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THE HONORABLE DAVID A. NICHOLS

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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' REPLY IN SUPPORT OF SUMMARY JUDGMENT ON ADA, RHA, AND WLAD CLAIMS

I. INTRODUCTION

Plaintiffs' ADA, RHA, and WLAD claims must fail because they have failed to identify a single public service or benefit that the State has denied them. Apparently conceding that the State has not denied them any tangible service or benefit, Plaintiffs cling to their discrimination claims by asserting they have been denied "stable and permanent homes." "Stable and permanent homes" are not a State-provided service, but rather the goal of foster care. The United States Supreme Court has recognized the distinction between goals and services or benefits in ADA and RHA claims. A suit must be premised on a denial of services or benefits, not a state's alleged failure to meet its goals.

Furthermore, Plaintiffs have failed to assert that disabled foster children are treated differently than non-disabled foster children. Despite Plaintiffs' protestations, this is in fact a

DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT ON ADA, RHA, AND WLAD CLAIMS - 1

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1 requirement of a prima facie case under the ADA, RHA, and WLAD. AS Plaintiffs have  
2 conceded that the State does not provide able foster children any services that it does not provide  
3 disabled foster children, they have effectively conceded their ADA, RHA, and WLAD claims.  
4 Instead of arguing that Plaintiffs have been denied benefits or services, they request new ones.  
5 Case law is clear that neither the ADA, RHA, or WLAD requires states to add any services or  
6 benefits not provided to non-disabled individuals.

7 Another noteworthy concession is Plaintiffs' admission that no court in any jurisdiction  
8 has recognized reactive attachment disorder ("RAD") as a disability. In fact, Plaintiffs have  
9 failed to cite any case holding that any of the disorders of which they complain is a disability.  
10 Moreover, although conceding that a finding of disability hinges on a finding that they are unable  
11 to participate in "major life activities," Plaintiffs have also failed to show how any of these  
12 disorders affects any "major life activity."

13 Finally, Plaintiffs' argument that damages are available under the ADA and RHA in  
14 suits against states defies United States Supreme Court precedent. Every court -that has  
15 addressed this issue since the landmark Garrett case has held that the Eleventh Amendment bars  
16 such suits. Additionally, Supreme Court precedent is absolutely clear that Eleventh Amendment  
17 immunity applies equally well to suits in state courts as to suits in federal courts.

## 18 II. ARGUMENT

### 19 A. Plaintiffs have not identified a single public service that the State has denied 20 them.

21 Plaintiffs claim only that the State has denied them "permanent and stable homes."  
22 "Permanent and stable homes" are not a public service or benefit. Rather, finding "stable and  
23 permanent homes" is the goal of State foster care. The United States Supreme Court recognized  
24 a similar distinction in Alexander v. Choate, 469 U.S. 287, 303 (1985), a case upon which  
25 Plaintiffs inexplicably rely. In Choate, the Court rejected the plaintiffs' suggestion that "the

benefit provided through state Medicaid programs is the amorphous objective of ‘adequate health care.’” Id. Calling this proposition “simply unsound,” the Court explained:

[T]he benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered-not “adequate health care.”

Id.

Plaintiffs’ suggestion that “stable and permanent homes” are a State-provided benefit is equally “unsound.” Id. Like adequate health care, “stable and permanent homes” are the “general aim” and “amorphous objective” that the specific benefits of the foster care program aim to achieve. Id. However, “the benefit provided remains the individual services offered,” not “stable and permanent homes.” Id.

Plaintiffs’ own inconsistent pleading reveals the fallacy of their current argument. In their Complaint, Plaintiffs identified “stable and permanent homes” as the “reasonable accommodation” that the State should have provided to enable Plaintiffs to enjoy State benefits and services. In their opposition to the State’s successful motion for partial summary judgment re: procedural safeguards, Plaintiffs argued that “stable and permanent homes” were a “constitutional right.” Plaintiffs now argue that a “stable and permanent home” is a State benefit. In fact, a “stable and permanent home” is not a reasonable accommodation, a constitutional right, or a State-provided benefit. It is, as the State has consistently maintained, a goal. Moreover, throughout this lawsuit, Plaintiffs have argued that the State has failed to provide foster children, disabled or not, with stable and permanent homes. Now, however, Plaintiffs’ argument rests on the supposition that the State provides all nondisabled foster children with stable and permanent homes-an interesting shift in position, to say the least.

The cases upon which Plaintiffs rely support the dismissal of their claims. Plaintiffs rely heavily upon Crowder v. Kitagawa, 81 F.3d 1480 (9<sup>th</sup> Cir. 1996). Defendants welcome the Court

i' 1 to apply the rules contained in Crowder, which support the dismissal of Plaintiffs' claims. In  
2 Crowder, the court explained that Congress did not intend "to classify a type of discrimination as  
3 either 'deliberate' or 'disparate impact,'" which Plaintiffs request this Court to do. Id. at 1484.  
4 Rather, a prima facie case is established if disabled plaintiffs show that they were denied a public  
5 service or benefit which others are provided. I& This is the precise standard Defendants stated  
6 in their opening brief, the precise standard which this Court should apply, and the precise  
7 standard that Plaintiffs have wholly failed to meet. In Crowder, the disabled plaintiffs were  
8 denied public benefits by a Hawaii law requiring them to quarantine their aid dogs for several  
9 months after entering the state. Id. at 1485. The court found that this law denied the disabled  
10 plaintiffs access to specific public services that the state provided to others, "such as public  
11 transportation, public parks, government buildings and facilities, and tourist attractions." Id. In  
12 contrast, here Plaintiffs have not identified a single public service or benefit that they are denied  
13 that others receive. As shown above, the other case upon which Plaintiffs rely, Alexander v.  
i 1 Choate, also supports the dismissal of Plaintiffs' claims.

15 **B. Plaintiffs failed to suggest any reasonable accommodation that would enable**  
16 **them to enjoy "stable and permanent homes."**

17 Plaintiffs' attempt to force the State to show that it cannot make any reasonable  
18 accommodations turns the analysis on its head. The State -does not nave-the burden to show that  
19 no reasonable accommodations can be made. Rather, Plaintiffs must suggest a reasonable  
20 accommodation. Wang v. Regents of the University of California, 192 F.3d 807, 816-17 (9<sup>th</sup> Cir.  
21 1999). They have not. As such, the State need not show that all potential accommodations are  
22 unreasonable.

23 However, the types of changes that Plaintiffs have urged are necessary throughout this  
24 lawsuit are not reasonable accommodations-they are additional services that are not required  
25 under the ADA and RI-IA. See Bowen v. American Hospital Association, 476 U.S. 610, 640  
(1986) (holding that RHA does not require special services or affirmative assistance to disabled);

1 Smith v. Robinson, 468 U.S. 992, 1018 (1984) (same); Southeaster Community CollePe v.  
2 Davis, 442 U.S. 397, 410-11 (1979) same). The Washington Supreme Court was equally clear  
3 that affirmative services are not required under the WLAD. Fell v. Spokane Transit Authority,  
4 128 Wn.2d 618, 63 1, 911 P.2d 13 19 (1996) (“The statute was not intended to entitle certain  
5 protected classes to some unspecified and unlimited level of services”) (emphasis original). In  
6 fact, Plaintiffs admit that these statutes “cannot require the creation of new programs or  
7 benefits.” Response, p. 21. Nonetheless, the only change alluded to in Plaintiffs’ thirty-seven  
8 page brief is the provision of more mental healthcare. As fully explained in Defendants’ opening  
9 brief and clearly established by the litany of cases cited therein, such additional services are  
10 simply not required under either statute. Moreover, Plaintiffs have provided no evidence to  
11 controvert Defendants’ valid explanation for its inability to provide all the services Plaintiffs  
12 would like-financial unfeasibility.

13 Plaintiffs make no attempt to distinguish their requests from those rejected in Charlie H.  
14 v. Whitman, 83 F.Supp.2d 476, 500-02 (D. N.J. 2000), one of the many cases holding that the  
15 ADA and RHA do not require the provision of affirmative services. Plaintiffs’ failure to address  
16 Charlie H. is understandable, as the case is virtually indistinguishable. As explained in  
17 Defendants’ opening brief, the Charlie H. plaintiffs alleged that New Jersey violated the ADA  
18 and RHA by failing to provide disabled foster children with “services necessary for them to  
19 participate fully in the state foster care system,” failing to place children in placements best  
20 suited to their needs, failing to provide training for foster parents, and failing to accede to foster  
21 parents’ requests for services. *Id.* These were not reasonable accommodations, but rather  
22 represented a challenge to “the substance of services provided,” which was not actionable under  
23 the ADA or RHA. *Id.* Plaintiffs’ requests for additional mental health care and foster parent  
24 training are also not reasonable accommodations, but additional services. Like the plaintiffs in  
25 Charlie H., Plaintiffs admit “that services are very nearly identical for able and disabled foster

II 1 children,” but complain that these “services are not effective for disabled children.” Response,  
2 p-19. As in Charlie H., such complaints are categorically insufficient to establish disability  
3 discrimination claims.

4 **C. Plaintiffs have cited no legal authority that any of the disorders of which they**  
5 **complain is a “disability” under the ADA, RHA, or WLAD.**

6 Plaintiffs acknowledge that if they are not disabled, they cannot bring disability  
7 discrimination claims. Although the **vast** majority of Plaintiffs’ brief is dedicated to showing  
8 that Plaintiffs are disabled, Plaintiffs fail to cite a single case that recognizes any of their alleged  
9 disorders as a disability under any of the three statutes upon which they base their claims. In  
10 fact, no court has ever found RAD to be a disability, in any context. One of the few cases  
11 referencing RAD came from our own Supreme Court, and cast dispersion on RAD and similar  
12 psychiatric “disorders.” T.B. v. CPC Fairfax Hospital, 129 Wn.2d 439, 462 n.2, 918 P.2d 497  
13 (1996). Plaintiffs’ attempt to brush off this criticism of RAD because it was a plurality opinion  
is hardly persuasive.

14 Moreover, Plaintiffs acknowledge that the appropriate test for determining whether one is  
15 disabled is whether the person suffers **from** an impairment that substantially limits “major life  
16 activities,” yet fail to argue that any Plaintiff has such an impairment. Response, p. 4. Plaintiffs  
17 describe “major life activities”-as- “functions-such as caring for one’s self, performing manual  
18 tasks, walking, seeing, hearing, speaking, breathing, learning and working.” Id. However, they  
19 fail to even argue that Plaintiffs are unable to care for themselves, perform simple tasks, walk,  
20 see, hear, speak, breathe, or work. As such, according to their own brief, Plaintiffs have failed to  
21 establish a prima facie case that they are disabled.

22 **D. Damages are not available against the State in ADA and RHA claims.**

23 The Supreme Court recently held that claims against states for money damages under  
24 Title I of the ADA are not cognizable due to states’ sovereign immunity. Board of Trustees v.  
25 Garrett, 531 U.S. 356 (2001). The Garrett Court’s reasoning applies equally well to claims under

1 Title II of the ADA, and Plaintiffs make no attempt to argue that it does not. Instead, Plaintiffs  
2 attempt to avoid the result mandated by Garrett by asserting the preposterous proposition that  
3 states are immune from such suits in federal courts, but not in their own **courts**. The United  
4 States Supreme Court conclusively rejected this proposition in Alden v. Maine, 527 U.S. 706  
5 (1999) (holding that Congress' failure to successfully abrogate states' sovereign immunity for  
6 FLSA claims precluded such claims in both federal and state courts). The Alden Court was  
7 unequivocally clear that state immunity "does not turn on the forum in which the suits were  
8 prosecuted, but extends to state-court suits as well." a at 733. The Court explained that,  
9 although immunity is often expressed as "Eleventh Amendment immunity," this is simply short-  
10 hand for sovereign immunity, which in fact pre-dates the Constitution itself, and w& not created  
11 by the Eleventh Amendment. Irl. at 728-30. It thus soundly rejected the precise argument raised  
12 by Plaintiffs:

13 To read this [Constitutional] history as permitting the inference that the  
14 Constitution stripped the States of immunity in their own courts and allowed  
15 Congress to subject them to suit there would turn on its head the concern of the  
16 founding generation-that Article III might be used to circumvent state-court  
17 immunity. In light of the historical record it is difficult to conceive that the  
18 Constitution would have been adopted if it had been understood to strip the States  
19 of immunity from suit in their own courts and cede to the Federal Government a  
20 power to subject nonconsenting States to private suits in these fora.

21 Id. at 743. See also In re Ellet, 2001 U.S. App. LEXIS 19184 (g<sup>th</sup> Cir., July 16, 2001, as  
22 modified Aug. 27, 2001) ("Alden.. held that the 11 th Amendment bars Congress from subjecting  
23 non-consenting States to suit in state as well as federal court.")

24 Plaintiffs then acknowledge that virtually every court that has addressed the issue since  
25 Garrett has held that damages suits against states under ADA Title II are not cognizable, but urge  
this Court to forge a divergent path. Plaintiffs rely on Mar&ins v. Paxton, 753 N.E.2d 918  
(2001), which held only that Garrett did not apply because the plaintiffs sought only injunctive  
relief. Mar&ins has no bearing, and expressed no opinion, on whether damages suits were

1 cognizable. The only other post-Garrett case cited by Plaintiffs is an unpublished decision, with  
2 no precedential value, in which the Ninth Circuit merely declined to reconsider the immunity  
3 issue. Wroncy v. Oregon Dept. of Transp., 2001 U.S. App. LEXIS 8761 (g<sup>th</sup> Cir. 2001). Relying  
4 solely on this dubious legal authority, Plaintiffs boldly request this court to ignore the Supreme  
5 Court's reasoning in Garrett and rule against the six courts that have, post-Garrett, held that Title  
6 II damages suits are not cognizable against states. See Thompson v. Colorado, 258 F.3d 1241  
7 (10<sup>th</sup> Cir. 2001); Jones v. Pennsylvania, 2001 U.S. Dist. LEXIS 14549, \*7 (E.D. Pa. Aug. 29,  
8 2001); Neiberger v. Hawkins, 2001 U.S. Dist. LEXIS 9638 (D. Colo. July 9, 2001); Doe v.  
9 Division or Youth & Fairiily Set%., 148 F.Supp.2d 462 (D. N.J. 2001); Koslow v. Pennsylvania,  
10 2001 U.S. Dist. LEXIS 11856, \*4 (E.D. Pa. May 31, 2001); Mincewicz v. Parker; 2001 WL  
11 256162 (D. Corm. Feb. 26 2001). Such a decision would be an anomaly, to say the least.

### 12 III. CONCLUSION

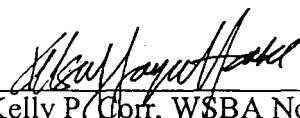
13 For the foregoing reasons, Defendants respectfully request that their Motion for Partial  
14 Summary Judgment Re: Americans With Disabilities Act, National Rehabilitation Act, and  
15 Washington Law Against Discrimination be granted, and that Plaintiffs' claims under these  
16 statutes be dismissed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

17 DATED this 24th day of Septemer, 2001.

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