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

JESSICA BRAAM; et al.

Plaintiffs,

V.

STATE OF WASHINGTON, et al.

Defendants.

Case No. 98 2 01570 1

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

**(JUDGE DAVID A. NICHOLS)**

**A. Introduction**

The State again attempts to obtain summary judgment where the material facts relevant to the legal issues are disputed. This Court is well aware of the nature of this case. Plaintiffs will show at trial that children under the State's care have been denied access to safe, stable, and permanent placement to which they are entitled under state and federal statutory and constitutional standards. One of the sets of standards by which the State's conduct should be judged are those set out in the Americans With Disabilities Act (ADA), Section 504 of the

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1 Rehabilitation Act, and the Washington Law Against Discrimination, RCW 49.60 (WLAD). As  
2 is shown below, summary judgment on these issues is inappropriate because there are serious  
3 factual disputes regarding whether plaintiffs have been denied meaningful access to the benefits  
4 enjoyed by other foster children by reason of the plaintiffs' emotional, behavioral, and  
5 psychological disabilities.

6  
7 The State contends that the plaintiff class members do not suffer from recognized  
8 disabilities, and have not Z'evenallege[d] that they were discriminated against or treated  
9 differently than non-disabled foster children." Motion at 1. Respectfully, the State's motion  
10 fails to accurately characterize Plaintiffs claims and also misconstrues disability law.

11 In order to prevail on motion for summary judgment, the State must show that there are  
12 10 genuine issues of material fact, and that they are entitled to judgment as a matter of law. The  
13 state fails to meet this burden by a wide margin.

### 14 3. Argument

15  
16 **Plaintiffs are entitled to relief under Title II of the Americans With Disabilities Act**  
17 **and Section 504 of the Rehabilitation Act because they are disabled and have been**  
18 **discriminated against on the basis of their disability by the State of Washington.**

19  
20 Federal law broadly prohibits discrimination against disabled individuals on the basis of  
21 their disability. Section 504 of the Rehabilitation Act of 1973 (hereinafter 3 504) reads in  
22 relevant part:

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

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**29 USC 0 794. Title II of the Americans with Disabilities Act (hereinafter ADA or Title II) similarly provides:**

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

42 USC 3 12132.

Plaintiffs contend that the state of Washington has discriminated against the class by denying or excluding them from the benefits of services, programs or activities, including placement stability and permanency, mandated under law.

In order to state a claim for relief under the Title II and 4 504i, a plaintiff must prove: “( 1) that he is a ‘qualified individual with a disability’; (2) he was either excluded from participation in or denied the benefits of a public entity’s programs, benefits or services, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.” *Weinreich v. Los Angeles County Metropolitan Trans. Authority*, 114 F. 3d 976,978 (9<sup>th</sup> Cir. 1997); *Black v. Department of Mental Health*, 83 Zal.App.4<sup>th</sup> 739,749 (Ct. App. 2 Dist. 2001).

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In most respects Title II and 9 504 contain the same requirements such that courts rely on case law under 9 504 to interpret Title **II. See Crowder** v. Kitagawa, 81 F. 3d 1480, 1484 (9<sup>th</sup> Cir. 1996) (“Section 12133 of the ADA provides that ‘[t]he remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights’ applicable to section 12132 discrimination claims (citations omitted)). **See also Bragdon v. Ibbott**, 524 U.S. 624,63 1 (1998) (“The ADA’s definition of disability is drawn almost verbatim from the definition of “handicapped individual” included in the Rehabilitation Act of 1973.. .”); and **Callings v. Longview Fibre Co., 63** F. 3d 828, 832 n. 3 (9<sup>th</sup> Cir. 1995).

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1 In its Motion, the, State suggests that there is no evidence sufficient to require a trial that  
2 the plaintiff class members are disabled and that they have been discriminated against.

3 Additionally, the State claims that even if there is both disability and discrimination, there are no  
4 reasonable modifications that would achieve the mandated benefits. Plaintiffs show in turn  
5 below that each of these contentions is incorrect.

6  
7 **A. Plaintiffs, who suffer from a myriad of emotional, behavioral, and**  
8 **psychological disorders including Serious Emotional Disturbance, are**  
9 **--d-iGbled tinder Title II, Set 504, and the WLAD.\***

10 Disability, for the purposes of Title II and 5 504, is defined as “a physical or mental  
11 impairment that substantially limits one or more of the major life activities of such  
12 individual.. . .”<sup>3</sup> 42 USC 12 102(2). Department of Justice regulations further define disability as:  
13 “a physical or mental impairment that substantially limits one or more major life activities.. .”  
14 28 C.F.R. 5 35.104. The regulations define a mental impairment as “any mental or  
15 psychological disorder such as mental retardation, organic brain syndrome, emotional or mental  
16 illness, and specific learning disabilities.” 28 C.F.R. 0 35.104. The ADA definition of disability  
17 is meant to be functional, meaning that a disability is based upon the degree of limitation the  
18 impairment causes. The key to whether an impairment constitutes a disability under the law is  
19 whether it substantially limits a major life activity.

20  
21 Major life activities are “functions such as caring for one’s self, performing manual tasks,  
22 walking, seeing, hearing, speaking, breathing, learning and working.” 28 C.F.R. 0 35.104

23  
24 Plaintiffs include WLAD in the section on disability because the standards for disability under all of the statutes  
25 involved are virtually identical. The other elements of the WLAD liability are discussed in section II, below.

26  
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1 (l)(iii)(2). EEOC's enforcement guidance on ADA and psychiatric disabilities further describes  
2 the major life activities that might be limited by mental impairments to include "learning,  
3 thinking, concentrating, interacting with others." U.S. Equal Employment Opportunity  
4 Commission, EEOC Enforcement Guidance: The Americans with Disabilities Act and  
5 Psychiatric Disabilities, 3 (1999) available at <http://www.eeoc.gov/docs/psvch.html>. "There is  
6 no exhaustive list of major life activities.. ." *Id.* "Examples of 'emotional or mental illness[es]'  
7 include major depression, bipolar disorder, anxiety disorders (which include panic disorder, - -  
8 obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and  
9 personality disorders." *Id.*

11 Plaintiffs have uncovered substantial evidence, that the plaintiff class exhibits serious  
12 mental health problems, including Severe Emotional Disturbance (SED), that rise to the level of  
13 a disability.<sup>4</sup> According to researchers at the University of Washington, about 70 percent "of  
14 children receiving services from the Washington Department of Social and Health Services" are  
15 Seriously Emotionally Disturbed.' Moreover, as "half of the children sampled were 8 years of  
16 age or younger, it is probable that rates of these antisocial behaviors are even higher among older  
17 children and adolescents served by CPS."<sup>6</sup>

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21 <sup>4</sup> Although not pertinent to this case, Title II also protects individuals with a record of impairment, and individuals  
22 'being regarded as having . . . an impairment.' 42 USC 12 102(2).

23 <sup>5</sup> Trupin, et al., found that 67% of children in Child Welfare System are SED. Jon McClellan and Eric Trupin,  
24 'Prevention of Psychiatric Disorders in Children, 40 Hospital and Community Psychiatry, (No. 6) June, 1989, at 630,  
25 citing Trupin E, Low B, Forsyth-Stephens A, et al.; Washington State Mental Health Systems Analysis, Draft  
26 Report, Olympia, WA, DSHS, May 20 1988.

<sup>6</sup> Trupin, E., et al, Children on Child Protective Service Caseloads: Prevalence and Nature of Serious Emotional  
Disturbance, 17 Child Abuse & Neglect, 345,349 (1993)

<sup>7</sup> *Id.*

<sup>8</sup> Plaintiffs' Response to Defendants' Partial  
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2 Other studies have found similarly high levels of psychological disabilities in the child  
3 welfare population: “McIntyre and Keesler (1986) found that 50% of the foster children they  
4 studied evidenced behavioral problems on the Child Behavior Check List (CBCL; Achenbach,  
5 1991). Hochstadt, Jaudes, Zimo, and Schachter (1987) report that 56.9% of children entering  
6 foster care in Chicago during a one-month sampling had significant emotional and/or behavioral  
7 problems requiring treatment and Clausen, Landsverk, Ganger, Chadwick and Litrownik (1998)  
8 report that 61% of their sample of foster children in San Diego showed--indications-of a mental  
9 health problem as assessed by the CBCL.”

10 While 50 to 70 percent of all foster children suffer from mental disorders, the  
11 concentration of emotionally disturbed children among class members is likely much higher.

12 Mentally disordered children suffer more placement failures than non-disabled children resulting  
13 in their disproportionate participation in the plaintiffs’ class of children suffering multiple  
14 placements. According to the state’s own research, “[t]he unmet needs of children with  
15 emotional and behavioral problems appears to figure prominently in the failure to achieve  
16 permanency.”\* Dee Wilson, Regional Administrator for DSHS, stated on October 20, 1999:

18 Emotionally disturbed children are more likely to suffer multiple placements and are less  
19 likely (a lot less likely) to be reunified with birth parents. It is the inability of public  
20 child welfare agencies to find stable placements for school age children with mental  
21 health problems, which is the main “driver” of foster care instability.’

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22 \* Newton, R., *et al.*, Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviors  
23 and Number of Placements, 24 Child Abuse & Neglect (No. 10), 1363, 1364 (2000).

24 \* 2001 Annual Report to the Washington State Department of Social and Health Services Children’s Administration,  
Foster Care Assessment Program (FCAP) at 16.

25 <sup>9</sup> Memorandum, October 20, 1999 from Dee Wilson to Jake Romote regarding instability of foster placements.  
DSHS RAM 04040033 (Exhibit 3).

Secretary Jean Soliz has also commented on this failure:

A 1992 DSHS study concludes that well over 85% of these children have clinical mental health needs. Other studies show that many of these children are chemically dependant, suicidal, violent and sexually aggressive. In spite of the data in one horror story after another in the media, the legislature repeatedly refused to fund assessment and adequate treatment services for dependent children.”

In seeking attorneys to sue her former agency (DSHS) for its failure to provide health care services, Secretary Soliz stated:

The advice need is heightened further when one recognizes when dependent children (victims by definition) do not receive assessments or treatment as a matter of course in the child welfare system. We have been unable to convince policy makers to fund these services and no major litigation has been filed to improve this system in years.”

The findings of the University of Washington researchers have importance beyond establishing the widespread incidence of mental disorders among foster children in Washington. <sup>12</sup> The researchers in that study used the benchmark condition termed ‘Serious Emotional Disturbance’ or SED. SED is a technical term for an array of psychological conditions that by definition seriously impair a child’s functioning at home, in school, or in the community.<sup>13</sup>

<sup>10</sup> Dep of Soliz, at 48.

<sup>11</sup> Id.

<sup>12</sup> See, Trupin, et al., Children on Child Protective Service Caseloads: Prevalence and Nature of Serious Emotional Disturbance, supra.

<sup>13</sup> The definition of SED varies somewhat across agencies and jurisdictions. A representative rule has been established by the federal Substance Abuse and Mental Health Services Administration. Serious emotional disturbance is defined as “a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet diagnostic criteria specified within the DSM-III-R, and that resulted in functional impairment which substantially interferes with or limits [a] child’s role or functioning in family, school, or community activities” within the past year.” 58 Fed. Reg. 29422-25 (1993). See also 34 C.F.R. 300.7(c)(4) (Department of Education, Office of Special Education and Rehabilitative Services, regulations for emotional disturbance).

1 SED, therefore, is unlike a condition or label such as 'stress' or 'depression' or 'abused  
2 md neglected.' Instead, SED is a functional measure of impairment that can be used to  
3 determine disability under Title II and 3 504. Indeed, a number of courts hearing Individuals  
4 with Disabilities Education Act, 20 U.S.C. § 1412 *et seq.*, claims have concluded that SED  
5 constitutes a disability under 20 U.S.C. § 1412. *Muller on Behalf of Muller v. Committee on Special Educ. of*  
6 *East Islip Union Free School Dist.*, 145 F.3d 95, n. 2 (2nd Cir. 1998) ("The definition of  
7 individual with a disability' under s-504; is broader -& certain respects than the definition of a  
8 child with [a] disability[y]' under the IDEA."); *Doe ex rel. Doe v. West Hartford Bd. of Educ.*,  
9 WL 557861 D. Conn. 2000); *Sylvie M v. Board of Educ. of Dripping Springs Independent*  
10 *School Dist.*, 48 F. Supp.2d 681 (W.D. Tex. 1999); *Ridgewood Bd. of Educ. v. N.E. ex rel. ME.*,  
11 172 F.3d 238 (3rd Cir. 1999); *Alexander S. By and Through Bowers v. Boyd*, 876 F. Supp. 773,  
12 D.S.C. 1995); *Manchester School Dist. v. Charles M F.*, 1994 WL 485754, (D.N.H. 1994);  
13 *Johnson v. Metro Davidson County School System*, 108 F.Supp.2d 906 (M.D. Tenn. 2000). The  
14 State have offered no evidence whatever that class members are not SED as alleged in the  
15 research. Moreover, if class members are suffering SED as described, *apprima facie* case has  
16 been made that they are disabled for the purposes of Title II, 20 U.S.C. § 1412 and the WLAD.

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19 Although Plaintiffs need not prove their disability at this stage, this extensive evidence  
20 demonstrates that class members are indeed disabled under Title II, 20 U.S.C. § 1412, and the WLAD.  
21 Expert testimony indicates that the named plaintiffs have suffered from chronic depression,  
22 anxiety disorder, PTSD, mild mental retardation, RAD, conduct disorder, bipolar disorder,  
23

1 organic brain dysfunction, ADHD, and other serious psychiatric conditions.<sup>4</sup> Moreover,  
2 research indicates that most children in the child welfare system suffer from emotional,  
3 behavioral, and psychological disorders indicating that the plaintiffs in this case are  
4 representative of most foster children. Additionally, the State's characterization of the  
5 Washington State Supreme Court's view of RAD takes serious liberties with the holding in *T.B.*  
6 *v. CPC Fairfax Hospital*, 129 Wn.2d 439,462 n.2, 918 P.2d 497 (1996). First, the State argues  
7 that *T. B.* stands for the proposition that "The Supreme Court has also noted that scholars have  
8 criticized the criteria for diagnosing RAD and other, similar 'disorders.'" Motion at 7. The  
9 footnote the State refers to merely cites scholarly journals which criticize the DSM-IV as a  
10 diagnostic tool, not RAD individually. Second, the State fails to mention that the opinion of  
11 Justice Sanders was joined only by three Justices. Justice Dolliver also wrote a concurring  
12 opinion which was joined by three Justices, which makes no mention of RAD, and Justice  
13 Madsen concurred in the result of the case only. Therefore, Justice Sanders' opinion is far from  
14 the holding of the court.

17 The State incorrectly contends that "the sole 'disability' that Plaintiffs have alleged is  
18 reactive Attachment Disorder (MD)." Motion at 6. In fact, as just shown, plaintiffs suffer from  
19 extensive emotional, behavioral and psychological disorders. RAD is just one of many disabling  
20 conditions. RAD is noteworthy in that multiple placements *contribute to or cause* RAD. Thus,  
21 the condition is both one of the harms arising out of the state's failure to provide stable and  
22 permanent placements for foster children in its care, as well as one of the sources of disability

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25 <sup>4</sup> See Declaration of Farris, attached to this response.  
26 Plaintiffs' Response to Defendants' Partial Summary Judgment Motion Page 9 -

1 among class members. RAD may constitute a disability protected under Title II and 5 504, but it  
2 need not for the purposes of this motion.

3 More to the point, however, is that a particular diagnosis or label alone does not  
4 determine whether a child is disabled under Title II or 4 504. The test is whether the disorder  
5 impairs the child's ability to perform major life activities, *supra*. "The determination that a  
6 particular individual has a substantially limiting impairment should be based on information  
7 about how the..impairment affects that individual and not on generalizations about the condition."  
8 EEOC Enforcement Guidance, *supra at 4*. The State's motion suggests further that  
9 psychological conditions are not disabilities under the ADA and 8 504. Clearly that intimation is  
10 false. The statutes on their face prohibit discrimination against individuals with physical *and*  
11 *mental* disabilities. See 42 USC 12 102(2). Moreover, implementing regulations make clear that  
12 psychiatric conditions may constitute disabilities under the ADA and 5 504. See 28 C.F.R. 0  
13 35.104. As well, numerous cases have held that mental impairments may constitute disability  
14 under law. *Pritchard v. Southern Co. Svcs.*, 92 F. 3d 1130 (1 1<sup>st</sup> cir. 1996); *Olmstead v. LC*, 527  
15 U.S. 581,604 (1999).

16  
17  
18 Furthermore, the applicability of the ADA to claims involving child welfare is not new.  
19 In *In Re Weljkre of A.JR.*, 896 P.2d 1298, 1302 (Wash.App. Div. 3,1995) *Review Denied by 904*  
20 *P.2d 1157* (Wash. 1995), the court held the ADA applicable to child welfare services provided to  
21 disabled parents but found that the ADA was not violated when court terminated the parental  
22 rights of a disabled mother and father. Provision of services tailored to the parents'  
23 developmental disabilities (pictorial instructions left on refrigerator, daily lessons on basic  
24

1 hygiene, cooking and child care, and visual rather than literary teaching aids used in parenting  
2 :lass) satisfied ADA reasonable accommodation of the parents' disabilities.<sup>5</sup>

3 The State's claim that *Sunderland Family Treatment Serve. v. City of Pasco*, 127 Wn.2d  
4 782. 903 P. 2d 986 (1995), stands for the proposition that "[t]he Washington Supreme Court has  
5 -ecognized that mental and emotional conditions are not disabilities" (State's Motion at 7-8),  
6 nisstates the holding of the case. The *court* in *Sunderland* specifically said that it was not  
7 :onsidering whether mental and emotional problems created disabilities: "... we do not consider \_ \_-. \_ \_ --  
x whether emotionally disturbed children are handicapped, but whether abused and neglected  
9 :hildren are handicapped." 127 Wn. 2d at 790. The court determined that abuse and neglect by  
10 .hemselves do not "in every case limit the victim's participation in major life activities." *Id.* at  
11 791. Because the test for disability is the effect of a disorder on major life activities, the court  
12  
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14 <sup>5</sup> **See, also, *In Interest of*** C.M. 526 N.W.2d 562, 566 (Iowa App. 1994) (No ADA violation as mother with  
15 rsonality disorder was provided with reasonable accommodation.); ***In re Terry***, 610 N.W.2d  
16 i63(Mich.App.,2000) (The ADA requires a public agency, such as the Family Independence Agency (FIA), to make m... -.  
17 easonable accommodations for those individuals with disabilities so that all persons may receive the benefits of  
18 mblic programs and services. Thus, the reunification services and programs provided by the FIA must comply with  
19 he ADA). ***People ex rel. T.B.***, 12 P.3d 1221, 1224 (Colo.App. 2000.) (Holding that the Department of Human  
20 ervices is a public entity and thus is subject to the ADA, see 42 U.S.C. 9 12131 (2000) but finding a violation of  
21 he statute does not constitute a defense to termination of parental rights proceedings.) ***In re Antony B.***, 735 A.2d  
22 193, 899 n.9 (Co~.App., 1999) (A failure to provide adequate services because of the parent's mental condition  
23 ould violate not only § 17a-112, but the ADA, 42 U.S.C. 9 12132. Such a violation would give rise to a separate  
24 ause of action under the ADA).

1 'ejected the proposition that labels alone-in that case "abused and neglected children"--could  
2 zstablish a disability under the law." The leap from there to the conclusion that *Sunderland*  
3 xcludes a finding of disability by this court is illogical and unsubstantiated by any facts  
4 adduced by the State. See Motion at 7-8.

5  
6 Thus *Sunderland* stands only for the proposition that abused and neglected children may  
7 )r may not be disabled under Title II, § 504 and the WLAD, and is not especially helpful in  
8 assessing whether Plaintiffs in this case are disabled. And in fact, severe emotional--disturbance -- -- ..  
9 was sufficient to constitute a disability in *Sunderland* 14 107 Wash.App. 109,26 P.3d 955  
10 2001). In *SunderZand* 11, the record showed that the troubled children referred to the home  
11 ieeking a special use permit did have mental and emotional problems, and were referred by  
12 mental health professionals. They thus were considered undoubtedly disabled. In contrast, the  
13 ecord in *SunderZand I* showed only that the children had been abused and neglected, which does  
14 tot necessarily amount to a disability.t<sup>6</sup>

15  
16 The State has merely shown in their Motion, at 6-7, that some circuit courts and other  
17 :ourts have denied to allow anxiety, fear of snakes, and depression to be classified as a disability.  
18 The SED diagnoses here are much more severe impairments." As noted above, in *Sunderland I*,  
19 teavily relied on by the State, the court did acknowledge that abuse and neglect "may  
20 mdoubtedly produce physical or mental effects," and held that "these effects do not *in every*  
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22  
23 ' In *Sunderland I*, the court refused to consider whether SED was a disability because there was nothing in the  
24 actual record showing that the children suffered from SED and the issue of SED had been brought up for the first  
25 me on appeal without support in the record. 127 Wn. 2d at 789-790.

26 ' While it may be true that no court has held RAD to constitute a disability, the question for the court on summary  
27 lgment is whether RAD does not, as a matter of law, constitute a disability. Defendants cite no authoritative case  
28 lith such a holding.

29 'aintiffs' Response to Defendants' Partial  
30 ummary Judgment Motion Page 12 -

1 case limit the victim’s participation in major life activities.” 127 Wn.2d at 791 (emphasis  
2 added). However, for foster children who have SED, RAD, specific learning disabilities, drug or  
3 alcohol addiction, fetal alcohol syndrome, or other disabilities and who have been moved three  
4 or more times, testimony will show that participation in major life activities, such as education,  
5 family, and safe and stable housing, are severely limited.”

6  
7 Plaintiffs have made a strong showing, more than sufficient to raise triable issues, that  
8 class members are disabled under Title II, 4 504, and the WLAD. At a minimum, there are  
9 genuine issues of material fact as to whether plaintiffs are disabled, and the State is not entitled  
10 to judgment as a matter of law on this element of Plaintiffs’ claims.

11 **B. Plaintiffs have been excluded from an opportunity to participate in and**  
12 **benefit from public services, programs or benefits they are entitled to by**  
13 **law because of their disability.**

14 “The ADA was enacted by Congress in 1990 ‘to provide a clear and comprehensive national  
15 mandate for the elimination of discrimination against individuals with disabilities.’” Crowder v.  
16 *Kitagawa*, 81 F. 3d 1480, 1483 (9<sup>th</sup> Cir. 1996). Department of Justice regulations promulgated  
17 pursuant to authority under the Act provide in pertinent part:

18  
19 I<sup>8</sup> For example, Berliner and Fine report that “Across all levels of care, many foster parents report the child as  
20 needing close supervision at all times... For enhanced family foster care (Level II) and treatment foster care (Level  
21 III) providers, 20 to 25 percent report that the child’s problems interfered all or much of the time with normal family  
22 activities such as going out or doing tin family activities, having quality time, and getting along with other  
23 children.” Berliner reports as well that some disruptive behaviors, such as damaging property in the home and  
threatening harm to other children, were reported with high frequencies by enhanced family foster care and  
treatment foster care providers. Lucy Berliner and David Fine, Long-Term Foster Care in Washington: Children’s  
Status and Placement Decision-Making (Olympia, WA: Washington State Institute for Public Policy, June 2001),  
Document Number 01-06-390 1, at 21.

24 I<sup>9</sup> In order to prevail on the question of disability, a disabled individual must be a “qualified” individual under the  
25 Act. This generally means that the individual must meet the “essential eligibility requirements for the receipt of  
26 services or the participation in programs or activities provided by the public entity. 42 U.S.C. 12131(2). Defendants

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1 (a) No qualified individual with a disability shall, on the basis of disability, be  
2 excluded from participation in or be denied the benefits of the services, programs, or  
3 activities of a public entity, or be subjected to discrimination by any public entity.

4 (b)( 1) A public entity, in providing any aid, benefit, or service, may not, directly or  
5 through contractual, licensing, or other arrangements, on the basis of disability--

6 (i) Deny a qualified individual with a disability the opportunity to participate in or  
7 benefit from the aid, benefit, or service;

8 (ii) Afford a qualified individual with a disability an opportunity to participate in or  
9 benefit from the aid, benefit, or service that is not equal to that afforded others;

10 (iii) Provide a qualified individual with a disability with an aid, benefit, or service that  
11 is not as effective in affording equal opportunity to obtain the same result, to gain the  
12 same benefit, or to reach the same level of achievement as that provided to others;

13 (iv) Provide different or separate aids, benefits, or services to individuals with  
14 disabilities or to any class of individuals with disabilities than is provided to others unless  
15 such action is necessary to provide qualified individuals with disabilities with aids,  
16 benefits, or services that are as effective as those provided to others;

17 (v) Aid or perpetuate discrimination against a qualified individual with a disability by  
18 providing significant assistance to an agency, organization, or person that discriminates  
19 on the basis of disability in providing any aid, benefit, or service to beneficiaries of the  
20 public entity's program;

21 (vi) Deny a qualified individual with a disability the opportunity to participate as a  
22 member of planning or advisory boards;

23  
24  
25 have not raised any question of whether any class member might not be a qualified individual under the Act.  
26 accordingly, plaintiffs do not address the issue herein.  
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(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

28 C.F.R. § 35.130 (a), (b)(1).

The State asserts that plaintiffs “claim must fail if there is no allegation that the plaintiffs were treated differently than those with disabilities.” Motion at 9, citations omitted. The State is correct that differential treatment is prohibited under the ADA and 3504. However, the State has failed to acknowledge that in passing 3504 and the ADA, “Congress intended to prohibit two different phenomenon [sic].” *Crowder v. Kitagawa*, at 1483. “Congress intended to prohibit outright discrimination as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.” *Id. See also, Black v. Dept. of Mental Health*, at 749 (“[S]ince the ADA was designed to address indifference to or benign neglect of the plight of the disabled, outright intentional discrimination is not required under Title II of the ADA.”); *Alexander v. Choate*, 469 U.S. 287,299 (1985) (“we assume without deciding that 3504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.”). In *Crowder*, blind individuals claimed that Hawaii’s animal quarantine laws discriminated against disabled individuals who relied upon guide dogs. Although the regulation treated able and disabled alike, the Court ruled that the disparate impact on visually-impaired people was discriminatory. Unfortunately, the State fails to address disparate impact even though it is the basis of plaintiffs’ title II and 3504 claims.

1 In *Alexander v. Choate*, the leading case on § 504 disparate impact, the Supreme Court  
2 established a balancing test requiring that a disabled individual must be provided “meaningful  
3 access to the benefit that the grantee offers.” *Id.*, at 301. See also, *Crowder* at 1484. *Choate*  
4 involved the reduction of covered inpatient days from 20 to 14 under Tennessee’s Medicaid plan.  
5 The handicapped Plaintiffs argued that the disproportionate and adverse impact of the rule  
6 change constituted unlawful discrimination under 9 504. The court disagreed, looking to several  
7 factors to determine whether-thehandicapped plaintiffs had been denied “meaningful access.”  
8

9 Those factors include:

- 10 -whether programmatically there is a particular exclusionary effect on people with
- 11 disabilities;
- 12 -whether program criteria is facially neutral;
- 13 -whether people with disabilities are unable to benefit meaningfully from the program
- 14 or service; and
- 15 -whether services are identical and effective.

16  
17 *Choate*, at 720-721.

18  
19 Evaluating a disparate impact claim begins with a description of the service, program, or  
20 activity benefits denied by the public entity. In this case, the plaintiff class alleges that they  
21 have been denied the benefits of stable and permanent placement--rights clearly established by  
22 the Washington legislature.

23  
24 According to Washington law:

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1 When the rights of basic nurture, physical and mental health, and safety of the child and  
2 the legal rights of the parents are in conflict, the rights and safety of the child should  
3 prevail. . . The right of a child to basic nurturing includes the right to a safe, stable, and  
4 permanent home and a speedy resolution of any proceeding under this chapter.

5  
6 RCW 13.34.020. So important are these benefits of safety, stability and permanence that  
7 Washington's Department of Social and Health Services has adopted specific performance  
8 measures for assessing the numbers of foster children who receive these benefits from the  
9 system. These assessments are conducted on a monthly basis and placement stability data is  
10 broken down by region and even by local office.”

11  
12 With passage of the Adoption and Safe Families Act of 1997, Congress reaffirmed that  
13 providing stability and permanence to abused and neglected children in foster care were the  
14 primary outcomes for which public child welfare agencies were responsible.<sup>21</sup> HHS is the  
15 federal agency responsible for monitoring the extent to which state agencies fulfill this obligation  
16 to children in their custody. In a series of policy announcements and directives to the states,  
17 CMS has emphasized that placement stability is a critical benefit and a measure by which states'  
18 performance and entitlement to continued federal funding will be assessed.<sup>22</sup> Secretary  
19 Greskovich was among those who participated in the discussions and decisions at CMS to  
20

21  
22 <sup>21</sup> See, Children's Administration Outcome Measures Monthly Report, July 200 1.

23 <sup>22</sup> See, e.g., 42 U.S.C. 679 b :

24 The Secretary [of USDHHS], in consultation with Governors, State legislatures, State and local public  
25 officials responsible for administering child welfare programs, and child welfare advocates, shall (1)  
26 develop a set of outcome measures (including length of stay, number of foster care placements, and number  
of adoptions) that can be used to assess performance of states in operating child protective and child  
welfare programs. . .

1 establish placement stability as one of seven key benefits for which public child welfare agencies  
2 must be responsible. There was no dissent among the participants that placement stability was a  
3 key outcome measure for children in foster care.<sup>23</sup>

4 Applying the analytical elements set forth in *Choate*, we see that although Washington  
5 procedures appear to be facially neutral, meaningful access to stable and permanent placements  
6 is not available to disabled foster children in the same manner it is to able foster children.  
7

8 Addressing the first element, does Washington's child welfare program have a  
9 particularly exclusionary impact on disabled children? According to DSHS it does. In its brief,  
10 DSHS asserts that, "[f]inding permanent homes for all disabled foster children is not a  
11 reasonable accommodation; it is a laudable goal that ignores every reality of foster care."  
12 Motion, at 13. DSHS does not claim that achieving this "laudable goal" for able children is  
13 unreasonable. By explicitly singling out disabled children from achieving the legislatively  
14 mandated benefit owed all foster children, the State confirms and admits the exclusionary impact  
15 of their programs.  
16

17 Second, are disabled children able to benefit meaningfully from program services? They  
18 are not. DSHS refuses to provide appropriate training to foster parents, sufficient assessments,  
19 or adequate mental health treatment for disabled children. DSHS argues in its motion that failed  
20  
21  
22

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23 <sup>23</sup> ***E.g., Notice of Final List of Child Welfare Outcomes and Measures, 64 Fed*** Reg. 45552-45554 (August 20,  
24 1999), and ***Information Memorandum 00-1 1***, USDHHS ACYF-CB-IM-00-11 (December 28,2000).  
25 <sup>1</sup> Deposition of Oreskovich at 37 - 39

1 placements are beyond their control,<sup>24</sup> including failed placements that DSHS acknowledges are  
2 :aused by severe behavioral problems. See Motion at 3 (“pre-existing severe behavioral  
3 problems also increase the risk of multiple placements.”) No evidence suggests that there is  
4 nothing the State can do to address the conditions - many of them disabling mental health  
5 :onditions -that cause harmful multiple placements. DSHS’s denial of any responsibility by  
6 asserting that no accommodation may be made to improve placement outcomes virtually  
7 guarantees that placements will continue to fail and disabled children will not be afforded the  
8 opportunity to achieve stable and permanent homes. Moreover, according to the, state’s own  
9 reports, “[a] child’s emotional and behavioral problems were the most common permanency  
10 barrier (93% [of assessed cases]) identified by FCAP evaluators.<sup>Y,25</sup> In a nutshell, although  
11 emotional and behavioral problems are likely the number one barrier to permanence, the State’s  
12 claim that such problems lie beyond DSHS’s control. Although all of the facts are not in, all of  
13 the evidence adduced so far indicates that psychologically disabled children are being denied an  
14 opportunity to benefit meaningfully from program services.

15  
16  
17 Finally, are services provided identical and effective? It may be that services are very  
18 nearly identical for able and disabled foster children (although appropriate mental health care for  
19 children typically is highly individualized). However, it seems clear from the record so far, that  
20 services are not effective for disabled children. Most children entering the foster care system do  
21 not suffer through multiple placements. “Almost 70% of children placed out of the home in  
22

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23 <sup>!4</sup> See Motion at 3 (“foster children are moved Corn placements for a variety of reasons, most of which are beyond  
24 DSHS’s control”); see also Motion at 14 (“Plaintiffs’ experts have also testified that placement changes are made for  
a variety of reasons that are beyond DSHS’s control.. .”)

1 Washington state leave placement within 1 year [. . .] It is children, especially school age children  
2 with mental health problems remaining in care for longer than 1 year, who become highly  
3 vulnerable to placement instability.<sup>26</sup> Of the children who languish in care and suffer through  
4 multiple placements, the vast majority is psychologically disturbed. DSHS itself admits in its  
5 motion that a child’s “pre-existing severe behavioral problems . . . increase[s] the risk of multiple  
6 placements.” Motion at 3.<sup>27</sup> Additionally, research and reports confirm that children with  
7 psychological disabilities fail to achieve stability-and permanence+ ,!&z. 2001 -Annual Report,  
8 *supra*; Newton, R., Children and Youth in Foster Care, *supra*; and Dee Wilson, *supra*, at 29-3 1.

10 DSHS’s failure to provide effective services to disabled children that would allow them  
11 equal opportunity to achieve stability and permanence is the final straw in the *Choate* analytical  
12 Framework. For each element, the evidence persuasively confirms that disabled children are not  
13 afforded meaningful access to stability and permanence under Washington’s foster care program.

14 Although the *Choate* analysis favors Plaintiffs claim, the State would have this court hold  
15 that no services may be offered to plaintiffs that are not offered to able foster children because  
16 new programs are not required by the ADA. Citing numerous cases, the State contends that  
17 “neither Title II of the ADA nor 5 504 of the RI-IA requires a defendant to provide or develop  
18 special services or programs to assist the disabled.” Motion at 9. *Lincoln CERCPAC v. Health &*  
19 *Yospitals Corp.*, 147 F. 3d. 165 (2nd Cir. 1998); *Ackley v. Arizona*, 98 F. 3d 461 (9\* Cir. 1996);

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22 <sup>5</sup> 2001 Annual Report to the Washington State Department of Social and Health Services Children’s  
23 administration, Foster Care Assessment Program (FCAP). Executive Summary, at ii.

24 <sup>6</sup> Dee Wilson, *Reduce. Muhinle Placements*, at 2.

25 <sup>7</sup> DSHS also confirms that placements fail because foster parents request changes and because children run away.  
26 One should note that this details the manner in which placements fail, not the reason for failure. A closer

1 *Kornblau. v. Dade County*, 86 F. 3d 193 (1<sup>st</sup> Cir. 1996); *Rodriguez v. City of New York*, 197 F.  
2 3d 611 {2<sup>nd</sup> Cir. 1999); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The  
3 State is likely correct in contending that Title II and § 504 cannot require the creation of entirely  
4 new programs on behalf of disabled persons. But Plaintiffs are not asking for new or additional  
5 programs or benefits. They are seeking benefits clearly owed all foster children--stability and  
6 permanency -regardless of ability. Neither are Plaintiffs “challenging ‘the substance of  
7 services provided, <sup>ed</sup> see *Charlie R Tz-Wzitman*, 83 F. Supp. 2d 476,501 (D. N.J. 2000), or  
8 seeking to “usurp the agencies’ power to make placement choices,” see *Dempsey v. Ladd*, 840 F.  
9 2d 638,641 (D. Or. 1988).

11 The question of how the state must act in order to provide meaningful access to stability  
12 and permanency lies with DSHS. Indeed, the state in its Motion lays out a series of steps that  
13 might be taken to provide meaningful access, that the DSHS officials “have repeatedly  
14 requested” from the state legislature. Motion at 3-4 (improve recruitment and training, increase  
15 foster parent payments, increase child welfare staff and training, provide more assessments and  
16 :reatment, etc.). In addition, as plaintiffs have repeatedly shown, there are steps DSHS could  
17 :ake to enhance the availability of services and start to implement some of these ideas even  
18 without additional money. It is difficult to comprehend how Plaintiffs could somehow be  
19 lharacterized as ‘usurping agency prerogatives,’ or demanding ‘affirmative action’ merely by  
20 xging the state to do what it claims to seek to do on its own.

24 :xamination of the reason for these failures shows that psychological disorders are a root cause. See Declaration of  
25 Kathleen Westover.  
26 ‘aintiffs’ Response to Defendants’ Partial  
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1           Moreover, the State ignores the asymmetry of their argument: The State's position is that  
2 disabled children cannot receive mental health services because able children do not; but able  
3 children can nevertheless receive permanency even though disabled children cannot. This sort  
4 of disparate impact, based explicitly on Plaintiffs' disability, is precisely what Congress sought  
5 to prevent in passing 5 504 and Title II of the ADA.  
6

7           Once again, the State has the burden to show that there are no material facts in dispute  
8 here, and that they are entitled to judgment as a matter of law. The State has failed to meet that  
9 burden on this issue.

10 **C. Plaintiffs are being discriminated against because they suffer from**  
11 **behavioral, emotional and psychological disabilities.**

12           The final element that Plaintiffs must show to establish their 5 504 and Title II claims is  
13 that they were discriminated against due to their disability. There can be little doubt that the  
14 discrimination complained of by plaintiffs has occurred, and continues to occur, by reason of  
15 class members' psychological disabilities. Placement failures, as we have shown, *supra*, occur  
16 because of the class' unmet mental health needs. Also, DSHS has conceded in its motion that  
17 stability and permanence are denied disabled *youth because* they are disabled. See Motion at 3  
18 "pre-existing severe behavioral problems also increase the risk of multiple placements.. . Each  
19 If these causes is beyond DSHS's control."); and 13 ("finding permanent homes for all disabled  
20 Foster children is not a reasonable accommodation; it is a laudable goal that ignores every reality  
21 If foster care".)

22           In conclusion, in order to establish a claim of discrimination under Title II and 5 504,  
23 Plaintiffs need to show that they are qualified disabled individuals who have been excluded from

24  
25  
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1 participation in or denied the benefits owed them by a public entity by reason of their disability.  
2 Plaintiffs have adduced plenty of evidence that this is occurring and are therefore entitled to a  
3 trial relief under these Acts. Even if Plaintiffs have not yet met the burden of conclusively  
4 proving their case, the State has utterly failed to carry its burden of showing that they are entitled  
5 to judgment as a matter of law.

6  
7 ***D. Where, as here, Plaintiffs have demonstrated that they are being***  
8 ***discriminated against, the state is obliged to make reasonable modifications to***  
9 ***eliminate the unlawful discrimination.***

10 Where a party has established that a public entity discriminates against a disabled  
11 individual in violation of the ADA and 5 504, the state may nevertheless avoid liability if it can  
12 show that making reasonable modifications to its programs would fundamentally alter its  
13 programs or result in undue financial and administrative burdens. *Olmstead v. LC*, 527 U.S. 581,  
14 604 (1999). See also, 28 C.F.R. § 35.150(a)(3), 35.164 (1999). The burden, however, is on the,  
15 government to plead and prove fundamental alteration or undue burden. C.F.R. § 35.150(a)(3),  
16 35.164 (1999).

17 The test for determining whether proposed program modifications would effect a  
18 Fundamental alteration or impose undue financial or administrative burdens requires the court to  
19 consider “two countervailing legislative concerns: (1) effectuation of the statute’s objectives of  
20 assisting the handicapped; and (2) the need to impose reasonable boundaries in accomplishing  
21 the legislative purpose.” *Helen L. v. DiDario*, 46 F. 3d 325, 337 (3rd Cir. 1995). See also  
22 *Southeastern Community College, supra*. This analysis is “highly fact-specific, requiring case-  
23

1 oy-case inquiry.” *Crowder, supra* at 1486 (citing *Chalk v. U.S. District Court Central District of*  
2 *California, et al.*, 840 F. 2d 701 (9<sup>th</sup> Cir. 1988).

3 According to the controlling regulations,

4 **The decision that compliance would result in such alteration or burdens must be made by**  
5 **the head of a public entity or his or her designee after considering all resources available for use in**  
6 **the funding and operation of the service, program, or activity, and must be accompanied by a written**  
7 **statement of the reasons for reaching that conclusion. If an action would result in such an alteration**  
8 **or such burdens, a public entity shall take any other action that would not result in such an alteration**  
9 **or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits**  
10 **or services provided by the public entity.**

11 **E.F.R. §5 35150(a)(3).**

12 Nothing in the record indicates that DSHS has complied with these regulations.

13 Moreover, the State seeks to short-circuit the reasonable modifications analysis by claiming, in  
14 effect, that *any* modification to its programs would be unreasonable because placement changes  
15 occur for reasons beyond DSHS’ control. DSHS argues that they cannot make any modifications  
16 that could achieve the program benefit of stability and permanence for disabled foster youth.  
17 Motion at 14. This controversial assertion is not supportable in the record and belies common  
18 sense.

19 The State also argues that program changes would be expensive and that although  
20 ‘Defendants have repeatedly requested these changes . . . the Legislature has consistently refused  
21 such requests in whole or in part.’ Motion at 4. It is no doubt true that some modifications to  
22 existing programs may be expensive. But whether the expense rises to the level of an undue  
23 burden is a factual inquiry that the State seeks to escape with bald assertions. See e.g., Motion at  
24 14 (“This is simply an unattainable goal, and literally millions of dollars would be spent  
25 attempting to achieve it.”) Moreover, some of the modifications requested, such as improved

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1 screens and better mental health treatment, do not constitute modifications at all. These services  
2 are mandated under Medicaid in most instances. The Third Circuit Court of Appeals addressed  
3 this issue head on, holding that merely requesting that an agency “fulfill its own obligations  
4 under state law” could not constitute an undue burden. *Helen L., supra*, at 338. Additionally,  
5 that same court concluded that, as the ADA applies to the state legislature as well as an  
6 administrative agency, the “DPW [Department of Public Welfare] can not rely upon a funding  
7 mechanism of the General Assembly to justify administering-its afiendant-care program in a  
8 manner that discriminates and then argue that it can not comply with the ADA without  
9 kmdamentally altering its program.” *Id.*

11 Plaintiffs contend that disabled foster children are entitled to the foster care benefits of  
12 placement stability and permanency, a benefit they have been unlaw-fully denied. A number of  
13 proposals to gain meaningful access to these benefits will constitute reasonable modifications in  
14 Washington’s existing foster care program, while some may not. Determining whether each of  
15 ‘laintiffs’ proposals is a reasonable modification under the law is a factual inquiry. As yet, the  
16 State has failed to adduce suffkient facts to adequately assess this issue. As the burden of  
17 proving these facts lies with the public agency claiming the defense, the State has failed to  
18 establish their right to the defense, and much less have they satisfied the burden to show that they  
19 are entitled to summary judgment as a matter of law.

21 **II. Summary Judgment Is Inappropriate on Plaintiffs’ Claims Under the**  
22 **Washington Law Against Discrimination.**

23 As fully explained above, there can be little dispute that the children in the Class are  
24 disabled and subjected to discrimination. The children almost universally suffer from mental or

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1 behavioral disabilities which cause behaviors that impair functioning and result in placement  
2 disruptions. While non-disabled foster care children enjoy the primary purpose and benefit of  
3 state foster care -- stable and permanent homes -- the children in the class are denied permanent  
4 homes because of their illnesses and attendant behaviors. The State discriminates against  
5 children in the class by denying them permanency through a denial of mental health and other  
6 services. In other words, sick children are kept from homes because the State discriminates  
7 against them when it denies them the care they need-to get-well.(or keep from getting worse) and  
8 consequently to be able to go to permanent homes.

10 The Washington Law Against Discrimination (WLAD) is specifically designed to  
11 address this kind of situation. RCW 49.60.030(1)(b) provides that the right to be free from  
12 discrimination extends to the “right to the full enjoyment of any of the accommodations,  
13 advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or  
14 amusement.” The Legislature designed RCW 49.60 to prevent discrimination in a variety of  
15 fields, i.e., to remove barriers to equal opportunity in our society. *FeZZ v. Spokane Transit*  
16 *Authority*, 128 Wn.2d 61863 1, 911 P.2d 13 19 (1996). This is the basic issue here, whether  
17 plaintiff class members are given as full access to the advantages of the foster care system  
18 extended to others.

20 Because discrimination is “a matter of state concern . . . [that] threatens not only the rights  
21 and proper privileges of its inhabitants but menaces the institutions and foundation of a free  
22 democratic state,” RCW 49.60.010, the Legislature has mandated that WLAD provisions “shall  
23 be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020.

24 *IG-anklin County Sher@fs Office v. Sellers*, 97 Wash.2d 3 17, 335, 646 P.2d 113 (1982). Courts  
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1 must give all allegations careful consideration, as the WLAD embodies a public policy of “the  
2 highest priority.” *Xieng v. Peoples Nat’l Bank*, 120 Wash.2d 512, 844 P.2d 389 (1993)  
3 rquoting *Allison v. Housing Auth.*, 118 Wash.2d 79, 86, 821 P.2d 34 (1991)). Not allowing a  
4 discrimination claim is to proceed when the material facts are far from being fully revealed to the  
5 xier of fact would be in direct contravention of the legislature’s intent.

6  
7 **4. The WLPD Claim Cannot Be Resolved On Summary Judgment Recourse Because The  
8 Relevant Facts Are Controverted.**

9 In their motion, the State mistakenly relies on *Fell, supra*, which ultimately held, in a  
10 :ase factually much more simple than the case at bar, that the WLAD issue was not ripe for  
11 ;urnmary judgment. The *Fell* holding, as will be discussed below, pointedly demonstrates that  
12 he WLAD analysis is replete with issues that raise significant disputed factual questions in this  
13 :ase. These factual disputes are, except in extreme circumstances not present here, normally  
14 nappropriate for disposition on summary judgment. Plaintiffs agree, for the most part, with the  
15 tate’s characterization of what is needed to prove a case of discrimination under the WLAD.  
16 ‘laintiffs cannot, however, agree that the relevant material facts are uncontroverted. The full  
17 extent of the relevant material facts will be presented at trial.

18 **B. Plaintiffs Have Alleged, And Will Prove At Trial. That The State Unlawfully Discriminated Against Them.**

19 Under the WLAD, a prima facie claim requires four elements: (1) plaintiff has a  
20 disability; (2) defendant’s establishment is a place of public accommodation; (3) defendant  
21 discriminated against plaintiff by providing treatment that was not comparable to the level of  
22 designated services provided to individuals without disabilities; and (4) the disability was a  
23

1 substantial factor causing the discrimination. *Negron v. Snoqualmie Valley Hospital*, 86 Wash.  
2 4pp. 579,936 P. 2d 55 (Div. I 1997).

3 As to factor (1), Plaintiffs contend, and have pointed to substantial evidence, that the  
4 Plaintiff class exhibits serious mental health needs amounting to disabilities under applicable  
5 law. This has been fully outlined above, in section I, above, and needs no further elaboration.

6 As to factor (2), whether the State's services amount to a public service subject to WLAD  
7 s presumably undisputed.

8 With respect to WLAD factor (3), comparable services, there is also no basis for  
9 summary judgment. While the State points out that the *Fell* court noted that "[t]he statute was  
10 not intended to entitle certain protected classes to some unspecified type and unlimited level of  
11 services," this is not what Plaintiffs are requesting. Motion at 17, citing *Fell*, at 631 (emphasis in  
12 original). In fact, what children in the class seek could not be a more reasonable assertion of the  
13 services needed for comparability - the mental health care that the State of Washington is already  
14 constitutionally required to provide. Since the State is constitutionally obligated to provide this  
15 mental health care, the children's requested accommodation (mental health care) is per se reasonable.

16 As pointed out above, for many years, in studies partially requested by DSHS, experts  
17 have pointed out the lack of services, such as outpatient mental health services and other  
18 supportive services, provided to SED youth in the State's care.<sup>28</sup>

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23 <sup>28</sup>See, e.g., Eric W. Trupin, et al., *Children on Child Protective Service Caseloads: Prevalence and Nature of Serious*  
24 *Motional Disturbance*, 17 *Child Abuse & Neglect*, 345,353 (1993); Lucy Berliner and David Fine, *Long-Term*  
25 *oster Care in Washington: Children's Status and Placement Decision-Making* (Olympia, WA: Washington State  
26 Institute for Public Policy, June 2001), Document Number 0 I-06-390 1, at 21.  
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1 In *Fell* the court held that places of public accommodation must meet a “test of  
2 comparable treatment.” However, the courts have cautioned that “‘comparable’ does not mean  
3 identical.” *Negron*, 86 Wn.App. at 585. Places of public accommodation dealing with disabled  
4 persons must make reasonable accommodations so that their treatment will in fact be comparable  
5 to that provided to people who are not disabled.

6  
7 In discussing comparability, the *Fell* court relied on cases from the employment setting,  
8 including *Holland v. Boeing Co.* [90 Wn.2d 384, 583 P.2d 621 (1978)]. The *Holland*  
9 court recognized that treating a disabled employee identically to a non-disabled employee  
10 may constitute discrimination. . . Similarly, places of public accommodation may be  
11 required to reasonably accommodate disabled patrons in order to provide them with  
12 treatment comparable to that received by non-disabled persons.

13  
14 *d (cite added)*. To treat the Plaintiff class identically with foster children who are not  
15 disabled discriminates against them, precisely because treatment that does not take into account  
16 the disabilities would not provide disabled foster children with comparably safe and secure  
17 placements. To subject the plaintiff class to unnecessary moves through the foster system  
18 without providing adequate treatment for their mental health problems and other supportive  
19 services is akin to a failure to accommodate special needs, needs which substantial evidence  
20 shows have been exacerbated by the State’s inaction.

21 The *Negron* court ultimately upheld the trial court’s determination that whether a hospital  
22 had discriminated against Negron on the basis of her disability was an issue of fact sufficient to  
23 defeat summary judgment. Likewise, whether the State discriminated against the plaintiff class  
24 because of their disabilities is a question of fact, not one appropriate for summary judgment. See  
25 *g., Fell*, 128 Wn.2d at 640.

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1 On factor (4), as discussed above, the State in essence admits that its actions are based on  
2 the disabilities of the plaintiff class. However, plaintiffs acknowledge that despite this strong  
3 evidence of discrimination, this remains a disputed factual question that must be determined at  
4 trial. "The question of whether a person's disability was a substantial factor in the alleged  
5 discrimination, like other matters of proximate causation, is a question of fact." *Fell, supra*, at  
6 341.

7 **C. The State Has Failed to Show An Adequate Uncontroverted**  
8 **Nondiscriminatory Reason For Their Discrimination.**

9 The State argues that even if the plaintiffs can establish a prima facie case of  
10 discrimination, the claim still must fail if the defendant shows a nondiscriminatory reason for its  
11 actions, such as "financial unfeasibility." Motion at 17. While the State may be allowed to show  
12 a nondiscriminatory reason at trial, this argument fails on summary judgment for two reasons.

13 First, the State has certainly not established that financial unfeasibility is the sole reason  
14 why the plaintiff class is receiving inadequate services. They have merely shown that they have  
15 requested more money from the legislature than the legislature has seen fit to provide them. This  
16 does not answer several crucial questions, including whether other sources of money may be  
17 found or whether services can be reorganized or changed to provide more to the most disabled.  
18 These are matters of fact and not law that should be determined at trial, as is the issue of whether  
19 their non-discriminatory reason is legitimate. "The question of pretext is generally a question for  
20 the trier of fact when there are competing inferences of discrimination in a case." *FeZZ* at 642.

21 As noted above, in *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 851  
22 Wn.2d 716 (Div. I 1993), review denied, 122 Wash.2d 1018, 863 P.2d 1352 (1993), a case cited in  
23 *Tell*, the Court of Appeals reversed and remanded the trial court's summary judgment for the  
24 plaintiffs' Response to Defendants' Partial  
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26

1 defendant because, once a plaintiff in a discrimination case presents evidence of a prima facie  
2 case and the employer proffers nondiscriminatory reasons for the discharge, the plaintiff may  
3 survive summary judgment by providing evidence that the employer's reasons are unworthy of  
4 belief or are otherwise a pretext for a discriminatory purpose. To meet this burden, the plaintiff  
5 "is not required to produce evidence beyond that already offered to establish a prima facie case.  
6 Nor is direct ("smoking gun") evidence required. Circumstantial, indirect, and inferential  
7 evidence will suffice to discharge the plaintiffs burden." *Sellsted*, at 860 (cites omitted).

9 The evidence that the failures of the State to adequately serve Plaintiffs are not solely  
10 caused financial issues is overwhelming. For example, Trupin, *et al.*, found that SED children  
11 are not well served because the child welfare system is designed for kids with a low level of  
12 psychopathology:

13 In addition to the relative ineffectiveness of the child welfare system in  
14 acknowledging, assessing, documenting and prioritizing the mental health needs of  
15 abused children, other system problems have prevented the mental health needs of abused  
children from being met . . .

16 Trupin, *et al.*, go on to cite, among other items, inflexible organizational boundaries that block  
17 transfer of information regarding the availability of services, limit communication about  
18 individual children and constrain the development of comprehensive child-centered service  
19 plans.~ Additionally, Dee Wilson has outlined numerous recommendations for reducing  
20 multiple placements which were not clearly tied to funding, such as a stronger commitment to  
21 permanency for children, widespread use of concurrent, strict adherence to statutory  
22 time limits, and increasing the kinship care rate.<sup>30</sup>

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24 <sup>29</sup> Eric W. Trupin et al., *Children on Child Protective Service Caseloads: Prevalence and Nature of Serious  
Emotional Disturbance*, 17 *Child Abuse & Neglect*, 345, 353 (1993).

25 <sup>31</sup> Dee Wilson, *Reducing Multiple Placements* (Revised), at 23-24.

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1 Second, “financial unfeasibility” is not a defense to meeting the standard of care and  
2 certainly not a defense when the State is under a constitutional obligation to provide health care  
3 to children in custody. The assertion regarding the financial unfeasibility justification for any  
4 discrimination is also a question for the jury in a discrimination claim, especially where the facts  
5 have not fully come to light.<sup>31</sup>

6 In summary, plaintiffs have presented substantial evidence of a violation of the WLAD,  
7 that Plaintiffs were and are disabled, that they were denied comparable services by the state  
8 because of those disabilities, and that the denial was not wholly based on the financial  
9 wherewithal of the Defendant. Examining the evidence in the light most favorable to the  
10 Plaintiffs, as the court is required to do on summary judgment, and considering the judicially  
11 recognized importance of WLAD claims, this court should find that the State has not met its  
12 burden and should dismiss their motion for summary judgment.

13 **[II. The Supreme Court has not decided the question whether claims for**  
14 **monetary damages under Title II of the ADA and § 504 are cognizable in**  
15 **federal court, and in any event the Eleventh Amendment does not apply to**  
16 **suits in state court and so would not bar ADA damage claims in the present**  
17 **case.**

18 The State challenges the availability of monetary damages for the named plaintiffs under  
19 the ADA and § 504 claims. Notably, however, the State does not challenge the availability of  
20 monetary damages under the WLAD. But even as to ADA and §504 damages, the State is  
21 incorrect to suggest they are not available here.

---

22  
23  
24 <sup>31</sup> . . . [T]he current financial status of an organization provides only a precarious and shifting ground upon which to  
25 base determinations of unlawful discrimination [ . . . ] A court should not delve so intrusively into local transit agency  
26 operations, making questions of discrimination **rise or fall** on the agency’s varied fiscal fortunes.” *Fell*, at 63 1, n. 17  
(emphasis added).

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1           In *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955  
2 1200 1), the Supreme Court held 5-4 that Congress did not validly abrogate Eleventh Amendment  
3 immunity under Title I of the ADA, and so a state employee could not sue the state for damages  
4 in federal court. The ADA claims in the present case, unlike *Garrett*, are brought under Title II,  
5 and they are brought in state, not federal, court. Because of these crucial differences, *Garrett*  
6 does not require dismissal of the ADA damage claims for the named plaintiffs in this case.  
7

8           For several reasons, *Garrett* does not support the State's motion. First of all, *Garrett*  
9 addressed the abrogation of the state's immunity from suit in the federal courts under the  
10 Eleventh Amendment. "The ultimate guarantee of the Eleventh Amendment is that  
11 nonconsenting States may not be sued by private individuals in federal court." *Garrett*, 121  
12 S.Ct. at 962 (emphasis added). The present action is not controlled by Eleventh Amendment  
13 jurisprudence as this action is pending in *state court*.  
14

15           The inapplicability of *Garrett* to ADA and 5 504 claims brought in state court was  
16 recently addressed by the Ohio Court of Appeals in *Mankins v. Paxton*, 753 N.E.2d 918 (2001).  
17 In *Mankins*, the plaintiff claimed that the state Department of Human Services operated a welfare  
18 program that discriminated against her on the basis of her handicap and deprived her of the right  
19 to reasonable accommodation in violation of 42 U.S.C. § 12131 et seq. Rejecting defendants'  
20 argument that *Garrett* controlled the decision in the case the Court of Appeals wrote:  
21

22           Garrett is not on point. *Garrett* addressed the issue of the Eleventh Amendment to the  
23 United States Constitution and suits against the state *in federal court* for money damages  
24 under the ADA. The case at bar is a claim under the ADA in state court, filed against the

1 state for injunctive and declaratory relief. Hence the holding in Garrett is inapplicable to  
2 the present case.”

3  
4 753 N.E. 2d at 927 (emphasis in original). The plaintiff in Munkins also raised claims under 4  
5 504. The court rejected defendants’ *Garrett* arguments with respect to that claim as well. See  
6 *h, Doe v. Division of Youth & Family Services*, 148 F.Supp.2d 462, (D.N.J. 2001) describing  
7 Seventh Circuit’s decision in *Walker v. Snyder*, 213 F.3d 344,346-47 (7<sup>th</sup> Cir.2000), cert. denied  
8 ;ub nom., *United States v. Snyder*, --- U.S. ----, 121 S.Ct. 1188, 149 L.Ed.2d 104 (2001) as  
9 ‘holding that claims brought against the State under Title II of the ADA must be brought in state  
10 .ather than federal court” 148 F. Supp2d at 485.

11  
12 Second, even if this case was in federal court, the question of Eleventh Amendment  
13 application to Title II of the ADA has not been settled. The Supreme *Court* in *Garrett* explicitly  
14 ,efrained from deciding the applicability of the Eleventh Amendment to claims under Title II.  
15 specifically, the Court stated, “We are not disposed to decide the constitutional issue whether  
16 rittle II, which has somewhat different remedial provisions from Title I, is appropriate legislation  
17 under §5 of the Fourteenth Amendment.” 121 S.Ct. at 960, n. 1. Thus the Court, recognizing and  
18 appreciating Title II’s separate and distinct remedial provisions, suggested that Title I and Title  
19 I may not be identical, as the State tries to suggest.

20  
21 And while it is true that some federal circuits have held that the Eleventh Amendment  
22 lees bar Title II damage claims, the Ninth Circuit has adhered to its *pre-Garrett* holding that  
23 here is no Eleventh Amendment bar. In *Clark v. California*, 123 F.3d 1267 (g<sup>th</sup> Cir. 1997), *cert.*  
24 *denied sub nom. Wilson v. Armstrong*, 524 U.S. 937, and *Dare v. State of California*, 191 F.3d

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1 1167 (9<sup>th</sup> Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001), the Ninth Circuit held that abrogation  
2 of Eleventh Amendment immunity had been properly effectuated by Congress as to Title II and 6  
3 504. Recently, the Ninth Circuit denied that *Garrett* extends to Title II, albeit in an unpublished  
4 opinion. In *Wroncy v. Oregon Dept. of Tramp.*, 2001 U.S. App. LEXIS 8761,2001 WL 474550  
5 (9<sup>th</sup> Cir. 2001), the Ninth Circuit said that that *Garrett* “does not compel us to reconsider”  
6 previous holdings that Title II’s abrogation of states’ Eleventh Amendment immunity was valid.  
7 Although the decision in *Wroncy* is unpublished and thus may not be relied upon for precedential  
8 value, it does demonstrate that Title II damages are still considered available by the Ninth  
9 Circuit.  
10

11 Federal district courts continue to permit damage claims under Title II in circuits that  
12 have held the Eleventh Amendment is not a bar to Title II damages. *Patricia N v. Lemahieu*,  
13 141 F.Supp.2d 1243, 1249 (D.Haw.2001) (following Ninth Circuit precedent and holding that  
14 Congress validly abrogated Eleventh Amendment immunity in Title II of the ADA); *Project Life*,  
15 *Inc. v. Glendenning*, 139 F.Supp.2d 703,707 n. 5 (D.Md.2001) (permitting a jury award against  
16 the State to stand in case brought under Title II of the ADA).  
17

18 Moreover, the reasoning in the Ninth Circuit cases is persuasive. In *Dare*, the Ninth  
19 Circuit concluded that the ADA was a congruent and proportional exercise of Congress’s  
20 enforcement powers under 0 5 of the Fourteenth Amendment that abrogated Eleventh  
21 Amendment *Immunity*. 191 F.3d at 1175. The *court* in *Clark* further held that, even in the  
22 absence of abrogation, those states which have accepted federal funds under the 0 504 of the  
23 Rehabilitation Act have waived sovereign immunity. 123 F.3d at 1271.  
24

1 In determining whether Congress properly abrogated the states' Eleventh Amendment  
2 mmunity under a statute, a court must consider whether Congress (1) unequivocally expressed  
3 ts intent to do so, and (2) acted within its constitutional authority. *Seminole Tribe v. Florida*, 571  
4 J.S. 44,56, 116 S. Ct. 114 (1996). The State concedes that the first requirement has been met.  
5  
6 \lotion at 15. Congress has unequivocally expressed its intent to abrogate the states' immunity  
7 mder the ADA and the 4 504. Furthermore, even if Congress has not effectively abrogated a  
8 ,tate's immunity, a state may waive it. *See Seminole Tribe*, 116 S. Ct. at 1128. One way for a  
9 tate to waive its immunity is to accept federal funds where the statute "manifests a clear intent  
10 o condition participation in the programs funded under the Act on a State's consent to waive its  
11 onstitutional immunity." *Clark*, 123 F.3d at 1271, quoting *Atascadero State Hosp. v. Scanlon*,  
12 ,73 U.S. 234,247, 105 S. Ct. 3142 (1985).

13 The Rehabilitation Act contains such an express waiver, manifesting a-clear intent to  
14 ondition a safe's participation. The RHA reads, in its pertinent parts:

15 (1) A State shall not be immune under the Eleventh Amendment.. .tkom any suit  
16 in Federal court for a violation of section 504 of the Rehabilitation Act of  
17 1973.. .of the provisions of any other Federal statute prohibiting discrimination by  
18 recipients of Federal financial assistance.

19  
20  
21 .2 U.S.C. §2000-7. Accordingly, because the state has accepted federal funds, it has waived any  
22 mmunity under the Eleventh Amendment.

23 Furthermore, it has never been doubted that the RHA was enacted pursuant to the  
24 'ourteenth Amendment. Both the Ninth Circuit and the Supreme Courts opinions have

25  
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1 consistently considered section 504 to be enacted pursuant to the Fourteenth Amendment. See  
2 *Clark*, 123 F.3d at 1271; *Atascadero-*, 473 U.S. at 244 n.4 (1985); *Welch v. Texas Dep't of*  
3 *Highways & Pub. Tramp.*, 483 U.S. 468,472 n.2, 107 S. Ct. 2941 (1987).

4 The 5-4 Supreme Court decision in *Garrett* did not address these points that are relevant  
5 to the Title II analysis. Given that this case is in state court, and that even if it were in federal  
6 court there would be no firm basis on which to dismiss the damage claims, summary judgment  
7 should be denied on this point.

## 9 1. Conclusion

10 For the foregoing reasons, the State's summary judgment motion should be denied.

11 DATED this 17th day of September, 2001.

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15  
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