA, it can be subject to liability for damages only if Congress was enforcing the
21 Fourteenth Amendment in enacting the ADA. To do so, Congress must have “identified a
22 history and pattern of unconstitutional. . . discrimination by the States against the disabled.”
23 *Id.* at 964. Additionally, “the remedy imposed by Congress must be congruent and
24 proportional to the targeted violation.” *Id.* at 967-68.

25 The Garrett Court found that Congress was not acting to enforce the Fourteenth
Amendment in enacting Title I of the ADA both because Congress failed to identify a

1 pattern of discrimination against the disabled and provided a remedy that was
2 disproportionately harsh to any violation. The Court held that Congress' findings in
3 support of the ADA were insufficient to establish a pattern of discrimination. Id. at 966.
4 Rather, Congress had merely provided "unexamined, anecdotal accounts" of disparate
5 treatment. Id. This holds true for the entire ADA, including Title II. &, 148 F.Supp.2d
6 462. As specifically pointed out by the J& court, those accounts "barely mention
7 discrimination against the disabled at the hands of child welfare agencies, and fall far short
8 of Congressional findings of a pattern of irrational discrimination." The Garrett Court also
9 held that, even if Congress had found the requisite pattern of discrimination, "the
10 accommodation duty far exceeds what is constitutionally required." 121 S.Ct. at 967. The
11 same is true under Title II. See, e.a., Thompson, 2001 U.S. App. LEXIS 17637 at * 17
12 ("Title II's accommodation requirement appears to be an attempt to prescribe a new federal
13 standard for the treatment of the disabled rather than an attempt to combat unconstitutional
14 discrimination"); Doe, 148 F.Supp.2d 461. And, as the preceding arguments show, since
15 the RHA is identical to the ADA for all relevant purposes, the same holds true for the RHA.

16 Congress failed to successfully abrogate the states' Eleventh Amendment immunity
17 under Title II of the ADA and the RHA. Thus, Plaintiffs' claims for money damages under
18 the ADA and RI-IA are not cognizable and should be dismissed.

19 **C. Even if Plaintiffs were "disabled," Plaintiffs' inability to show that they were**
20 **treated differently than foster children without disabilities precludes a claim**
21 **under WLAD.**

22 First, as explained above, Plaintiffs are unable to show that they are disabled, a
23 prerequisite for bringing a claim for disability discrimination. RCW 49.60. The WLAD
24 does not define "disability." Hill v. BCTI Income Fund-I, 2001 WL 521402, *9 (Wn. May
25 17,200 1). However, for purposes of an employment discrimination claim, Washington
caselaw defines disability as a physical, mental, or sensory abnormality substantially
affecting the plaintiffs ability to perform his or her job. Id. "Major life activities," as

1 provided under the federal statutes, is certainly a fair substitution for the word “job” in
2 cases outside of the employment context. See also Sherman v. State, 128 Wn.2d 164, 202,
3 905 P.2d 355 (1996) (analyzing disability discrimination claim under WLAD as under
4 RHA); Sunderland, 127 Wn.2d at 790 (looking to federal definition of disability for
5 guidance in interpreting disability under Washington Housing Policy Act). As noted above,
6 the Washington Supreme Court has held that physical and mental effects arising from
7 neglect or abuse do not constitute disabilities. *Id.* at 791. Furthermore, the court has
8 specifically cast doubt on the validity of a diagnosis of R4D. T.B., 129 Wn.2d at 462 n.2.
9 As explained above, Plaintiffs have made no showing that they have disabilities
10 substantially affecting their ability to perform major life tasks.

11 Under RCW 49.60, “there is discrimination only when the disabled are not provided
12 with comparable services [to those without disabilities]. It is this comparability element
13 that is an essential ingredient in the test for discrimination against the disabled.. ..” Fell v
14 Spokane Transit Authority, 128 Wn.2d 618,635-36, 911 P.2d 1319 (1996). Liability is
15 conditioned on a finding of discrimination. *Id.* at 628,632. Hence, the “touchstone” of a
16 WLAD disability discrimination case is whether individuals with disabilities received
17 “comparable treatment” to those without disabilities. *Id.* at 63 1. Additionally, the plaintiffs
18 must prove that their disabilities were a substantial factor in the discrimination. *Id.* at 637,
19 640 (“The causation requirement is based on the commonsense notion that if the alleged
20 discrimination results from factors other than anything the defendant did, the defendant has
21 not violated the Law Against Discrimination.”). Finally, even if the plaintiff can establish a
22 prima facie case of discrimination, the claim still must fail if the defendant shows a
23 nondiscriminatory reason for its actions, such as “financial unfeasibility.” *Id.* at 642.

24 The &Jl court was very clear that “[t]he statute was *not* intended to entitle certain
25 protected classes to some unspecified type and unlimited level of services.” *Id.* at 63 1
(emphasis original). Moreover, “[f]hancial ability to provide a service is not enough.” *Id.*

1 at 631-32. The WLAD simply does not require a public entity “to offer *greater* service to
2 disabled people than is available to nondisabled people,” nor does it contain any “mandate
3 to provide services” whatsoever. Id. at 640,639 (emphasis in original).

4 Plaintiffs cannot establish a claim under the WLAD. As Molly explained above,
5 there is no evidence that Plaintiffs were treated any differently from any other foster
6 children. There is no evidence that Plaintiffs were denied any DSHS benefit. There is
7 simply no evidence that DSHS discriminated against the Plaintiff foster children because of
8 their alleged disabilities. As Fell plainly establishes, Plaintiffs’ assertions that they were
9 entitled to better or different treatment or services than those which are currently available
10 are not sufficient to establish a claim under the WLAD. Moreover, even if Plaintiffs were
11 able to establish a prima facie case of discrimination, DSHS has a complete defense in that,
12 according to Plaintiffs’ witnesses, its inability to provide greater services is due to
13 “financial unfeasibility,” and due in large part to factors beyond its control.

14 V. CONCLUSION


15 For the foregoing reasons, Defendants respectfully request that their Motion for
16 Partial Summary Judgment Re: Americans With Disabilities Act, National Rehabilitation
17 Act, and Washington Law Against Discrimination be granted, and that Plaintiffs’ claims
18 under these statutes be dismissed with prejudice.

19 DATED this 2^{1/Jc} day of August, 2001.

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