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Hon. David A. Nichols

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

JESSICA BRAAM, et al.,

Plaintiffs,

vs.

STATE OF WASHINGTON, et al.,

Defendants.

No. 98-2-01570-1

PLAINTIFFS' BRIEF IN SUPPORT OF
RENEWED MOTION TO PROHIBIT
ADMISSION OF EVIDENCE OF
INADEQUATE FUNDING AS A
DEFENSE AND IN SUPPORT OF JURY
INSTRUCTIONS

I. Introduction

This Court recently ruled that the only issue that will be submitted to the jury in this case is whether the State is complying with constitutional requirements to adequately fund education for the plaintiff class. While the children preserve their objection and do not waive their objection to a jury trial on remaining injunctive issues, it becomes even more important for the jury to be properly instructed given the potential for jury confusion.

Now that the Court has limited the jury's consideration to constitutional issues, the Children submit the following further briefing on whether the State can claim that lack of funds excuses it from performing its constitutional duty. As is shown below, the law is clear. On an injunctive claim for failure to follow constitutional requirements, lack

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f money is not a defense. If evidence of lack of money leading to the State’s inability to
 1 ,110~ its duties is to be admitted at all, it should be admitted only as evidence that the
 2 tate is *not* meeting the substantive due process standard, and if the Court decides to
 3 dmit budgetary evidence, the jury should be so instructed. In addition, the defendants
 4 hould not be able to argue that any recent improvements shield them from liability for an
 5 ljunction.

II. Lack of Funds Is Not a Defense to Constitutional Claims for Injunctive Relief.

The State contends that the lack of available funding justifies or explains its
 10 iolation of the constitutional rights of the plaintiffs.

There is no budgetary escape hatch from the mandates and protections of the
 12 nited States Constitution. Therefore, this Court should prohibit the State from arguing
 13 3 the jury that the State’s budgetary limits could be an excuse for failing to meet
 14 onstitutional mandates. Limits on funding are not a defense to the Constitutional issues
 15 hat remain in this case.

As the cases cited below embody, the reason why budgetary limits do not
 18 onstitute a defense when the State has violated the Constitutional rights of individuals is
 19 traightfonvard. After all, if states could duck their constitutional obligations simply by
 20 efusing to fund them, the rights the Constitution affords would be rendered illusory

Take, for example, the constitutional rights of those accused of crimes - the right
 23 o counsel. If applied to cases involving the right to counsel when accused, the State’s
 24 position here would boil down to this: The State may deny the accused legal counsel, so
 25 ong as the State couches that denial in budgetary terms. Any constitutional right could

1 e violated or eviscerated by the State's simple failure to fund them. Food for prisoners,
2 medical treatment for prisoners, voting rights in minority neighborhoods, etc. According
3 to the State, there is no enforceable obligation to fund programs that are necessary to
4 protect the constitutional rights of individuals.

5 Judging from the paucity of cases on this subject, very few state governments
6 have even directly made such an argument. Not surprisingly, in the few cases where
7 states have dared to do so, courts have flatly rejected the argument. In the words of the
8 Supreme Court, "the cost of protecting a constitutional right cannot justify its total
9 denial." One court put it even more bluntly:

10 *Inadequate resources can never be an adequate justification for the state's*
11 *depriving any person of his constitutional rights.* If the state cannot obtain
12 the resources to detain persons awaiting trial in accordance with minimum
13 constitutional standards, then the state simply will not be permitted to
14 detain such persons. The final decision may, indeed, rest with the qualified
15 voters of the governmental unit involved. This Court, of course, cannot
16 require the voters to make available the resources needed by public
17 officials to meet constitutional standards, but it can and must require the
18 release of persons held under conditions which violate their constitutional
19 rights, at least where the correction of such conditions is not brought about
20 within a reasonable time.

21 *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) (emphasis added).²

22 In *Brooks vs. Morrow*, 601 F. Supp. 1055, 1060 (D.D. N.C. 1984), the Federal
23 Court noted.

24 *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977) (holding that prisoner's constitutional
25 right to access to courts encompasses right to access to law library or alternative means of legal
26 knowledge). *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996),
subsequently narrowed a portion of the *BOW&* case that addressed issues pertaining to
prisoner's standing to challenge the absence of law library access, but did not challenge the
principle quoted above in the text.

Courts have also confirmed that state budgetary restrictions are no defense to a state's failure to
comply with a federal statute. See *Lapeer County Medical Care Facility v. State of Mich.*
through Dept. of Social Svcs., 765 F. Supp. 1291 (W.D. Mich. 1991) (state Medicaid agency may
consider budgetary constraints, but such constraints cannot excuse noncompliance with federal
Medicaid law). -

Lack of funding or of established alternatives is not a factor which may be considered in determining the scope of this constitutional right. . . Nor are budgetary constraints restrictive of a court's equitable authority and power in fashioning prospective relief after determining that this constitutional right has been violated. (emphasis added.)

In *Wyatt vs. Stickney*, 344 F. Supp. 387 (M.D. of Ala., 1972), the Federal trial court reviewed the conditions and treatment of the mentally ill in Alabama state facilities. The conditions and lack of treatment worsened after the State legislature cut the budget. The Court found the conditions and lack of treatment violated the constitutional rights of 11% mentally ill noting that "adequate and effective treatment is constitutionally required". *Id.* at 390. The Court confronted the State's position that the legislature had failed to fund the treatment and entered an extensive order which included the hiring of new staff, provisions for treatment and other programs designed to bring the conditions and treatment of the mentally ill within constitutional limitations. The Court further noted that to the extent the State continued to fail to fund the necessary reforms, the Court was prepared to consider the Plaintiffs request that the Defendant be ordered to sale assets and refrain from certain expenditures to fund the court's ordered services.

In the event, though, that the legislature fails to satisfy its well defined constitutional obligation and the Mental Health Board, because of lack of funding or any other legally insufficient reason, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including the appointing a master, to ensure that proper funding is realized. .

Id. at 394.

On appeal, the Fifth Circuit upheld the *Wyatt* trial court decision. The Court of Appeals took note of the State's argument that the district's court's order is in effect an order requiring the state to furnish a particular service. In flatly rejecting the State's argument, the Court stated:

We find these arguments unpersuasive. . . "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations". (Citations omitted) Inadequate resources can never be an adequate justification for the state's depriving any

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1 right” The obligation of Respondents [prison officials] to eliminate
2 unconstitutionality does not depend upon what the legislature may do. (Citation
3 omitted).

4 d. at 1315. The Fifth Circuit stated that it was prepared to order the State to fund the
5 program to eliminate the unconstitutionality. *Wyatt* was cited with approval by the
6 Ninth Circuit in *Ohlinger vs. Watson*, 652 F.2d 775, 778 (1980) with regard to the State’s
7 failure to provide treatment to civilly committed sexual predators.

8 In *Holt v. Sawyer*, 309 F. Supp. 362, 385 (1970) affirmed 442 F.2d 304, 305 (8th
9 Cir., 1971), the trial court noted (with approval by the Fifth Circuit Court of Appeals):

10 Let there be no mistake in the matter; the obligation of the Respondent to
11 eliminate existing unconstitutionality does not depend upon what the legislature
12 may do, or upon what the Governor may do, or indeed, upon what the
13 Respondents may actually be able to accomplish. If Arkansas is going to operate
14 a Penitentiary System, it is going to have to be a system that is countenanced by
15 the Constitution of the United States.

16 Courts in cases in which foster care systems were challenged have laid down the
17 same law. As the court in *Doe v. New York City Dep’t of Social Services* put it:

18 “[c]oncern with the availability of resources is not part of the
19 constitutionally acceptable decision-making process.”³

20 *Doe* is particularly relevant since that case, like this one, involved a challenge to
21 certain governmental foster care practices, such as temporarily placing foster children in
22 homeless shelters. The government’s own employees conceded that these placements
23 weren’t “reasonable, appropriate and adequate,” but complained that its actions should be
24 viewed in the “context of the current available resources and circumstances we face.”
25 Using the language quoted above, the court rejected this argument out of hand and
26 ordered injunctive relief.

3670 F. Supp. 1145, 1184 (S.D.N.Y. 1987).

Other courts have all agreed that budgetary constraints are no defense to liability

1)r prospective injunctive relief. In the words of one:

2 Defendant asserts that it is exclusively within the realm of state
3 government to decide how to allocate its resources. This argument is
4 unsound. Concern with the availability of resources is rarely part of the
5 constitutional decision-making process where a recognized constitutional
6 right is violated.⁴

7 In the words of another, “professional judgment must be based on what is
8 appropriate and not on what is available.”⁵

9 This court has commented on the case pending in Federal Court before the
10 [onorable William L. Dwyer on the rights of civilly committed sexual predators to
11 mental health treatment. Judge Dwyer’s ruling, consistent with all other cases, is clear
12 that the State may not defend the claim by alleging the legislature failed to fund
13 treatment. Citing *Youngberg*, Judge Dwyer found funding no defense to a claim for
14 injunctive relief:

15 The Fourteenth Amendment Due Process Clause of the United States
16 Constitution requires state officials to provide civilly-committed persons, such as
17 these plaintiffs, with access to mental health treatment that gives them a realistic
18 opportunity to be cured or to improve the mental condition for which they were
19 confined. See *Youngberg v. Romeo*, 457 U.S. 307, 319-22, 102 S.Ct. 2452, 73
20 L.Ed.2d 28 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir.1980). This
21 rule applies to sex offenders, and “[Z]ack offends, staff facilities cannot justify,
22 the State’s failure to provide [those confined] with that treatment necessary for
23 rehabilitation.” *Ohlinger v. Watson*, 652 F.2d at 778-79.

24 *Uray v. Selig*, 108 F.Supp.2d 1148, 1151 (W.D.Wash.2000) (emphasis added). Judge
25 Dwyer ordered reforms and treatment even though the State legislature had not funded
26 these programs and treatment.

26 *B.H. v. Jolzson*, 715 F. Supp. 1387, 1398 (N.D. Ill. 1989).

Leisz v. Kavanagh, 629 F. Supp. 1487, 1495 (N.D. Tex. 1986) & DAUGERT, PLLC

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1 Here, if the State of Washington cannot defend the withholding of mental health
2 treatment for civilly committed sexual predators by a defense of “a lack of funds”, it
3 certainly cannot do so with civilly committed children in its foster care.

4 Attached are the decisions in Turay (Judge Dryer), Ohlinger, *Brooks* and Wyatt (trial
5 and Court of Appeals). The Court may find these cases instructive not only for the clear rulings
6 on the issue of inadequate funding, but for the duty and nature of the injunctive remedy the
7 courts fashioned to correct the unconstitutional treatment.

8 **11. Evidence of Inadequate Funding Is Only Admissible In Claims for Damages
9 Against Individuals and Then Only to Establish Good Faith Immunity.
Neither of these Claims Exist in the Present Litigation.**

10 The State may suggest that a different result is obtained under the standard
11 established in *Youngberg v. Romeo*, 457 U.S. 301, 102 S. Ct. 2452, 73 L. Ed. 2d 28
12 (1982), and that states are free to introduce evidence of budgetary restrictions to
13 show that the conduct of its professionals is not a “substantial departure from
14 accepted professional judgment, practice, or standards.” That simply is not true.

15 *Youngberg* discussed a limited role for the admission of budget data, but only on
16 the question whether *damages* against an *individual* should be imposed, not on the issue
17 whether the constitutional standard has been met. Immediately after enunciating the
18 constitutional standard of liability, the Supreme Court explained:
19

20 In an action for damages against a professional in his
21 individual capacity, however, the professional will not be
22 liable if he was unable to satisfy his normal professional
23 standards because of budgetary constraints; in such a
situation, good-faith immunity would bar liability.

24 *Id.* at 307, 102 S. Ct. at 2462 (emphasis added).

Here, of course, the plaintiffs have brought no claims against anyone in his or her individual capacity. Nor is this an action for damages, now that the parties have settled the damages portion of the case. This is a suit for prospective injunctive relief.

Moreover, as the quote above reflects, lack of funds is not relevant to the question whether the individual's conduct actually met accepted professional standards. Rather, it merely supports a claim of personal immunity from damages liability for failing to meet those standards.

Similarly, in determining the ---constitut~~~~~f~prison conditions under *Youngberg*, the Sixth Circuit held:

In *Youngberg*, . . . the Court indicated that budgetary constraints could cloak an individual with good-faith immunity. Such immunity based on budgetary constraints does not, of course, excuse the constitutional violations themselves, or prevent court orders that require the government to correct deficiencies.⁶

In the present case, of course, the Plaintiffs now seek an order requiring the government to correct deficiencies, not damages against any individual. Thus the State may not defend on a claim of inadequate funds.

IV. The Court Should Exclude the Defense From Consideration by the Jury

Notably, the cases cited above involved injunctive trials to courts. The governmental entities presented budgetary limitations to the courts sitting without juries and argued that those limitations could excuse them from constitutional requirements, arguments that the courts rejected in the courts' extensive findings and opinions. In the present case, because there is a jury, it would be extremely prejudicial and confusing to even allow extensive evidence on budget limitations and argument by the State that this

⁶ *Birell v. Brown*, 867 F.2d 956, 958 (6th Cir. 1989) (citations

could excuse constitutional violations, because such evidence and argument would
1 *suggest to the jury there is a defense that, unbeknownst to the jury, does not exist. A
2 court can read briefs and cases and decide to reject such this unavailable “defense,” but a
3 jury cannot, and so the evidence should not be presented to the jury.

4
5 Therefore, assuming that only a constitutional issue will be presented to the jury,
6 the State’s proposed budgetary evidence should be excluded as irrelevant and unduly
7 prejudicial. Plaintiffs previously suggested that the State might have a limited budget
8 defense if any of the statutes on which plaintiffs rely, provided that the State’s duties
9 were to be performed “within available resources.” However, assuming that only
10 constitutional issues are presented, this defense is not available. For this reason, plaintiffs
11 will not rely - even on the question of what the professional standards are that the State
12 must follow - on any statute that includes the words “within available resources.”
13 Therefore, budget shortfall evidence is irrelevant.

14
15 The State may try to claim that disallowing this defense will leave the State
16 without a defense. This would not be true - the State can always defend on the basis that
17 it is doing what the Constitution requires. But defending, in the injunctive phase, on the
18 basis that money is not available would not be permissible under constitutional caselaw.

19
20 The only possible relevance of budgetary limitations would not be as a defense to
21 constitutional injunctive liability, but instead could only be used to show the State has not
22 met constitutional standards. Courts have concluded that the lack of sufficient resources
23 actually *supports* a finding of liability for a constitutional injunction. The reason, these
24 courts have explained, is that evidence that a professional judgment was made to conform
25
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to available resources tends to prove a substantial departure from accepted professional standards.⁷ As one court reasoned:

Lack of funding or of established alternatives is not a factor, which may be considered in determining the scope of this constitutional right [to professionally prescribed treatment] *To the extent that a professional's judgment of the appropriate treatment is shown to have been modified to fit what is available, that judgment likely has become a "substantial departure from accepted professional judgment, practice, or standards."*

Thus, if the evidence were to be admitted, plaintiffs would be entitled to an instruction setting forth that if it-to -be used at all, it is evidence of the State's noncompliance with constitutional mandates.

The better course, however, would be to exclude the evidence because if defendants are allowed to present a lot of evidence of budgetary limitations, this would prejudicially suggest to the jury that the State can rely on such evidence to support a defense. Since there is no legal support for that defense, the Court should determine that budget limit evidence should not come in.

V. Defendants Should Be Precluded From Suggesting to the Jury That Recent Improvements Are -A Complete Defense to Liability For An Injunction.

Injunctive relief is appropriate even where recent changes show improvements in unconstitutional conditions unless the State can meet a heavy burden to show no chance of recurrence. The State may present evidence of very recent changes in some aspects of the foster care system that the State alleges will alleviate some of the problems

⁷ *Id.*; *Lelsz*, 629 F. Supp. at 1495.

⁸ *Brooks*, 601 F. Supp. at 1059-60 (quoting *Youngberg*, 457 U.S. at 323, 102 S.Ct. at 2462) (emphasis- added); see also *Lelsz*, 629 F. Supp. at 1495 ("Evidence that the professional judgment was made to conform to what was available may indicate that the judgment was a 'substantial departure from accepted professional judgment, practice or standards.'").

1 experienced by members of the plaintiff class. The State obviously can argue that it has
2 never violated the constitutional rights of the plaintiff class. However, the State should
3 It be permitted to argue that, “yes, we may have been doing the wrong thing, but these
4 law improvements have fixed it” and are a complete defense to injunctive relief, or even
5 more forward-looking, as the State’s counsel has repeatedly suggested, “there is hope for
6 the future.”

7 In *Allee v. Medrano*, 416 U.S. 802, 94 S. Ct. 2191 (1974) the court held that
8 despite the cessation of the offending behavior in question, a claim was not necessarily
9 rendered moot. *Id.*, 416 U.S. at 811. “It is settled that an action for an injunction does not
10 become moot merely because the conduct complained of has terminated, if there is a
11 possibility of recurrence, because otherwise the defendants would be free to return to
12 their old ways.” *Id.*, 416 U.S. at 810 (internal quotes, citations omitted). That is exactly
13 the situation here. Assuming a constitutional violation has occurred, the State would be
14 free, without an injunction, to “return” to denials of services in contravention of the
15 Constitution and state and federal statutes.

16
17 The United States Supreme Court recently reiterated this doctrine in the strongest
18 terms:

19
20 It is well settled that “a defendant’s voluntary cessation of a
21 challenged practice does not deprive a federal court of its power to
22 determine the legality of the practice.” *Ci@ of Mesquite*, 455 U.S. at 289.
23 “[I]f it did, the courts would be compelled to leave ‘[t]he defendant . . . free
24 to return to his old ways.’ ” *Id.*, at 289, n. 10 (citing *United States v. W. T.*
25 *Grant Co.*, 345 U.S. 629,632 (1953)). In accordance with this principle,
26 the standard we have announced for determining whether a case has been
mooted by the defendant’s voluntary conduct is stringent: “A case might
become moot if subsequent events made it absolutely clear that the
allegedly wrong+ behavior could not reasonably be expected to recur.”
United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199,
203 (1968). The “heavy burden of persua[ding]” the court that the

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challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. I&d.

1 ; *i-tends of the Earth v. Laidlaw Environmental Sews.*, **120 S. Ct. 693, 708**

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3 2000)(emphasis added). And on the same day, the Court applied this doctrine to a
4 :onstitutional claim. *Adarand Constructors, Inc. v. Slater*, 120 S.Ct. 722 (2000).

5 Plaintiffs are not proposing jury instructions on this specific issue, because we
6 relieve the question whether improvements have rendered moot the need for an
7 njunction is a matter for the Court in deciding whether to issue an injunction if liability is
8. Established. But nevertheless this doctrine should inform both jury instructions and the
9 limits of argument to the jury. The jury should be asked simply whether the Children
10 have shown a pattern or practice of violations of the rights of the plaintiff class, and the
11 state should not be allowed to argue that while the class's rights may have been violated
12 up until the recent past, the jury should not return a verdict for plaintiffs if the jury
13 relieves that very recent changes and "hope for the future" will cure the problems. The
14 jury should be charged to determine the basic facts of liability, not matters that go to the
15 necessity (or lack thereof) for entering an injunction.
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18 This important distinction between liability and issuance of an injunction was
19 clearly set out recently in a case involving foster care:

20 For purposes of determining whether conditions were constitutionally
21 adequate, the defendants' remedial measures are not relevant. Remedial measures
22 will be considered (1) insofar as they were taken prior to the litigation in
23 connection with the defendants' state of mind; and (2) for the purpose of framing
24 an appropriate remedy.

25 *Joe v. New York City Dept. of Social Services*, 670 F. Supp. 1145, 1180 n.53 (S.D.N.Y.
26 ,1987) (emphasis added). The jury will be asked to determine compliance with

connection with the defendants' state of mind; and (2) for the purpose of framing an appropriate remedy.

1
2 *Doe v. New York City Dept. of Social Services*, 670 F. Supp. 1145, 1180 n.53 (S.D.N.Y.
3 J87) (emphasis added). The jury will be asked to determine compliance with
4 Institutional standards, not whether the State has fixed any constitutional problems that
5 'e found to exist.'

6 Respectfully submitted November 19, 2001,



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9 By: Timothy C. Farris, WSBA #7264
10 Cynthia Novotny, WSBA #26655
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24 If the State is allowed to talk about hope for the future, then this will render relevant evidence
25 regarding the upcoming projected State revenue shortfall, including the Governor's request that
26 all agencies submit items for a 15% budget cut, and the Children will bring in this evidence. The
State cannot be permitted to talk about claimed hope without the full picture being presented.

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