

COPY

Civil Track I
Judge Ann Schindler

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WASHINGTON STATE COALITION)
FOR THE HOMELESS,)
et al.,)

Plaintiffs,)

vs.)

No. 91-2-15889-4

DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
et al.,)

Defendants.)

Plaintiffs' Memorandum

Opposing Defendants' Motion for Reconsideration

and

Supporting Motion to Reinstate Plaintiffs' Federal Statutory Claims

November 4, 1994

Tables of Contents

I.	THE COURT HAS NO BASIS TO CHANGE ITS FOSTER CARE RULING UNDER STATE LAW AND IT SHOULD REINSTATE THE PLAINTIFFS' FEDERAL FOSTER CARE CLAIMS. OTHERWISE, IT MUST RESOLVE THE PLAINTIFFS' CONSTITUTIONAL CLAIMS. . . .	1
A.	<i>In re Welfare of J.H. Is Not Published Authority</i>	1
B.	Dependency Courts Have Authority Under State Law to Order DSHS to Provide Necessary Preventive and Reunification Services.	1
1.	<i>In re the Welfare of J.H. Still Requires Dependency Judges To Address Homelessness that Causes or Prolongs a Placement.</i>	1
2.	<i>The Washington Supreme Court, in a More Recent Opinion, Has Rejected the Basis of In re Welfare of J.H. and Reaffirmed the Court's Authority to Require Services.</i>	2
3.	<i>More Recent Amendments to Chap. 13.34 RCW and RCW 74.14C.070 Have Strengthened the Authority of the Courts to Order DSHS to Provide Preventive and Reunification Services.</i>	6
C.	This Court Has the Authority to Grant Class-Wide Relief to Remedy Systematic Defaults.	10
1.	<i>Superior Courts Have Constitutional Authority to Review and Remedy Violations of Law.</i>	10
2.	<i>Class-Wide Relief Becomes More Appropriate If Dependency Courts Lack the Authority to Enforce the Law. . . .</i>	12
D.	Recent Amendments to the Social Security Act Reversing <i>Suter v. Artist M.</i> Require the Court to Reinstate Most of the Plaintiffs' Federal Statutory Claims.	14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

E. The Court Should Grant the Proposed Relief on the Foster Care Cases 18

1. DSHS Must Plan 18

2. The Foster Care Relief Should Be Targeted to Those Cases Where the Housing Assistance Would Work. 20

F. If It Denies Relief Under State Law or the Social Security Act the Court Must Address the Constitutional Issues. 22

1. DSHS Deprives the Plaintiffs of Their Liberty and Family Without Substantive Due Process. 22

2. The Plaintiffs' Right to Fair Procedures 26

II. THE COURT HAS NO BASIS TO CHANGE ITS TRIAL VERDICT IN FAVOR OF HOMELESS CHILDREN UNDER RCW 74.13.031(1) and 74.13.020. 27

A. In re Welfare of J.H. Did Not Address and Does Not Affect DSHS's Obligation Under RCW 74.13.031(1) to Have a Coordinated and Comprehensive Plan for Homeless Children. 27

B. RCW 74.13.020 is Enforceable Under In re Detention of J.S.. 29

III. CONCLUSION 30

- Attachment A: Plaintiffs' Revised Proposed Findings of Fact, Conclusions of Law, Order and Judgment;
- Attachment B: Findings and Order and Verbatim Report of Proceedings in recent King County Superior Court dependency ruling.

1 I. THE COURT HAS NO BASIS TO CHANGE ITS FOSTER CARE
2 RULING UNDER STATE LAW AND IT SHOULD REINSTATE THE
3 PLAINTIFFS' FEDERAL FOSTER CARE CLAIMS. OTHERWISE, IT
4 MUST RESOLVE THE PLAINTIFFS' CONSTITUTIONAL CLAIMS.

5 A. *In re Welfare of J.H.* Is Not Published Authority

6 The defendants cite the recent Division I decision in *In re Welfare of J.H.*. This
7 decision is as yet unpublished. In fact, the mother in that case has moved for reargument and
8 reconsideration in light of the superseding authority discussed below. Unless and until it is
9 published, DSHS may not cite this case and the court may not rely on it:

10 A party may not cite as an authority an unpublished opinion of the Court of
11 Appeals.

12 RAP 10.4(h). Division I itself has stated that it is "plainly improper to rely on unpublished
13 decisions of this court. RAP 10.4(h). Such decisions "have no precedential value". *Bankers*
14 *Ass'n v. Wash. Sav. Bank*, 92 Wn.2d 453, 598 P.2d 719 (1979).

15 B. Dependency Courts Have Authority Under State Law to
16 Order DSHS to Provide Necessary Preventive and
17 Reunification Services.

18 *In re Welfare of J.H.* confirms the authority for this court's class-wide relief for
19 DSHS's systematic defaults. The court's authority has become clearer yet from a more
20 recent decision of the Washington Supreme Court and from more recent amendments to
21 Chap. 13.34 RCW and RCW 74.14C.070 that *In re Welfare of J.H.* was not able to consider.

22 1. *In re the Welfare of J.H.* Still Requires Dependency
23 *Judges To Address Homelessness that Causes or*
24 *Prolongs a Placement.*

25 *In re the Welfare of J.H.* did not repudiate DSHS's obligation to provide and the
26 court's to require effective preventive and reunification services, in that case housing
27 assistance. It only limited the manner in which a dependency court may require DSHS to do

1 so. A dependency court may not directly order DSHS to provide them. Yet *In re the*
2 *Welfare of J.H.* strongly confirmed the dependency court's duty and authority to confront
3 these needs and to require DSHS to address them, using the peculiar powers of a court:

4
5 Our holding does not mean, as the mother suggests, that the juvenile court is
6 obliged to ignore the reality of the connection between homelessness and
7 dependency. The court **should confront** that reality when it affects the fate of
8 the children under the court's supervision, not with the tools of appropriation
9 and administration that are more adapted to the other branches of government,
10 but by means of its authority as a court. The court has **indisputable authority**
11 over the parties, as well as **statutory authority to require** that an
12 individualized service **plan** proposed for a dependent child do a better job of
meeting critical needs. The court has the power to compel the attendance in
the courtroom of the caseworker, or her supervisor, or even the Secretary of
the Department, as frequently as necessary until the agency acts with the
urgency and effectiveness that the particular needs of the children
demand.

13 *In re the Welfare of J.H.*, pages 11 - 12 (emphasis added). This decision does not overturn
14 DSHS's duty that the court found to address a family's homelessness in foster care cases. To
15 enforce that ruling, the court has at least the powers stated above in *In re Welfare of J.H.*
16 That power by itself defeats DSHS's motion for dismissal of the plaintiffs' foster care claims.

17
18 2. *The Washington Supreme Court, in a More Recent Opinion,*
19 *Has Rejected the Basis of In re Welfare of J.H. and Reaffirmed*
20 *the Court's Authority to Require Services.*

21 In a more recent decision, the Washington Supreme rejected the basis for the
22 limitation stated in *In re Welfare of J.H.* on the court's authority to require DSHS to provide
23 services. In *In re Welfare of J.H.* the Court of Appeals acknowledged that RCW
24 13.34.130(1) required the dependency court to order necessary services.

25 Upon entering an order of dependency, the juvenile court must enter an order
26 of disposition that either provides a program of services making it possible for
27 the children to remain at home safely, or places them out of the home.

1 (Slip Opinion, page 7 - 8, footnote 1.)¹ Yet the Court of Appeals panel accepted DSHS's
2 view that such orders, which may require DSHS to spend money that DSHS asserts is not
3 available, are an excessive court "intrusion into the legislative realm in deference to the
4 doctrine of separation of powers." (Slip Opinion, page 10.) This is the same argument that
5 DSHS has made in this case to dispute judicial authority to enforce the law. This is exactly
6 the argument that DSHS made and that a unanimous Supreme Court firmly and expressly
7 rejected in the recent case of *In re Detention of J.S.*, 124 Wn.2d 689. This decision was not
8 available to the Court of Appeals panel for consideration.

9
10 In *In re Detention of J.S.*, the Supreme Court affirmed the authority of the court to
11 order DSHS to provide services that a statute allowed the court to require. At issue in that
12 case was the mental health commitment law, Chap. 71.05 RCW. That statute allows a
13 superior court to order DSHS to provide a "less restrictive" placement instead of commitment
14 at Western State Hospital. In that case, DSHS had stated that "no financial resources were
15 available" to provide such alternatives. 124 Wn.2d at 691 - 694. After rejecting DSHS's
16 various statutory arguments, the Court addressed and rebuffed DSHS's assertion that a court
17 lacks the authority to order the expenditure of funds to fulfill a statutory duty:
18

19
20 The State finally argues the court has improperly ordered it to incur
21 expenditures beyond its appropriations by essentially creating new services for
22 the Respondents. The State maintains the trial court is attempting to modify
23 policy choices made at the legislative level. This argument, however, is
24 misplaced. The Legislature has granted the court the power to determine the
25 best interests of the individual and in so doing, to consider less restrictive
26 treatment. The statutory framework represents a legislative policy choice to
27 create this role for the court. We find that because the court has the power
28

26 ¹ Other statutes cited by this court also require preventive and reunification services. RCW
27 13.34.060(8)(a), RCW 13.34.130(1)(b); RCW 13.34.130(5)(b), RCW 74.13.031, RCW 74.13.020,
28 Chap. 74.14A. RCW. See Order on Defendants' Motion for Judgment on the Pleadings, §§ 7(B)(C).
See Also, RCW 13.34.130(1)(a); RCW 1334.130(3).

1 under the statute to order less restrictive treatment, it necessarily has the power
2 to compel compliance with its order.

3 124 Wn.2d at 698 - 699. This ruling is consistent with long standing Supreme Court
4 decisions that vindicate the authority of the courts to enforce the law despite the purported
5 lack of available funds. See Plaintiffs' Memorandum Opposing Defendants' Motion for
6 Judgment on the Pleadings, pages 36 - 42.

7 This holding applies directly to this case. Its essential and simple point is that courts
8 have the authority that the legislature gives them to require services from DSHS. For this
9 reason, the language of the statute at issue is determinative.² The mental health laws
10 expressly give the courts the authority to order "less restrictive treatments". As the court in
11 this case has already ruled, Chap. 13.34 RCW gives the courts the power to order preventive
12 and reunification services.³ In fact, the authority of the dependency courts is far more
13 extensive and specific than that granted under the mental health commitment laws. The
14 mental health laws state only that the court, upon proper findings of fact, "shall remand him
15 to the custody of [DSHS] or to a facility certified for ninety day treatment or to a less
16 restrictive alternative for a further period of less restrictive treatment not to exceed ninety
17 days" RCW 71.05.320. The Supreme Court accordingly limited the court to requiring
18 a "less restrictive placement" without specifying the actual facility to be used. The choice of
19
20
21

22 ² The Supreme Court contrasted statutes reviewed in other cases that "did not grant specific
23 placement powers to the courts" including the old dependency statutes of Chap. 13.04 RCW reviewed
24 in *In re Gakin*, 22 Wn.App. 822, 592 P.2d 670 (1979). 124 Wn.2d at 696. The statute at issue in
25 *Gakin* only limited the dependency court's authority to the question of whether or not a child should
26 be committed. In 1979, this statute was changed dramatically in the overhaul of the laws that created
the present distinction between dependency and delinquency proceedings. In the present dependency
statutes under Chap. 13.34 RCW, the authority of the dependency courts extends beyond placement
decisions to the power to specify services.

27 ³ Order on Defendants' Motion For Judgment On The Pleadings, §§ 7(B)(C); Order on Cross
28 Motions For Summary Judgment, §§ B(1)(3).

1 facility was left to DSHS to determine. 124 Wn.2d at 696-697.

2 The dependency laws go further to allow and require the courts to specify the
3 necessary services. For example:

4 Order a disposition other than removal of the child from his or her home,
5 which shall provide a program designed to alleviate the immediate danger to
6 the child, to mitigate or cure any damage the child has already suffered, and to
7 aid the parents so that the child will not be endangered in the future. In
8 selecting a program, the court should choose those services that least
interfere with family autonomy, provided that the services are adequate to
protect the child.

9 RCW 13.34.130(1)(a)(emphasis added). When a child is removed from a family, the court
10 must require a "specific plan" detailing, among other items, "what steps will be taken to
11 return the child home, . . . ". RCW 13.34.130(3)(emphasis added). When reviewing a
12 placement the court, among other duties, must "establish . . . whether additional services are
13 needed to facilitate the return of the child to the child's parents; if so, the court shall order
14 that reasonable services be offered specifying such services; . . . " RCW 13.34.130(5)(b)
15 (emphasis added). See Also RCW 13.34.120 (predisposition study required to specify
16 services.) These sections are in addition to those that require "reasonable efforts". E.g.,
17 RCW 13.34.060(6).
18
19 :

20 The court's foster care ruling in this case states the authority that the legislature
21 expressly gave to the dependency courts. There is no reason to change that ruling, especially
22 in light of the more recent amendments to Chap. 13.34 RCW and Chap. 74.14C RCW that
23 strengthen the court's authority to order services. See next section.

1 3. *More Recent Amendments to Chap. 13.34 RCW and*
2 *RCW 74.14C.070 Have Strengthened the Authority of*
3 *the Courts to Order DSHS to Provide Preventive and*
4 *Reunification Services.*

5 The legislature recently increased the dependency court's authority to order DSHS to
6 provide services to prevent or shorten placements. The court in *In re Welfare of J.H.*
7 apparently was not aware of these amendments, which were enacted after the oral argument
8 in that case.⁴ In amendments to Chap. 13.34 RCW, the legislature substantially strengthened
9 both the statutory obligation of DSHS to provide preventive and reunification services and the
10 authority of the court to enforce this obligation. Chap. 288, Laws of 1994 (S.S.S.B. No.
11 6255). This new language requiring "preventive services" is in addition to DSHS's duty and
12 court powers described above. Amendments to RCW 74.14C.070 firmly rebuff DSHS's
13 assertion that it can be ordered to provide only those preventive and reunification services for
14 which a specific appropriation is made. The amendments are:

15 ▶ New language now requires DSHS, when it recommends a child's removal, to
16 include in its mandatory predisposition study for the court a full description of ". . . the
17 preventive services that have been offered or provided and have failed to prevent the need
18 for out-of-home placement, unless the health, safety, and welfare of the child cannot be
19 protected adequately in the home; . . . " RCW 13.34.120(2)(c)(emphasis added).
20

21 ▶ The amendments also added the requirement that the dependency court find, as
22 a basis for a placement decision, ". . . that preventive services have been offered or
23 provided and have failed to prevent the need for out-of-home placement, unless the health,
24

25
26

⁴ The court, in fact, quoted from the old version of RCW 13.34.110. See Slip Opinion, pages 7
27 - 8, footnote 1. It also did not refer at all to the amendments in RCW 74.14C.070 despite their
28 obvious pertinence to the point the court was addressing.

1 safety, and welfare of the child cannot be protected adequately in the home," RCW
2 13.34.130(1)(b)(emphasis added).

3 ▶ Permanency plan requirements are now strengthened:

4
5 (1) A permanency plan shall be developed no later than sixty days⁵ from the
6 time the supervising agency assumes responsibility for providing services,
7 including placing the child, or at the time of a hearing under RCW 13.34.130,
8 whichever occurs first. The permanency planning process continues until a
9 permanency planning goal is achieved or dependency is dismissed. **The**
10 **planning process shall include reasonable efforts to return the child to the**
11 **parent's home.**

12 (a) Whenever a child is placed in out-of-home care pursuant to RCW
13 13.34.130, the agency that has custody of the child **shall** provide the court
14 with a written permanency plan of care directed towards securing a **safe,**
15 **stable and permanent home** for the child as soon as possible. . .

16 RCW 13.34.145(emphasis added).

17 ▶ In new and strong language, the legislature expressly stated the court's
18 authority and duty to review the adequacy of DSHS's efforts:

19 (5) At the permanency planning hearing, the court **shall** enter findings as
20 required by RCW 13.34.130(5) [which govern review hearings and which
21 require the court, upon retaining a child in placement, to determine "Whether
22 additional services are needed to facilitate the return of the child to the child's
23 parents; if so, the court shall order that reasonable services be offered
24 specifying such services;"] and shall review the permanency plan
25 prepared by the agency. . . In cases where the primary permanency planning
26 goal has not yet been achieved, the court shall inquire regarding the reasons
27 why the primary goal has not been achieved and determine what needs to be
28 done to make it possible to achieve the primary goal. **In all cases, the court**
shall:

(a)(i) **Order** the permanency plan prepared by the agency to be **implemented;**
or (ii) modify the permanency plan and **order implementation** of the modified
plan;

25 RCW 13.34.145(5)(emphasis added). To make this clearer still, the legislature emphasized
26 the duty of DSHS to provide services independent of the court's order:

27 (10) The approval of a permanency plan that does not contemplate return of
28

1 the child to the parent does not relieve the supervising agency of its
2 obligation to provide reasonable services, under this chapter, intended to
3 effectuate the return of the child to the parent including but not limited to
visitation rights.

4 RCW 13.34.145(10)(emphasis added).

5 ▶ Two further amendments particularly undermine the limits that *In re Welfare of*
6 *J.H.* placed on dependency court authority. To explain those limits, the appellate court cited
7 the Family Preservation Services Act, Chap. 74.14C RCW, which states that the services
8 defined in that bill cannot be ordered by a court:
9

10 (3) Nothing in this chapter shall be construed to create an entitlement to
11 services nor to create judicial authority to order the provision of family
12 preservation services to any person or family where the department has
determined that such services are unavailable or unsuitable or that the child or
family are not eligible for such services.

13 RCW 74.14C.005(3). By its express terms, this provision was limited to the services that
14 "have all of the following characteristics" provided for "family preservation services",
15 including highly intensive casework by "specially trained caseworkers" with a "caseload size"
16 of "two families per caseworker" who are on call 24 hours a day, 7 days a week. RCW
17 74.14C.010(2) and 74.14C.020. As the plaintiffs had previously explained and this court has
18 accepted, this bill was clearly intended to encourage DSHS to employ the Homebuilders
19 model of intensive preventive and reunification services. It was not intended to have the
20 ironic effect of deterring the use of more modest services like housing assistance.⁵ Even so,
21 the court in *In re Welfare of J.H.*, citing this statute as "dispositive" stated that it precluded
22 the court's authority under Chap. 13.34 RCW to order simple housing assistance. (page 6).
23

24 The legislature, however, has effectively overturned this ruling. It expressly defined
25

26
27 ⁵ Plaintiffs' Response to Defendants' Memorandum Regarding Family Preservation Services and
28 Supplemental Facts re Hill and Sanders (June 22, 1992).

1 its newly required "preventive services" to include the services of the Family Preservation
2 Services Act:

3 (9) "Preventive services" means family preservation services, as defined in
4 RCW 74.14C.010, and other reasonably available services capable of
5 preventing the need for out-of-home placement while protecting the child.

6 RCW 13.34.030(9). In other words, even if housing assistance is somehow regarded as
7 "Family Preservation Services" under Chap. 74.14C RCW as DSHS asserts, it is now within
8 the "preventive services" that the recent amendments allows a court to require from DSHS in
9 order to prevent or shorten an otherwise unnecessary placement.

10 ▶ The legislature also firmly rebuffed the DSHS assertion that it cannot be made
11 to provide preventive services that require money that the legislature did not specifically
12 appropriate for the purpose. DSHS had argued to the appellate court and in this case that its
13 budget does not allow it to divert money from foster care to preventive services.⁶ Effective
14 June 9, 1994, however, the legislature has settled this question. It now allows DSHS to
15 "transfer funds appropriated for foster care services to purchase family preservation services
16 and other preventive services for children at imminent risk of foster care placement." RCW
17 74.14C.070 (Chap. 288, Sec. 3, Laws of 1994). This provision clearly confirms the
18 flexibility DSHS has thus far disavowed. With this flexibility, it becomes even more critical
19 for DSHS to justify its failure to provide services found to be necessary and effective in
20 preventing or shortening more expensive placements.
21
22
23
24
25

26 ⁶ This assertion has been incorrect since DSHS first made it. Only about 5% of DSHS's child
27 welfare budget is designated. See Plaintiffs' Memorandum Opposing Defendants' Motion for
28 Judgment on the Pleadings, page 37.

1 C. This Court Has the Authority to Grant Class-Wide Relief
2 to Remedy Systematic Defaults.

3 1. Superior Courts Have Constitutional Authority
4 to Review and Remedy Violations of Law.

5 Even if *In re Welfare of J.H.* survives *In re Detention of J.S.* to limit the power of a
6 dependency court, those limits only apply to the special statutory dependency proceedings.
7 They do not limit the constitutional powers of the superior court when exercising its general
8 jurisdiction, as in this case. Not even the legislature can diminish this power:

9 The precise question before us . . . is whether the legislature can abolish or
10 abridge the power of the superior court to issue injunctions, or regulate that
11 power in specific classes of disputes in such a way as will, to that extent,
12 abolish or abridge the power. We hold that it cannot, because to do so would
be an encroachment upon the judicial power.

13 *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 412, 63 P.2d 397 (1936)(voiding
14 statutory limits on court's authority to issue injunctive relief in certain labor disputes.) The
15 Court noted that this power derives from Const. art. IV, §§ 1, and 6, as well as from the full
16 equitable powers inherited from the English Chancery courts:

17 'By the constitution all the judicial power (which is a distinct branch of the
18 sovereignty) is vested in the courts therein created, independently of all
19 legislation. The jurisdiction of these courts is universal, covering the whole
domain of judicial power,'

20 'The constitution of this state has clothed the superior court with original
21 jurisdiction in all cases in equity, . . . Const., Art. IV, § 6. The superior
22 court has all the power of the English chancery court.'

23 Thus, by the constitution, and independently of any legislative enactment, the
24 judicial power over cases in equity has been vested in the courts, and, in the
25 absence of any constitutional provisions to the contrary, such power may not
26 be abrogated or restricted by the legislative department. Any legislation,
therefore, the purpose or effect of which is to divest, in whole or in part, a
constitutional court of its constitutional powers, is void as being an
encroachment by the legislative department upon the judicial department.

27 188 Wash. at 414-415 (quoting from a variety of other cases). The court also noted that the
28

1 injunction was the "principal, and the most important process issued by courts of equity, it
2 being frequently spoken of as the 'strong arm of equity'." 188 Wash. at 415. The court's
3 remedial authority is restated in statute.⁷ Washington Courts have since guarded their
4 authority and independence with vigilance. E.g., *Spokane v. J-R Distributors*, 90 Wn.2d
5 722, 727, 585 P.2d 784 (1978)("That judicial power may not be abrogated or restricted by
6 any legislative act."); *Orwick v. Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984)("The
7 superior courts have broad and comprehensive original jurisdiction over all claims which are
8 not within the exclusive jurisdiction of another court. Const. art. 4, § 6. Because of this
9 specific constitutional grant of jurisdiction, exceptions to this broad jurisdiction will be read
10 narrowly.") In *Orwick v. Seattle*, the court further stated the superior court's particular
11 authority to remedy systematic abuses, in that case concerning municipal courts:
12

13
14 We hold that superior courts have original jurisdiction over
15 claims for equitable relief from alleged **system-wide** violations
16 of mandatory statutory requirements

17 103 Wn.2d at 251 (emphasis added). This power even includes the "inherent authority" to
18 invalidate unlawful orders of state agencies. *Rettkowski v. Department of Ecology*, 122
19

20 ⁷ E.g. The Uniform Declaratory Judgments Act restates the court's powers both to issue
21 declaratory judgments concerning state statutes and to provide relief based upon those declarations:

22 A person . . . whose rights, status or other legal relations are affected by a statute . .
23 . may have determined any question of construction or validity arising under the . . .
24 statute and obtain a declaration of rights, status or other legal relations thereunder.

25 RCW 7.24.020.

26 Further relief based on a declaratory judgment or decree may be granted whenever
27 necessary or proper. . . .

28 RCW 7.24.080. *See Also*, Chap. 7.40 RCW (Injunctions).

1 Wn.2d 219 (1993).

2 These powers, at a minimum, include those confirmed in *In re Detention of J.S.*, to
3 order DSHS compliance with the special statutory requirements that govern those
4 proceedings. Outside the constraints of those special proceedings, this court has the additional
5 powers of a constitutional court with full legal and equitable authority to provide declaratory
6 and injunctive relief for violations of law. This power is especially evident when, as in the
7 case of the placement or retention of children, the court's themselves are made the
8 instrument of the resulting illegality.
9

10 2. *Class-Wide Relief Becomes More Appropriate If*
11 *Dependency Courts Lack the Authority to Enforce the Law.*

12 If the dependency court lacks an effective remedy for DSHS default, class-wide relief
13 then becomes even more appropriate for reasons the plaintiffs noted early in this case:

14 The dependency court cannot review the systematic inadequacy of services. It
15 has a child to think about. The court must decide whether or not to remove
16 him from the family based not upon what services should be available, but
17 upon what services are actually available. . . . The plaintiffs only allege
18 DSHS's systematic failure to make the necessary resources available to its
19 caseworkers and the dependency court.

20 Plaintiffs' Memorandum Opposing Defendants' Motion for Judgment on the Pleadings, page
21 60 (November 8, 1991). All other courts that have provided class-wide relief in foster care
22 cases have done so not only despite but because of the limitations of the dependency court's
23 authority in individual dependency cases. Most recently, the court in *LaShawn A. By Moore*
24 *v. Kelly*, 990 F.2d 1319 (D.C.Cir 1993) declined to abstain from a challenge to systematic
25 defaults:

26 Neglect proceedings are designed to focus on the special problems surrounding
27 the neglect or abuse of a child by his or her parent, guardian or custodian.
28 The Family Division of the D.C. Superior Court has recognized that these
proceedings are not suitable arenas in which to grapple with broad issues

1 external to the parent-child relationship.

2 990 F.2d at 1323.⁸

3 By placing limits on the authority of a dependency judge, *In re the Welfare of J.H.*
4 only emphasizes the importance of class-wide relief. While that case may limit the authority
5 of the dependency courts when confronted with a caseworker who is not equipped to provide
6 a necessary service, courts of general jurisdiction remain able and obligated as they always
7 have been to address the systematic defaults that explain the lack of preparedness in the first
8 place.⁹

11 ⁸ The court's ruling relied exclusively on local law and not federal statute or constitutional
12 provisions. *Id.* at 1322.

13 ⁹ Courts have this capacity to examine systematic failures even if the problems are characterized
14 as fiscal. The trial court in *LaShawn A. By Moore v. Kelly* made this clear by acknowledging the
lack of resources while granting relief:

15 Testimony of social workers and of the former chief of the ICSB revealed that services
16 frequently are not provided because they are not available. . . Similarly, although a
17 substantial number of parents have housing and unemployment problems, the CFSD
18 does not have the capability to directly provide housing or job services. Because the
19 CFSD is unable to provide many direct services and does not have any priority access
20 agreements with other agencies or organizations, defendants have candidly admitted
21 that the CFSD has insufficient service resources to meet the "reasonable efforts"
requirement of federal law. Based on the foregoing, the Court finds that defendants
have consistently failed to provide services or otherwise use "reasonable efforts" to
prevent placement. The result has been an increased risk of arbitrary or inappropriate
placements as well as an increased cost to the District. 762 F.Supp. at 970-71. . . .

22 The failure to provide services designed to facilitate a child's return home is
23 frequently due to the unavailability of those services." *Id.* at 974.

24 It is a case about thousands of children who, due to family financial problems,
25 psychological problems, and substance abuse problems, among other things, rely on
26 the District to provide them with food, shelter, and day-to-day care. It is about
27 beleaguered city employees trying their best to provide these necessities while plagued
28 with excessive caseloads, staff shortages, and budgetary constraints. It is about the
failures of an ineptly managed child welfare system, the indifference of the
administration of the former mayor of the District of Columbia, Marion Barry, and
the resultant tragedies for District children relegated to entire childhoods spent in
foster care drift. Unfortunately, it is about a lost generation of children whose tragic

1 In this case, for example, it is clear that DSHS does not equip its caseworkers to
2 address homelessness; it has not acknowledged responsibility to do so; it never sought
3 appropriation for the necessary resources; and it never examined the extent to which
4 homelessness is a problem in its foster care caseload or whether the assistance will in fact be
5 cheaper than foster care. These are defaults that are beyond the ability of a dependency judge
6 to explore. They are exactly the types of problems that make systematic challenges
7 necessary. It would be ironic indeed if the courts lack the ability under state law to address
8 the very deficiencies that hamper their authority in individual cases.
9

10 **D. Recent Amendments to the Social Security Act Reversing**
11 ***Suter v. Artist M.* Require the Court to Reinstate Most of the**
12 **Plaintiffs' Federal Statutory Claims.**

13 Recent amendments to the Social Security Act, effective October 20, 1994, require the
14 court to reinstate some of the plaintiffs' federal statutory claims that the court had dismissed
15 under *Suter v. Artist M.*. In its Order on Defendants' Motion for Judgment on the Pleadings,
16 the court dismissed the plaintiffs' several statutory claims under the Adoption Assistance and
17 Child Welfare Act of 1979, Title IV-B and Title IV-E of the Social Security Act. The court
18 cited *Suter v. Artist M.*:
19

20 Plaintiffs have no private right of action, either implied or based on 42 U.S.C.
21 Sec. 1983, to enforce the reasonable efforts requirement of 42 U.S.C. Sec.
22 671(a)(15). There is no private right of action, either implied or based on 42

23 plight is being repeated every day." *Id.* at 960.

24 Defense counsel has argued that public institutions cannot solve the problems brought
25 about by poverty, neglect, and abuse until society addresses their causes. Plaintiffs
26 have not asked for a "perfect world", however, they merely request compliance with
27 statutory and constitutional requirements and they ask not to be harmed while in the
28 District's custody. *Id.* at 961.

27 *LaShawn A. v. Dixon*, 762 F.Supp. 959 (D.D.C. 1991), *affirmed*, *LaShawn A. By Moore v. Kelly*,
28 990 F.2d 1319 (D.C.Cir 1993).

1 U.S.C. Secs. 670 et seq. (Title IV-E of the Social Security Act) or under 42
2 U.S.C. Secs. 620 et seq. (Title IV-B of the Social Security Act). *Suter v.*
3 *Artist M.*, 112 S.Ct. 1360 (March 25, 1992).

4 Order on Defendants' Motion for Judgment on the Pleadings, § 2.1

5 Congress recently amended the Social Security Act to expressly overturn that part of
6 *Suter v. Artist M.* that had precluded private enforcement. The amendments did leave
7 unchanged only the *Suter* ruling that precludes enforcement of the "reasonable efforts"
8 provision. Other requirements for preventive and reunification under Title IV-B and IV-E
9 services are now enforceable by a private cause of action. The new law states:

10 (a) In an action brought to enforce a provision of the Social Security Act,
11 such provision is not to be deemed unenforceable because of its inclusion in a
12 section of the Act requiring a State plan or specifying the required contents of
13 a State plan. This section is not intended to limit or expend the grounds for
14 determining the availability of private actions to enforce State plan
15 requirements other than by overturning any such grounds applied in *Suter v.*
16 *Artist M.*, 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court
decisions respecting such enforceability: Provided, however, That this section
is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15)
of the Act is not enforceable in a private right of action.

17 P.L. 103-382; P.L. 103-432; Sec. 555 of the Improving America's Schools Act of 1994,
18 adding a new section to Title XI (General Provisions) of the Social Security Act, 42 U.S.C.
19 §§ 1301 et seq. (Reprinted in Congressional Record, vol. 140, No. 138-part II (September
20 28, 1994)).¹⁰ The amendment expressly applies to "pending cases":

21 (b) The amendment made by subsection (a) shall apply to actions pending
22 on the date of the enactment of this Act and to actions brought on or after such
23 date of enactment.

24 *Id.*

25 By this amendment, Congress made clear that private plaintiffs have a private right of
26

27 ¹⁰ President Clinton signed the amendment into law on October 20, 1994.
28

1 action to enforce provisions of federal law that dictate the contents of state plans. This is also
2 clear from the legislative history:

3 A sweeping Supreme Court decision eliminated an individual's right to sue to
4 enforce provisions of State plans under the Social Security Act. This caused
5 real concern, and I joined with several of my Senate colleagues in petitioning
6 the finance committee to review this court decision and its impact on States
7 and children in 1992. Senators Moynihan and Packwood held a hearing which
helped to forge a compromise on this issue. That compromise is part of this
legislation.

8 Senator Rockefeller. Congressional Record - Senate (October 8, 1994, S15024). Courts have
9 made the same point about the proposed amendment when dismissing Title IV-B and Title
10 IV-E claims before its enactment:

11 If children's rights under the AACWA and CAPTA are to be recognized as
12 privately enforceable under § 1983, Congress will need to clarify those rights,
13 and the available remedies, in unambiguous terms. Congress can easily do so.

14 *Eric L. By and Through Schierberl v. Bird*, 848 F.Supp. 303, 311 (D.N.H. 1994). The court
15 then noted the proposed amendment which at that time had not yet passed. *Id.* at 311, n. 10.

16 This amendment requires the court to vacate the second sentence of paragraph 5.1 of
17 its ruling above and to reinstate the plaintiffs' claims under Title IV-B and Title IV-E other
18 than those arising under 42 U.S.C. § 671(a)(15). These claims are:

- 19 :
20 ▶ 42 U.S.C. § 627(a)(2)(C), which requires DSHS to have "a service program
21 designed to help children, where appropriate, return to families from which they have
22 been removed or be placed for adoption or legal guardianship.";
- 23 ▶ 42 U.S.C. § 627(b)(3) which requires the state to have "implemented a
24 preplacement preventive service program designed to help children remain with their
25 families.";
- 26 ▶ 42 U.S.C. § 675(1)(B) which requires DSHS to have for each child "a plan for
27
28

1 assuring that the child receives proper care and that services are provided to the
2 parents, child, and foster parents in order to improve the conditions in the parents'
3 home, facilitate return of the child to his own home or the permanent placement of the
4 child,"

5
6 Federal courts have long found these provisions enforceable prior to *Suter v. Artist M.*¹¹

7 Those holdings are again good authority.

8 The reinstatement of these claims does not require further fact finding. They are
9 based upon the same stipulated and undisputed facts of the summary judgment record.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

25 ¹¹ E.g., *Lynch v. King*, 550 F.Supp. 325 (D. Mass 1982), *aff'd* 719 F.2d 504 (1st Cir. 1983);
26 *L.J. ex rel Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert denied*, 488 U.S. 1018 (1989);
27 *Scrivner v. Andrews*, 816 F.2d 261 (6th Cir. 1987); *Leshner v. Lavrich*, 784 F.2d 193 (6th Cir. 1986);
28 *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill 1989); *In re Scott County Master Docket*, 672 F.Supp.
1152 (D.Minn 1987), *aff'd* 868 F.2d 1017 (8th Cir. 1989).

1 E. The Court Should Grant the Proposed Relief on the
2 Foster Care Cases

3 The reinstatement of the federal claims and the amendments to Chap. 13.34 RCW
4 support plaintiffs' proposed order on the foster care issues: (1) The proposed order requires
5 DSHS to plan for equipping its caseworkers and the dependency court with housing resources
6 for their use in those cases where it is required. (2) The proposed order includes families for
7 whom housing assistance would work to prevent or shorten a placement, even if they have
8 other problems that can also be considered a "primary factor" in causing or prolonging the
9 need for placement.
10

11 I. DSHS Must Plan

12 DSHS objects to the requirement that it plan for providing the required housing
13 assistance. Letter to the Court, dated September 15, 1994. Yet an agency plan is necessary
14 for meaningful relief. The federal statutes requires "plans" and "programs" to provide the
15 necessary preventive and reunification services. E.g., 42 U.S.C. § 627(a)(2)(C), (requiring
16 "a service program"); 42 U.S.C. § 627(b)(3)(requiring a "preplacement preventive service
17 program"); 42 U.S.C. § 675(1)(B)(requiring "a plan"); 42 U.S.C. § 627(a)(2)(C)(requiring
18 "a service program"). The recent amendments to Chap. 13.34 RCW also require in
19 individual cases that "preventive services" be part of the "permanency plan". See above.
20

21 In their reply letter of September 20, 1994, the plaintiffs also explained why DSHS
22 must plan if any relief is to be meaningful:
23

24 It is essential that DSHS plan for this. Otherwise, individual dependency
25 judges will be faced with caseworkers and Assistant Attorneys General in
26 dependency cases who will (i) not know about the order in this case or will not
27 be prepared or inclined to inform the dependency court about it; and (ii) will
28 not be equipped to comply with any order in a dependency court and, instead,
will asked to be excused on the grounds that their office is not prepared for
compliance. In other words, the ruling in this case will likely have no effect.

1 The plaintiffs' order proposes only that DSHS do what any credible agency
2 would do with an important responsibility: plan for its fulfillment and
3 promulgate its policies. Otherwise, other dependency courts will be
4 relitigating the same issues; or worse, these issues will not be raised at all in
5 cases where housing assistance could prevent or shorten a child's placement.

6 *Id.* at page 5.

7 The requirement for a plan would not be affected by any limitation on the authority of
8 the dependency courts. A plan is necessary to address those cases where the DSHS
9 caseworker herself determines that the assistance is necessary but where DSHS has failed to
10 equip her with the resources. (*In re the Welfare of J.H.* did not address this situation. In
11 that case, the court ordered services that the caseworker opposed as "unnecessary". See page
12 3.) The basis for this relief is quite independent from the authority of the dependency
13 court.¹² It arises before the placement petition.¹³ Indeed, prevention services by definition are

14 ¹² See Plaintiffs' Memorandum Opposing Defendants' Motion for Judgment on the Pleadings,
15 pages 18 - 27 (November 8, 1991).

16 ¹³ *E.g.*

17 State efforts shall address the needs of children and their families, including
18 emotionally disturbed and mentally-ill children, potentially dependent children, and
19 families-in-conflict by:

20 (1) Serving children and families as a unit in the **least restrictive setting** available
21 and in close proximity to the family home, consistent with the best interests and
22 special needs of the child;

23 (2) Ensuring that appropriate social and health services are provided to the family
24 unit both **prior** to and **during** the removal of a child from the home and **after** family
25 reunification.

26 . . .

27 (5) Developing and implementing comprehensive, preventive, and early intervention social
28 and health services which have demonstrated the ability to **delay or reduce the need for out-**
of-home placements and ameliorate problems before they become chronic or severe;

... .

(7) (a) Developing coordinated social and health services which: (i) Identify
problems experienced by children and their families early and provide services which

1 useless unless they are tried before the situation deteriorates to the point of requiring a
2 petition for placement. The basis applies as well throughout the life of an adjudicated case,
3 independent of court orders. Caseworkers have a duty to achieve reunification without being
4 ordered to do so by a dependency court and must attempt it throughout the long intervals
5 between court review. DSHS must at least fulfill its statutory duties to permit its
6 caseworkers to fulfill the needs that they identify themselves.

8 2. *The Foster Care Relief Should Be Targeted to Those*
9 *Cases Where the Housing Assistance Would Work.*

10 The court's summary judgment ruling focused on those cases where a family's
11 homelessness "is the primary factor" that determines the placement or retention of a child.
12 Order on Summary Judgment, §B(3). These formulation may leave out plaintiff class
13 members who may have other problems that could also be characterized as primary but for
14 whom housing assistance would still be necessary and effective to prevent or shorten a
15 placement. The record showed without dispute that these cases exist. (See e.g. Declaration
16 of Terrence A. Carroll.) The plaintiffs' have already discussed the practical problems that
17 this formulation presents to the dependency courts and caseworkers.¹⁴ The formulation has
18 since been of only limited help to dependency courts.¹⁵

21 are adequate in availability, appropriate to the situation, and effective; . . . (iii) Serve
22 children and families in their own homes thus **preventing unnecessary out-of-home**
23 **placement** or institutionalization; . . .

23 RCW 74.14A.020 (emphasis added).

24 ¹⁴ Plaintiffs' Motion for Clarification and Reconsideration of Ruling on Cross Summary
25 Judgment Motions, page 3 (January 5, 1994).

26 ¹⁵ Attachment B is a Verbatim Report of Proceedings in a recent dependency case of King
27 County Superior Court, along with the Findings and Order. In that case, Judge Bobbe Bridge
28 initially ordered DSHS to provide housing assistance to the caseworker for his use, if necessary, on
behalf of a mentally ill homeless mother whose children were in placement. DSHS argued and the

1 The federal statutes and the amendments to Chap. 13.34 RCW give reason for the
2 court to review its formulation. Those laws do not limit DSHS's service obligation only to
3 address narrow and discreet problems that can be isolated from other needs. Citing the
4 same federal statutes that again apply in this case, the court in *Norman v. Johnson* 739
5 F.Supp. 1182, 1185 (N.D.Ill. 1990) allowed for this flexibility. It required DSHS to provide
6

7 court agreed that this court's class ruling did **not** apply because the mother's homelessness was not
8 the "primary reason". Instead, the court based its order on the "inextricable" link between
9 homelessness and the mother's ability to recover from her mental illness.

10 THE COURT: No, but take it the other way, What if she has this miraculous mental
11 recovery and it's substance free, abuse-free, you still would not
12 return them; would you?

13 [DSHS AG]: We would still be concerned about the housing issue, and we would continue
14 to work with her.

15 THE COURT: Well, I have expert opinion here telling me that that's exacerbating and
16 impeding her ability to recover, that being the lack of housing. We get to
17 the vicious circle.

18 [DSHS AG]: I think the lack of housing is certainly a factor in any case, whether it's a
19 family with no housing or mental health issues or any other kind of issues,
20 that the lack of housing certainly is going to impede the ability to reunify the
21 family. But again, I think if I have to look at Schindler's ruling then, it's
22 specific in saying that it has to be the primary factor preventing
23 reunification, and I don't think this case meets that criteria. But certainly
24 it's an issue, and we don't deny that it is.

25 THE COURT: And although was not perhaps the primary reason for removal, the fact is
26 that now housing seems to be extricably [sic] linked to sub reasons for
27 removal, mental health issues and domestic violence as I read from my
28 review of the petition and the State's pleading. . . . As I indicated earlier,
based upon the uncontroverted evidence that I have before me from experts
in the field, not only mental health professionals but also law enforcement,
and I would regard as an expert, who see these situations on a daily basis,
people on the street without adequate housing, I am convinced that the lack
of stable housing exacerbates those mental health issues. And so they are
therefore inextricably linked. . . .

Attachment B, Verbatim Report of Proceedings, 21, 22, 28-29. (The parties later agreed to vacate
this order.)

1 housing assistance to a class of families, defined like the plaintiffs, to include those who are
2 separated " at least in part, because of their inability to provide adequate housing for their
3 children." 739 F.Supp. at 1185. (emphasis supplied).

4 The plaintiffs' proposed formulation would allow the caseworker and the dependency
5 court the needed flexibility to focus on whether the service is necessary and would work. At
6 least the formulation should expressly decline to restrict the power of dependency courts in
7 individual cases from requiring the assistance on other grounds, as Judge Bridge did.

8
9 **F. If It Denies Relief Under State Law or the Social**
10 **Security Act the Court Must Address the Constitutional Issues.**

11 If the court denies relief on the foster care claims under state or federal statutes, than it
12 must address the constitutional claims under *In re Detention of J.S.* and other authority:

13 **1. DSHS Deprives the Plaintiffs of Their Liberty and Family Without**
14 **Substantive Due Process.**

15 The plaintiffs' claims for preventive and reunification services are also based on their
16 substantive due process right against unnecessary government deprivation of their liberty and
17 family integrity. See Plaintiffs' Memorandum Opposing Defendants' Motion for Judgment on
18 the Pleadings, pages 51 - 55. The court's statutory foster care judgment has thus far made a
19 constitutional ruling unnecessary. If state and federal statutes, however, allow DSHS to place
20 or retain children unnecessarily then the only limits on state power in these cases are the
21 fundamental principles of due process. *In re Detention of J.S.* has now defined those limits.
22 It cited the analysis of *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28
23 (1982).
24

25 The court in *In re Welfare of J.H.* dismissed these constitutional claims in a cursory
26 comment without analysis. It made the point that "the constitution does not guarantee family
27
28

1 unity at state expense." (page 7). As a general proposition, this is true enough. The
2 question changes dramatically, however, when the family unit is threatened by the state itself.

3 The Court [in *Youngberg*] noted that although a state has no
4 general constitutional duty to provide substantive services to its
5 citizens a duty may arise when a person is in the state's custody
6 [foster care] and is dependent upon the state for care.
Youngberg, 457 US at 317, 102 S.Ct. at 2458.

7 *LaShawn A. v. Dixon*, 762 F.Supp. 959, 992 (D.D.C. 1991), *aff'd* on other grounds, *aff'd* on
8 other grounds, *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993)(reviewing
9 foster care system). The Supreme Court in *In re Detention of J.S.* also cited *Youngberg* to
10 distill the requirement that the deprivation be based on "professional judgment". 124 Wn.2d
11 at 700:

12
13 Thus, the constitutionally significant issue is not whether the optimal course of
14 treatment must be followed, but whether a course of treatment is adequate and
reasonably based on professional judgment.

15 124 Wn.2d at 700.

16 The summary judgment record in this case is uncontested that DSHS has failed to
17 exercise professional judgment, that it has frustrated the professional judgment of its own
18 caseworkers and the dependency court, and that its practices in these cases fall below the
19 standards of the child welfare profession.
20

21 First, DSHS has stipulated that it has not even compiled the information or data that
22 would be necessary for the exercise of DSHS's professional judgment as an agency:

23 The Department of Social and Health Services (DSHS) has not conducted any
24 studies and does not compile information or data on the following:

25 . . .

26 2.3 whether homelessness or the lack of housing is an individual factor in
27 the placement or retention of children in foster care in Washington State,
voluntarily or involuntarily, or is mentioned in dependency pleadings or
Individual Service Plans;
28

2.4 the extent to which the parents' procurement of adequate housing is listed in dependency court orders or Individual Service Plans among the preconditions for a child's return from foster care.

Stipulation of Facts, § 2. Even to the extent that cost efficiencies are a legitimate part of professional judgment, DSHS has not even made the analysis: it has stipulated that it has not conducted the studies or compiled information or data on "homelessness among families with children in Washington State . . . or its effects on the cost or accessibility of DSHS programs for children and families;" Stipulation of Facts, § 2.1. In fact, the **only** evidence on the record shows that making housing assistance available to caseworkers and the dependency courts for their use when they find it necessary would save money.¹⁶

Second, DSHS's even frustrates the judgment of its own caseworkers who determine that housing assistance is necessary. In fact, the plaintiffs' primary goal from the start is to have DSHS equip its caseworkers with these resources for their use when in their professional judgment it is necessary. Yet, the record is uncontested that DSHS does not provide the resources even in these cases. This is clear from the dependency judges, caseworkers and other professionals:

¹⁶ The summary judgment record on this point was uncontested:

The provision of shelter and housing to families in these cases is likely to save the state substantial sums of money that must otherwise be spent on the enormous costs of foster care placements.

Declaration of Terrence A. Carroll, page 5.

Under this obligation, the child welfare agency must equip its caseworkers and the dependency court with the shelter and housing services for use when this assistance is determined to be necessary and effective to prevent or shorten a placement in a specific case. In such cases, the cost of the assistance can easily be recouped in the greater cost of the foster care to be averted.

Declaration of Elizabeth S. Cole, page 5.

1 The DSHS, however, has not equipped its child protective or child welfare
2 services workers to provide effective housing resources necessary to assist the
3 family in dependency cases in finding adequate housing. In opposing proposals
4 in these cases that the court order the provision of housing assistance, the
DSHS representative would uniformly assert that the caseworker lacks the
resources to do so.

5 Declaration of Terrence A. Carroll (retired judge) ¶ 8. Other foster care practitioners,
6 including CPS/CWS workers and defense attorneys, report similarly.¹⁷

7
8 **Third**, as a result of these defaults DSHS's actions in these cases fall below the
9 standards of the child welfare profession, according to nationally prominent experts whose
10 assessments are uncontested:

11 In these cases where housing assistance is likely to make a difference in the
12 need for placement or continued placement, the caseworker's provision of
13 housing assistance to the family is a necessary part of DSHS's duty to make
14 reasonable efforts to prevent placements or to reunify families. Failing to
15 provide shelter and housing in these cases also falls below the minimum
standards of the an adequate child welfare agency that is charged with the duty
of protecting children.

16 Declaration of Terrence A. Carroll, § 6. *See Also* Declaration of Elizabeth S. Cole, § 11.

17 The constitutional case is straightforward. The record shows not only that DSHS's
18 professional judgment does not meet minimum constitutional standards. It shows that DSHS
19 has not even made a professional judgment or that it foils it when it is made.¹ Under the
20 *Youngberg* analysis, this is, by definition, a denial of substantive due process.

21
22
23
24
25 ¹⁷ E.g., Declaration of Janet Engle, (CPS worker) ¶ 10; Declaration of Patricia Proebsting
26 (public defender), ¶ 5 ("I have never represented a parent for whom the CPS or CWS worker could
27 offer any housing assistance more than such a [letter stating that the children will be returned soon
upon the procurement of housing]."; Declaration of Kristin Silverton (CPS worker) ¶ 16; Declaration
of Laura L. Crawford (defense counsel), ¶ 12 ("Unfortunately, my experience has been that DSHS
workers are just not able to provide housing assistance.").

1 2. *The Plaintiffs' Right to Fair Procedures*

2 As the court is aware, the plaintiffs have not heretofore alleged defects in the
3 procedures available in the dependency system whereby class members whose children are
4 subject to the foster care system can contest the denial or termination of services. The
5 plaintiffs have instead presumed that the proceedings of the dependency court were available
6 for this purpose. If under *In re Welfare of J.H.*, however, the dependency court lacks
7 authority to review DSHS service decisions and to remedy defaults then the plaintiffs will
8 either move to amend their complaint to add the following claims or seek relief in separate
9 litigation:
10

- 11 (a) DSHS fails to provide an adequate "case review system" as required by 42
12 U.S.C. § 675(5).;
- 13 (b) DSHS fails to provide "fair hearings" as required by 42 U.S.C. § 671(a)(12);
- 14 (c) DSHS fails to comply with state law and its own regulations requiring the
15 provision of fair hearings. Chap. 74.08 RCW; Chap. 388-15 RCW.
- 16 (d) DSHS denies the plaintiffs' their property interest in preventive and
17 reunification services without procedural due process of law.¹⁸

18

19 ¹⁸ Property interests do not have to be guaranteed "entitlements" to receive constitutional
20 protection. Indeed, major procedural due process decisions concerned benefits that were in limited
21 supply or were governed by the exercise of great discretion. E.g., *Board of Regents v. Roth*,
22 *supra*, (tenure at a university); *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (An applicant for
Section 8 housing was found to have a right to due process even though her admission to the
program depended on the exercise of agency discretion in the selection process and the number of
available units was very limited.); *Yashon v. Gregory*, 737 F.2d 547 (6th Cir. 1984) (employment).

23 Similarly, DSHS may not deny preventive and reunification services available without due
24 process. Courts have consistently ruled that state statutes, regulations, and policies governing
dependency systems create constitutionally protected property interests.

25 To the extent these statutes and regulations confer benefits upon the plaintiffs in the
26 District's foster care, the deprivation of those benefits takes on constitutional
dimensions.

27 *LaShawn v. Dixon*, 762 F.Supp. 959, 993 (D.C. Cir. 1991), *aff'd on other grounds*, *LaShawn A. by*
28

1 **II. THE COURT HAS NO BASIS TO CHANGE ITS TRIAL**
2 **VERDICT IN FAVOR OF HOMELESS CHILDREN UNDER**
3 **RCW 74.13.031(1) and 74.13.020.**

4 DSHS also asserts that *In re Welfare of J.H.* requires the court to reverse its various
5 rulings under RCW 74.13.020 and RCW 74.13.031(1) including its trial verdict that DSHS
6 has failed to devise and implement the "coordinated and comprehensive plan" required under
7 RCW 74.13.031(1). This is incorrect for several reasons. (1) *In re Welfare of J.H.*
8 concerned the authority of a dependency court to order DSHS to provide services to homeless
9 families in a dependency proceedings. It does not pertain to other homeless families and
10 their claims under Chap. 74.13 RCW. Not even its dicta addressed the separate requirement
11 of RCW 74.13.031(1) that DSHS devise and implement a "coordinated and comprehensive
12 plan" for homeless children. (2) Its dicta about "cash entitlements" and "housing assistance"
13 does not conflict with this court's rulings that DSHS must have an adequate plan for homeless
14 children and that the plan must address their need for shelter and housing. (3) *In re Welfare*
15 *of J.H.*, if it is ever published, is superseded by *In re Detention of J.S.*.

16
17 **A. *In re Welfare of J.H.* Did Not Address and Does Not Affect**
18 **DSHS's Obligation Under RCW 74.13.031(1) to Have a Coordinated**
19 **and Comprehensive Plan for Homeless Children.**

20 *In re Welfare of J.H.* did not concern and does not even mention the separate
21 requirement of RCW 74.13.031(1) that DSHS "develop, administer, supervise, and monitor a
22 coordinated and comprehensive plan that establishes, aids, and strengthens services for the
23 protection and care of homeless . . . children." The Court of Appeal's decision provides no
24 grounds to reverse the court's trial verdict under this statute.
25

26
27

Moore v. Kelly, 990 F.2d 1319 (D.C. Cir. 1993); *Taylor By and through Walker v. Ledbetter*, 818
28 F.2d 791, 798 - 800 (11th Cir. 1987); *Chrissy F. by Medley v. Mississippi DPW*, 925 F.2d 844,
 851-852 (5th Cir. 1991).

1 The dicta in *In re Welfare of J.H.* asserts that RCW 74.13.031 does not give rise to
2 an "entitlement to cash grants" or an "entitlement" to "housing assistance money". Slip
3 Opinion, page 6. Several comments are in order. **First**, this is nothing new. The court in
4 this case has already ruled that there is no "entitlement" to housing assistance.¹⁹ DSHS does
5 not have to assist homeless children because they are "entitled" to a particular form of
6 assistance. DSHS must serve them as part of its implementation of the adequate "coordinated
7 and comprehensive plan" that even *In re Welfare of J.H.* does not question.

9 **Second**, this court has never ruled and the plaintiffs have never asserted that DSHS
10 must provide "cash grants" or "housing assistance money" as a matter of law. Instead, the
11 court has ruled only that the "language of RCW 74.13.031 is mandatory. . . . [and that]
12 housing would certainly be a component that would need to be addressed in any plan that
13 complies with state law." Order on Cross Motions for Summary Judgment, § A(2). The
14 court did not rule as a matter of law that the plan must provide any particular form of
15 assistance. Instead, the court ruled that whether or not DSHS had an adequate plan was a
16 factual question for trial. This type of assessment occurs repeatedly in court. While the
17 legal terms "reasonable care" or "medically necessary" do not as a matter of law dictate a
18 particular course of treatment, for example, the trier of fact must determine whether the
19 evidence calls for a specific procedure. Similarly, DSHS was free to prove at trial that its
20 plan without housing assistance adequately served homeless children. It failed. The
21 overwhelming trial evidence was that homeless children need shelter and housing assistance,
22 that this assistance is a necessary part of an adequate plan and that, without it, DSHS's plan
23 will have no "appreciable effect" on our state's homeless children. See Plaintiffs' Proposed
24
25
26

27 ¹⁹ Order on Cross Motions for Summary Judgment, § A(4).
28

1 Findings of Fact with Citations to the Evidence. Nothing in *In re Welfare of J.H.* precludes
2 the court's authority and duty to make this assessment based upon the evidence.

3 **Third**, even after the trial, the court did not rule and the plaintiffs do not assert that
4 the housing assistance has to be "cash grants" or "money". The evidence made clear that
5 many different ways are available to provide housing assistance in all its forms: preventive,
6 emergency shelter and transitional assistance. DSHS has the discretion to make choices. The
7 plaintiffs' proposed order in fact does not specify any choice. It only requires that DSHS
8 submit a plan. Nothing in *In re Welfare of J.H.* changes this requirement.

10 **B. RCW 74.13.020 is Enforceable Under**
11 ***In re Detention of J.S.***

12 The dicta in *In re Welfare of J.H.* refers to the requirement of RCW 74.13.031 that
13 DSHS provide homeless children with "child welfare services" defined in RCW 74.13.020.
14 Citing *Aripa v. Department of Social and Health Services*, 91 Wn.2d 135, 139, 588 P.2d 185
15 (1978), it discounts these provisions as an unenforceable "statutory policy statement". Slip
16 Opinion, page 6. However, the court should not follow this dicta. The superseding
17 authority of *In re Detention of J.S.* makes clear that courts must enforce DSHS's duties as
18 those duties are stated in statute. The language of RCW 74.13.020 and 74.13.031 is just as
19 mandatory as the provision of Chap. 71.05 RCW enforced in *In re Detention of J.S.* The
20 dicta in *In re Welfare of J.H.* should not be read to repeal the clear language of this statute
21 that the Supreme Court makes clear should be taken seriously.

1 **III. CONCLUSION**

2 The court should sign the plaintiffs' proposed order and enforce the law governing
3 DSHS's responsibility to the plaintiff children. Doing so does not intrude the court into a
4 legislative province. This is not a conflict between the courts and the legislature. This is
5 conflict between, on the one hand, clear legislative mandates and the judiciary seeking to
6 enforce them, and, on the other hand, a state agency that seeks to avoid the constraints and
7 judicial oversight that make for a balanced and lawful government.
8

9
10 November 4, 1994

11 Michael Mirra

12 Michael Mirra, WSBN 10,877
13 Lori Salzarulo, WSBN 17,294
14 Carol Vaughn, WSBN 16,579

15 Attorneys for Plaintiffs

16 **EVERGREEN LEGAL SERVICES**
17 Suite 401
18 401 Second Avenue South
19 Seattle, WA 98104
20 (206) 464-1422

21 **GARVEY, SCHUBERT & BARER**
22 Second & Seneca Building
23 18th Floor
24 1191 Second Avenue
25 Seattle, WA 98101
26 (206) 464-3939

27 a.58:HOMCHIL.443
28

