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JAMES NORMAN and PAULETTE PATTERSON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

GORDON JOHNSON, Director, Illinois Department of Children and Family Services,

Defendant.

No. 89 C 1624 /012918

MEMORANDUM OPINION AND ORDER

This is a putative class action challenging certain practices of the Illinois Department of Children and Family Services ("DCFS") as being in violation of relevant federal statutes and the federal Constitution. Plaintiffs' motion for class certification and for preliminary relief for the named class members was referred to a magistrate for a report and recommendation. After a hearing, the magistrate issued recommended findings of fact and conclusions of law. The magistrate recommended granting a preliminary injunction as to plaintiffs Wanda Hilliard and Joann Mitchell and denying preliminary relief to plaintiff Gina Johnson.[1] Defendant

[1] The recommendation as to class certification has not yet been issued.

objected to the recommendation as regards Hilliard and Mitchell.[2] No objection was raised to the recommended denial of relief for Johnson.

As stated in the First Amended Complaint, plaintiffs "are impoverished parents and legal guardians who have lost, are at risk of losing, will lose, or cannot regain custody of their children from the Illinois Department of Children and Family Services ('DCFS') because they are homeless or unable to provide food or shelter for their children." Defendant Gordon Johnson is the director of DCFS, an agency of the State of Illinois. According to the complaint,

> Plaintiffs challenge defendant's policies and practices of (1) taking and retaining custody of children from impoverished parents and legal guardians because of their inability to obtain cash, food, shelter, or other subsistence, while failing to assist the parents and children to meet these needs; (2) failing to assist them to secure cash, food, shelter or other subsistence through the coordination of services to needy families and otherwise; (3) failing to make reasonable efforts to prevent removal of plaintiffs' children and reunite families; and (4) abridging the liberty and property interests of parents in retaining custody of their children and maintaining the means to support themselves and their families. Plaintiffs allege that these

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[2] Leave was reluctantly granted to defendant to file a 50-page brief in support of his objections to the magistrate's report. It is now apparent that such a lengthy brief was burdensome. It is filled with repetitive arguments. See Fleming v. County of Kane, 855 F.2d 496, 497 (7th Cir. 1988) (per curiam). Also, defendant (and, to a lesser degree, plaintiffs) seek to incorporate arguments contained in the briefs before the magistrate into the already oversized briefs. Cf. id. at 498. Surprisingly, despite the length of the briefs, both parties make a number of assertions regarding legal rules without citing authority to support their assertions, thereby further imposing an undue burden on the court.

> policies and practices violate provisions of Title IV-B and IV-E of the Social Security Act, as amended by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620 et seq. and 671 et seq., and the First and Fourteenth Amendments to the United States Constitution.

Plaintiffs seek only injunctive and declaratory relief; no damages are sought.

Stated succinctly, the magistrate found that plaintiffs Hilliard, Mitchell, and Johnson were separated from their children and could not be reunited with them, at least in part, because of their inability to provide adequate housing for the children. The magistrate found that, in violation of 42 U.S.C. § 671(a)(15),[3] DCFS typically does not make a reasonable effort to assist such parents in finding and obtaining housing so that they can be reunited with their children. However, with respect to Johnson, the magistrate found a reasonable effort had been made and therefore recommended not granting any relief for Johnson. A preliminary injunction in favor of Hilliard and

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[3] Section 671(a)(15), which is part of the Adoption Assistance and Child Welfare Act of 1980 ("AAA") and included in Title IV-E of the Social Security Act, provides:

> (a) In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which-- . . .
>
> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

Mitchell was recommended. Defendant challenges some of the factual findings supporting this recommendation. His primary arguments, however, are that there is no legal basis for granting the relief recommended either because there is no private right of action or because abstention militates against granting such relief.

FINDINGS OF FACT

Defendant's objections to the magistrate's findings of fact have been examined, as have the transcribed testimony and plaintiffs' response to the objections. No material fact contained in the proposed findings requires revision. The magistrate's recommended findings of fact are adopted.[4]

CONCLUSIONS OF LAW[5]

A number of federal courts, including at least two circuit courts,[6] have held that rights provided for in the AAA are enforceable either under § 1983, L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988), cert. denied, 109 S. Ct. 816 (1989);

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[4] The recommended findings of fact consist of 72 paragraphs and are on pages 2 through 26 of the magistrate's report. The magistrate's report is attached hereto as an appendix.

[5] Any finding of fact which is a conclusion of law shall be deemed to be a conclusion of law as if fully set forth therein. Any conclusion of law that is a finding of fact shall be deemed to be a finding of fact as if fully set forth therein.

[6] Where the Seventh Circuit has not yet spoken on an issue, this court should give the consistent decisions of other circuits substantial deference. Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987).

Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983); Artist M. v. Johnson, 726 F. Supp. 690, 696-97 (N.D. Ill. 1989); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1011 (N.D. Ill. 1989); B.H. v. Johnson, 715 F. Supp. 1387, 1403-04 (N.D. Ill. 1989); Joseph A. v. New Mexico Department of Human Services, 575 F. Supp. 346, 353 (D.N.M. 1983),[7] or because the AAA contains an implied right of private action. Artist M., 726 F. Supp. at 694-96; B.H., 715 F. Supp. at 1404-05. The statute can be enforced pursuant to § 1983;[8] it is unnecessary to determine if an implied right of action also exists.

There is a conflict as to whether § 671(a)(15)(B) creates an enforceable right to "reasonable efforts" to reunify the family. In Artist M., Judge Shadur held that there is an enforceable right to prompt assignment of caseworkers. In determining whether such an enforceable right existed, Judge Shadur relied on the "reasonable efforts" language of § 671(a)(15)(B). In Aristotle P., Judge Williams held that

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[7] In Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987), the Sixth Circuit apparently agreed with Lynch that the rights under the AAA can be enforced pursuant to § 1983, but held that the AAA did not provide for a right to meaningful visitations. In Del A. v. Edwards, 855 F.2d 1148, vacated for reh'g, 862 F.2d 1107 (1988), appeal dismissed, 867 F.2d 842 (5th Cir. 1989), a panel of the Fifth Circuit held, in an interlocutory appeal of a qualified immunity issue, that the AAA created rights enforceable under § 1983. That decision, however, was vacated for a rehearing en banc and the appeal was subsequently dismissed when plaintiffs voluntarily dismissed their damages claim.

[8] The magistrate's well-reasoned and thorough discussion of whether the AAA may be enforced through § 1983 is also adopted. That discussion is at pages 30 through 43 of the magistrate's report.

"reasonable efforts to reunify families" was too amorphous to create an enforceable right. In B.H., Judge Grady held there is no enforceable right to reasonable efforts to prevent removal and that, while there is a right to individualized case plans and a case review system, there is no right to be provided with particular services.[9] The state courts have generally found 671(a)(15)(B)'s requirement of reasonable efforts to reunify the family to be enforceable in proceedings to terminate parental rights. See In re Kenny F., 786 P.2d 699, 703 (N.M. Ct. App. 1990); In re S.A.D., 382 Pa. Super. 166, 555 A.2d 123, 127-28 (1989); In re M.H., 444 N.W.2d 110, 113 (Iowa Ct. App. 1989); In re Burns, 519 A.2d 638, 648-49 (Del. 1986). But see In re Cynthia A., 8 Conn. App. 656, 514 A.2d 360, 365 (1986).[10] The state cases have held that the AAA requires the provision of affirmative services to help reunify the family, including, in appropriate circumstances, providing housing, monetary assistance for obtaining housing, and assistance in finding housing. It has also been held that the state child welfare agency may be

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[9] The other federal cases hold there is an enforceable right to case plans and case reviews, see Massinga, supra; Lynch, supra; Joseph A., supra, and maintenance of adequate foster home standards, Massinga, supra. Cases also hold there is no enforceable right to meaningful visitation, Scrivner, supra, nor to a least restrictive, most family-like placement, Aristotle P., supra; B.H., supra.

[10] Cynthia A. holds rights under the AAA are unenforceable primarily because the AAA is an appropriations statute and therefore cannot create enforceable rights. Such a holding has been rejected by the federal courts that have considered the enforceability of the AAA under § 1983.

required to provide services ordinarily provided by other agencies.[11] S.A.D., 555 A.2d at 128.

Defendant argues that a standard of "reasonable efforts" is too vague to be enforceable. That argument is supported by Aristotle P., 721 F. Supp. at 1012. It is contradicted by Artist M., by the state cases that have found enforceable rights under § 671(a)(15) and applied the reasonable efforts language, and by the recommendation of the magistrate. Aristotle P., as does defendant, relied on Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24-25 (1981). In Pennhurst, the Supreme Court stated it was difficult to know what was meant by "appropriate treatment" and "least restrictive" setting as used in 42 U.S.C. § 6010, the bill of rights provision of the Developmentally Disabled Assistance and Bill of Rights Act of 1975. This implied that § 6010 did not create enforceable rights because "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." The Supreme Court, however, made clear that while the nonspecificity of the language provided some support for interpreting Congress's intent, the "crucial inquiry . . . is not whether a State would knowingly undertake that obligation, but whether Congress spoke

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[11] Also, as S.A.D., 555 A.2d at 128, points out, even viewed purely in fiscal terms, it is often cheaper to provide initial payments for rent, security deposits, utilities, and other items than to instead incur the much greater expense of placement outside the family.

so clearly that we can fairly say that the state could make an informed choice." 451 U.S. at 25.

The language of § 6010 stated, "Congress makes the following findings respecting the rights of person with developmental disabilities." The statute does not state that those findings create requirements for the states to follow. In contrast, § 671(a) expressly states that "in order for a State to be eligible for payments under this part, it shall have a plan . . . which . . . ." (Emphasis added.) Subsection (15) provides a specific date by which a participating state must comply with its requirements. The intent of Congress to mandate compliance with § 671(a)(15) is clearly expressed. Also, unlike the situation in Pennhurst, 451 U.S. at 25, the Secretary of Health and Human Services has included the "reasonable efforts" provisions among the requirements for a Title IV-E State plan and provides examples to further clarify the meaning of reasonable efforts. See 45 C.F.R. §§ 1356.21(b), 1356.21(d)(4), 1357.15(e). See also S.A.D., 555 A.2d at 127-28.

Even absent consideration of the regulations, Judge Shadur is correct that a requirement of "reasonable efforts" is not too ambiguous to be enforceable. See Artist M., 726 F. Supp. at 696-97. Cf. Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418, 431-32 (1987) (provision for a "reasonable" allowance for utilities not too vague or amorphous as to be unenforceable under § 1983). Courts are accustomed to enforcing reasonableness standards and state actors and others

are accustomed to being required to comply with such standards. See id. at 432. See also Lynch, 719 F.2d at 511-12 (difficulty in determining if state's actual practices are in compliance is no reason to deny enforcement). Also, the state cases cited above show that the states are able to interpret the reasonable efforts requirement. Contrary to defendant's argument, permitting enforcement does not unduly deprive the state of flexibility and discretion in providing child welfare services. A standard of "reasonable efforts" is a flexible standard that leaves much to the discretion of the states.

Defendant argues that even if rights under § 671(a)(15) can be enforced pursuant to § 1983, the child, not the parent, is the only appropriate party to seek enforcement of those rights. Defendants argue that a holding to the contrary would be "absolutely unprecedented" and that plaintiffs can cite no case to support their position. This is a surprising assertion for two reasons. First, defendant's brief contains no case citations in support of his own position. Just as there are no precedents expressly holding that parents can enforce rights under the AAA, there are no precedents holding parents cannot enforce such rights. Second, while no case has been found or cited which explicitly discusses the question of parental standing to enforce rights under the AAA, a number of cases involve parents enforcing rights under the AAA. Lynch was a suit brought by both parents and children. Scrivner was brought by the mother of a child; relief was denied only because the particular right sought to be

enforced was held not to be provided for by the AAA, not because a mother had no enforceable rights under the AAA. The state cases cited above are all suits in which the parents are permitted to enforce rights under the AAA. The magistrate's conclusion that parents can enforce rights under the AAA is far from "absolutely unprecedented."

The basis of defendant's argument is unclear. Defendant makes the same argument as regards both an implied private right of action and § 1983. But whether the AAA implies a cause of action for parents is a question distinct from whether a cause of action exists under § 1983. See Artist M., 726 F. Supp at 691-92. Since this court relies only on § 1983, it need only be considered whether parents can have a cause of action under that statute. As previously discussed, the rights contained in the AAA are enforceable under § 1983. Whether the parents are appropriate parties to enforce such rights would appear to be a standing question, an issue nowhere mentioned in defendant's brief, but one which must be addressed whenever a substantial question is raised because it goes to this court's jurisdiction. Lindley v. Sullivan, 889 F.2d 124, 128 n.3 (7th Cir. 1989). The basic requirements of standing are that "A plaintiff must allege [1] personal injury[, 2] fairly traceable to the defendant's allegedly unlawful conduct and[, 3] likely to be redressed by the requested relief." Frank Rosenberg, Inc. v. Tazewell County, 882 F.2d 1165, 1168 (7th Cir. 1989), cert. denied, 110 S. Ct. 726 (1990) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984))

(brackets in Rosenberg). Those three requirements are clearly met by the parents.

There are, however, also prudential requirements of standing. Ordinarily, "as a matter of prudence courts should not hear a plaintiff who rests his or her 'claim to relief on the legal rights or interests of third parties.'" Lindley, 889 F.2d at 128 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). Perhaps this is the principle that defendant silently relies upon. Issues of prudential standing, however, are not jurisdictional and can be waived. Lindley, 889 F.2d at 129. While defendant argues the AAA creates rights only for children, not their parents, he cites no authority that that has any legal significance, i.e., he cites no standing cases. Therefore, the standing issue could be treated as waived, at least as regards the question of a preliminary injunction. The waiver issue need not be decided, however, because the AAA creates rights for parents as well as the children.[12] See, e.g., 42 U.S.C. §§ 622(b); 625(a)(1)(D); 627(a)(1); 627(a)(2)(C); 671(a)(12); 675(5)(C); 675(6). Additionally, when a statute provides for the continued unification or reunification of a family, it cannot be said to be only for the benefit of the children, both the children and the parents are beneficiaries of such a policy.

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[12] Even if the AAA did not create rights for the parents, they might still have standing to bring this action. Compare Lindley, 889 F.2d at 129 (adopted child of recipient of disability benefits had third-party standing to maintain his parents' claim that denial of child insurance benefits was unconstitutional).

Furthermore, contrary to defendant's argument, some of the funding for states is used to provide services to parents as well as children. Plaintiffs in this case have standing.

Defendant also argues that the AAA only requires that an adequate system be in place and therefore only systemic deficiencies can violate the AAA. From this, defendant appears to draw the conclusion that only systemic relief can be granted and no claim for individual relief is available. It is unclear if defendant is making such an argument, but to the extent defendant is arguing this court can only examine the state's statutory and regulatory system to see if it complies with the AAA, the argument is not supported by the cases. Even if, on paper, the state complies with the AAA, the AAA is still violated if the state's actual practices do not comply with the AAA. Lynch, 719 F.2d at 511. The magistrate found, with this court adopting those findings, that system-wide deficiencies exist. Therefore, it is unnecessary to determine if failure to make reasonable efforts as to only one person could state a claim under the AAA.[13] The question still remains as to whether individual relief can be granted based on systemic violations. Neither party cites any case authority on this question. However, there is no reason why an individual who suffers from systemic violations should not be entitled to relief under the statute. Moreover, since the court is presently only considering

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[13] It is noted that, in the state cases previously referred to, individual parents were permitted to claim violations of the AAA without proving systemic deficiencies.

preliminary relief, it is more sensible to permit only individual relief instead of ordering broader systemic relief.

Defendant also argues that the magistrate's analysis essentially results in imposing a successful reunification standard instead of a reasonable efforts standard. It is true, as defendant points out, that the reasonable efforts standard can be satisfied without there being successful reunification.[14] Contrary to defendant's argument, Hilliard and Mitchell are not granted relief simply because they have not found adequate housing nor been reunited with their children, but because they have suffered from systemic deficiencies that included the failure of DCFS to make reasonable efforts on their behalf. That reasonable (or, at least, partially successful) efforts were put forth as regards Johnson is not incompatible with there being systemic deficiencies that generally result in inadequate efforts on behalf of persons in plaintiffs' situations. Since efforts made to assist Johnson have aided her in her effort to reunite with her family, she, unlike Hilliard and Mitchell, has no need for preliminary relief.

Defendant argues that plaintiffs are collaterally estopped from arguing reasonable efforts were not made because the state Juvenile Court made findings that reasonable efforts were made. Although this court is to accord a decision of a

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[14] This, of course, was also recognized by the magistrate. She did not recommend ordering reunification, but only recommended ordering the development "if, at all possible," of a plan to overcome obstacles to reunification.

state court the same preclusive effect that courts in that state would accord it, 28 U.S.C. § 1728, Wozniak v. County of DuPage, 845 F.2d 677, 680, 682 (7th Cir. 1988), defendant cites no Illinois law in support of his collateral estoppel argument. Two of the requirements of collateral estoppel are that (1) the issues which form the basis of estoppel were actually litigated and decided on the merits in the prior suit and (2) those issues are identical to issues raised in the subsequent suit. Id. at 682-83 (quoting County of Cook v. MidCon Corp., 773 F.2d 892, 898 (7th Cir. 1985)).

Unlike res judicata, collateral estoppel applies only to issues that were actually litigated, not also to issues that could have been raised in the prior proceeding, but were not. Lester v. Arlington Heights Federal Savings & Loan Association, 130 Ill. App. 3d 233, 474 N.E.2d 33, 37 (1985) (quoting Godare v. Sterling Steel Casting Co., 103 Ill. App. 3d 46, 50, 430 N.E.2d 620 (1981)). To have a collateral estoppel effect, an issue cannot simply be decided, but must be both actually litigated and decided. Where a court makes a finding on an issue that was not actually litigated, there is no collateral estoppel effect. Lester, 474 N.E.2d at 37-38. See also Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 469-70 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983). Here, although the Juvenile Court judges made statutorily mandated findings that DCFS made reasonable efforts to reunite the families, those were pro forma findings that were not actually litigated. Therefore, there can

be no preclusive effect. Additionally, even if the issue was actually litigated, the Juvenile Court judges did not decide the same issues that are presently before this court because they only decided whether reasonable efforts had been made as of the time that they issued their rulings. Cf. In re Overton, 21 Ill. App. 3d 1014, 316 N.E.2d 201, 206 (1974) (order of a court depriving a parent of custody of a child is only res judicata as to facts which existed at the time the order was entered); In re Finch, 40 Ill. App. 2d 18, 189 N.E.2d 678, 679 (1963) (abstract opinion) (same). This court's findings relate to present circumstances. Plaintiffs' claims are not barred by collateral estoppel.

Consistent with his shotgun approach in opposing plaintiffs' motion, defendant argues that three abstention doctrines[15] go against granting relief in this case. Abstention has apparently only been raised in one reported federal case involving enforcement of the AAA; the limited argument made in that case was summarily rejected.[16] See Joseph A., 575 F. Supp. at 350.

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[15] As the Seventh Circuit has noted, the doctrine set forth in Colorado River is more properly characterized as one of deference. "[T]he Supreme Court distinguishes between Colorado River deference and traditional abstention doctrines. We abide by that distinction here, while making no claim that we understand it." Medema v. Medema Builders, Inc., 854 F.2d 210, 212 n.1 (7th Cir. 1988).

[16] In at least one unpublished order, a district court declined to invoke Younger abstention. See R.C. v. Hornsby, No. 88-D-1170-N at 5-9 (M.D. Ala. April 19, 1989).

Although not active cases, the Juvenile Court retains continuing jurisdiction over the custody proceedings of the children of Hilliard and Mitchell. Finch, 189 N.E.2d at 679. Absent an interested party petitioning for a modification, this means that the guardian or custodian appointed by the court must file updated case plans every six months. Ill. Rev. Stat. ch. 37, ¶ 802-28(2). Plaintiffs in this case do not seek any order from this court regarding custody nor do they seek to enjoin any action of the state court. While the state court may have the power to order the type of individual relief presently requested, there is no active proceeding in which such relief is being sought. There is no basis for invoking Younger abstention in this case.

Burford abstention is appropriate only in cases involving difficult questions of state law and where review of that question would disrupt state efforts to establish a coherent policy respecting a matter whose importance transcends the result of the case under consideration. Evans v. City of Chicago, 689 F.2d 1286, 1295 (1982), overruled on other grounds, 873 F.2d 1007 (7th Cir. 1989). Defendant does not point to any difficult question of state law involved in this case. Plaintiffs do not raise a challenge to any state statute or regulation; they instead charge that the state's actual practices do not measure up to the requirements of the AAA, a federal statute. This case does not involve interpreting the requirements of state statutes

or regulations implemented pursuant to the AAA. There is no reason to invoke Burford abstention.

The first question to address in considering Colorado River deference is whether there are parallel proceedings. Medema v. Medema Builders, Inc., 854 F.2d 210, 213 (7th Cir. 1988). "Cases are parallel if "'substantially the same parties are contemporaneously litigating substantially the same issues in another forum.'" Id. This requirement is not satisfied; defendant points to no ongoing state proceeding in which the reasonable efforts question is presently being litigated. Even if the inactive Juvenile Court proceedings can be considered parallel proceedings, it is doubtful that this is an appropriate case for Colorado River deference. See Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1288-89 (7th Cir. 1988) (setting forth factors to consider). The custody proceedings are limited to the individuals involved and thus are not the appropriate place to litigate the systemic questions involved in this proceeding; the governing law in this case is federal; and the state cases are not presently active cases. Proceedings will not be stayed based on the Colorado River doctrine.

With respect to the standards for preliminary injunctive relief, the Court of Appeals for the Seventh Circuit has stated:

> Before a preliminary injunction will issue, the movant must show, as a threshold matter, that: (1) they have no adequate remedy at law; (2) they will suffer irreparable harm if the injunction is not granted; and (3) they have some likelihood of success on the merits in the sense that their "chances are better than negligible." Roland Machinery Co. v. Dresser Industries, Inc.,

> 749 F.2d 380, 386-87 (7th Cir. 1984); see also Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986). If the movant can meet this threshold burden, the inquiry then becomes a "sliding scale" analysis of the harm to the parties and the public from the grant or denial of the injunction and the actual likelihood of success on the merits. In particular, and keeping in mind that the public interest may become important in a given case, the "more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor [in order to get the injunction]; the less likely he is to win, the more need it weigh in his favor." Roland Machinery, 749 F.2d at 387.

Thornton v. Barnes, 890 F.2d 1380, 1384 (7th Cir. 1989) (quoting Ping v. National Education Association, 870 F.2d 1369, 1371-72 (7th Cir. 1989)).

As stated by the magistrate,

> A likelihood of success on the merits has been shown with respect to Wanda Hilliard and Joann Mitchell but not with respect to Gina Johnson. Hilliard and Mitchell will be irreparably injured if DCFS does not do what the law requires it to do; they and their children are likely to sustain deep psychological injury and to have their relationships as families irreparably destroyed. There is no countervailing harm to the defendant; the cost of working out a viable service plan for these families is de minimis. Moreover, the defendant will save money if, by giving these plaintiffs modest assistance, it can get their children out of the foster care system. The public interest in this case is clearly expressed in the AAA: unnecessary foster care placement is detrimental to the individuals involved and to the public.

Defendant argues that this summation fails to take into consideration the harm of interfering with the state judicial process and interfering with a caseworker's ability to exercise

his or her own judgment. As previously discussed in regards to abstention, the recommended relief does not interfere with state court proceedings. As regards a caseworker's discretion, the recommended relief leaves to the caseworker the discretion to develop an appropriate plan. Defendant also argues that the interests of the children are ignored. The recommended relief, however, does not require that the children be reunited with their mothers. All that is ordered is that adequate procedures be followed so that the families may have the opportunity to be reunited if possible and appropriate. If it is not in the best interests of the children to be reunited with their mothers, presumably the caseworker will not make such a recommendation to the Juvenile Court and the Juvenile Court will not order such to occur.[17]

Defendant argues that the recommended relief is a mandatory preliminary injunction and that such relief should be granted in only rare circumstances. Typically, the purpose of a preliminary injunction is to maintain the status quo pending the resolution of the merits of a case. Jordan v. Wolke, 593 F.2d 772, 774 (7th Cir. 1978) (per curiam); Desert Partners, L.P. v. USG Corp., 686 F. Supp. 1289, 1293 (N.D. Ill. 1988). While mandatory preliminary injunctions are to be "cautiously viewed and sparingly issued," there are "situations justifying a

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[17] Defendant makes no argument that the evidence shows that continued attempts at reunification would not be in the best interests of any of the children involved or that continued attempts at reunification would be futile. See, e.g., Kenny P., 786 P.2d at 703-04.

mandatory temporary injunction compelling the defendant to take affirmative action." Jordan, supra. Where the harm is substantial and maintaining the status quo would mean further harm and possibly make a final determination on the merits futile, the grant of a mandatory preliminary injunction may be appropriate. See Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984); C.A. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2947 at 424 (1973). Still, a mandatory preliminary injunction should not be granted unless the law and facts clearly favor the plaintiff. Committee of Central American Refugees v. INS, 795 F.2d 1434, 1441, amended, 807 F.2d 769 (9th Cir. 1986). Also, a mandatory preliminary injunction that grants the full relief requested is viewed with greater disfavor than one that grants less than the full relief. Bricklayers, Masons, Marble & Tile Setters, Protective & Benevolent Union No. 7 of Nebraska v. Lueder Construction Co., 346 F. Supp. 558, 561 (D. Neb. 1972); Wright & Miller, § 2948 at 445.

Here, the recommended preliminary relief does not grant the full relief sought; it does not result in a correction of the systemic problems alleged and heretofore proven nor is the broad relief requested in the First Amended Complaint granted. More importantly, the potential harm to plaintiffs is great. The longer they are separated from their children without an adequate effort being made to reunite the families, the less likely it is that reunification will be possible. If no preliminary relief is granted, continuation of present circumstances likely could

result in any relief granted at the termination of this case being of no help to Hilliard or Mitchell. It cannot be overstated that permanent loss of the bond with one's child is one of the most extreme harms that a person can suffer and far outweighs any potential harm to defendant from the improvident grant of preliminary relief. Plaintiffs have made a strong showing both as to the likelihood of success and the balance of harms. This is one of those situations where issuance of a mandatory preliminary injunction is appropriate.

Defendant also argues that the recommended relief usurps the state's opportunity to decide in the first instance how to best comply with the statute. That argument borders on the ridiculous. The recommended relief still leaves to the caseworker the development of the particulars of any case plan. It also continues to leaves to DCFS the opportunity to develop a solution to systemic problems. The recommended relief does not unduly impinge on DCFS's opportunity to determine how to comply with the statute. Compare Lynch, 719 F.2d at 513-14.

Finally, defendant argues that the recommended relief violates the Eleventh Amendment because the report of the magistrate clearly indicates that appropriate action requires providing cash assistance in finding housing. But even assuming this to be true, there is no Eleventh Amendment problem because the Eleventh Amendment only prohibits awarding damages for past injuries. It does not prohibit ordering prospective relief that may result in future expenditures. Quern v. Jordan, 440 U.S. 332

may result in future expenditures. Quern v. Jordan, 440 U.S. 332 (1979).

IT IS THEREFORE ORDERED that:

(1) Plaintiffs' motion for preliminary injunctive relief is granted as regards plaintiffs Wanda Hilliard and Joann Mitchell and denied as regards Gina Johnson.

(2) Within 14 days of the date of this order, defendant shall assign a caseworker or caseworkers, familiar with the requirements of the AAA, to meet with the Hilliard and Mitchell families and prepare written case plans relating to the possible return of each child to his or her home. The case plans shall (a) identify any housing obstacles to family reunification, (b) identify what if any resources are available to overcome such obstacles, and (c) specify how and when, if possible, such obstacles can be overcome.

(3) Copies of the plans ordered shall be provided to plaintiffs and their counsel within 21 days of the date of this order.

(4) Because of the poverty of plaintiffs, no preliminary injunction bonds are required.

ENTER:

Benjamin T. Hart

UNITED STATES DISTRICT JUDGE

Dated: MAY 18, 1990