

1 Joseph Mais (005470)
Shane Swindle (011738)
2 **PERKINS COIE LLP**
2901 N. Central Avenue, Suite 2000
3 Phoenix, Arizona 85012-2788
4 T: (602) 351-8000
5 F: (602) 648-7000
6 jmais@perkinscoie.com
sswindle@perkinscoie.com

7 Anne C. Ronan (006041)
Timothy M. Hogan (004567)
8 **ARIZONA CENTER FOR LAW IN THE**
9 **PUBLIC INTEREST**
514 West Roosevelt Street
10 Phoenix, Arizona 85003
11 T: (602) 258-8850
12 F: (602) 258-8757
13 aronan@aclpi.org
thogan@aclpi.org

William Kapell (admitted *pro hac vice*)
Julia L. Davis (admitted *pro hac vice*)
Rachel B. Nili (admitted *pro hac vice*)
Adriana T. Luciano (admitted *pro hac vice*)

CHILDREN’S RIGHTS, INC.
330 Seventh Avenue, Fourth Floor
New York, New York 10001
T: (212) 683-2210
F: (212) 683-4015
wkapell@childrensrights.org
jdavis@childrensrights.org
rnili@childrensrights.org
aluciano@childrensrights.org

14 *Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

16 B.K. by her next friend Margaret Tinsley;
17 C.P. and B.T. by their next friend Jennifer
Kupiszewski; A.T.; A.C-B; M.C-B; J.C-B;
18 D.C-B; J.M. and J.C. by their next friend
19 Susan Brandt, for themselves and those
similarly situated,

Plaintiffs,

v.

21 Gregory McKay, in his official capacity as
22 Director of the Arizona Department of Child
Safety; Cara M. Christ, in her official capacity
23 as Director of the Arizona Department of
Health Services; and Thomas J. Betlach, in his
24 official capacity as Director of the Arizona
25 Health Care Cost Containment System,

26 Defendants.
27
28

) No. 2:15-cv-00185-PHX-ROS

)
)
) **SECOND AMENDED COMPLAINT**
) **FOR INJUNCTIVE AND**
) **DECLARATORY RELIEF AND**
) **REQUEST FOR CLASS ACTION**

) (Assigned to the Honorable Roslyn
) O. Silver)

1 Plaintiffs, by their undersigned attorneys, bring this civil action for declaratory and
2 injunctive relief, and allege as follows:

3 **INTRODUCTION**

4 1. This is a civil rights class action brought by the Named Plaintiffs, children in
5 Arizona state foster care custody, on behalf of themselves, a general class of children who
6 are or will be placed in such custody following reports that they have suffered child abuse
7 or neglect, and certain subclasses of these children.

8 2. Plaintiffs are among the State's most vulnerable citizens. Through no fault of
9 their own, they find themselves in the legal custody of the State after having already
10 suffered the trauma of being abused or neglected by their own families. Plaintiffs seek
11 declaratory and injunctive relief to end certain child welfare policies and practices
12 described herein exposing them to yet further physical and emotional harm and
13 unreasonable risk of harm while in the State's care.

14 3. On May 29, 2014, legislation was enacted giving responsibility for the state's
15 child welfare operations to the state Department of Child Safety ("DCS") and removing
16 such responsibility from the state Department of Economic Security ("DES"). As of May
17 29, 2014, DCS, which was established as an independent agency, is legally responsible for
18 managing the state's child welfare system.

19 4. Plaintiffs name Gregory McKay, the Director of DCS, as a defendant. Defendant
20 McKay, who is sued solely in his official capacity, directly and indirectly controls and is
21 responsible for the policies and practices of DCS, including those set forth herein.

22 5. Plaintiffs also name Cara M. Christ, M.D., the Director of the state Department
23 of Health Services ("DHS"), as a defendant. DHS is responsible for providing mental and
24 behavioral health services to children in Arizona state foster care custody. Defendant
25 Christ, who is sued solely in her official capacity, directly and indirectly controls and is
26 responsible for the policies and practices of DHS, including those set forth herein.

27 6. Plaintiffs also name Thomas J. Betlach, the Director of the Arizona Health Care
28 Cost Containment System ("AHCCCS"), as a defendant. AHCCCS is responsible for

1 administering and supervising the Medicaid program in Arizona. Defendant Betlach, who
2 is sued solely in his official capacity, directly and indirectly controls and is responsible for
3 the state's compliance with Medicaid's statutory and regulatory requirements.

4 7. Over the past several years, while foster care rates across the nation have been on
5 the decline, Arizona has experienced a dramatic increase in the number of children in state
6 foster care. From 2003 to 2012, the number of children in the State's foster care custody
7 nearly doubled. More recently, Arizona's foster care population grew from 10,207 as of
8 March 31, 2010 to 15,037 as of September 2013, a 47.3% increase. The number of
9 children in out-of-home care grew by another 10% from February 2013 to February 2014.
10 As of September 30, 2014, there are 16,990 children in state foster care custody who have
11 been placed in out-of-home care.

12 8. This huge growth in the state's foster care population has been fueled by
13 extensive state budget cuts to important support services that had previously helped keep
14 families together. In particular, state funding for DES's contracts with community-based
15 providers who offered in-home services to children, aimed at making removal of children
16 into foster care unnecessary, was cut in half in recent years, from \$43 million in fiscal year
17 2008 to under \$22 million in fiscal year 2012.

18 9. These cuts followed the state's termination of its Family Builders program in
19 2004, which had provided family-centered assessments, case management, and services for
20 families with children deemed to be at low or only potential risk of being abused or
21 neglected.

22 10. According to the Arizona Chapter of the American Academy of Pediatrics
23 "[c]uts to DES family support services including child care assistance, housing assistance,
24 substance-abuse treatment and job training for families has resulted in a 40% increase in
25 the number of children who needed to be placed in foster care since 2009 and these
26 children are staying in foster care longer because their parents are not provided with the
27 services they need."
28

1 11. As former Governor Brewer publicly acknowledged in 2014, the Arizona “child
2 welfare system is broken, impeded by years of structural and operational failures.”
3 Defendants DCS and DHS (collectively the “Defendants”) are legally responsible for
4 overseeing this “broken” system.

5 12. Defendants are well aware that the following structural and operational failures
6 continue to plague the state’s child welfare system:

- 7 • **A severe shortage in and inaccessibility of physical, mental and**
8 **behavioral health services available to children in state care.** As a result,
9 far too many children in state foster care custody do not receive the health
10 care services they desperately need and all children in state care are subject
11 to an unreasonable risk that they will suffer physical and emotional harm and
12 deterioration while in the state’s care.
- 13 • **A widespread failure to conduct timely investigations of reports that**
14 **children have been maltreated while in state foster care custody.** As a
15 result of the state’s deficient investigation practices, children in state foster
16 care custody are placed at an undue risk of suffering physical and emotional
17 harm while in state care.
- 18 • **A severe and sustained shortage of family foster homes.** As a result of
19 this shortage, children in state foster care are emotionally harmed and
20 subjected to an unreasonable risk of harm by being placed far from their
21 families and communities, separated from their siblings, and forced to
22 experience disruptive school changes.
- 23 • **A widespread failure to engage in basic child welfare practices aimed at**
24 **maintaining family relationships, such as placing siblings together,**
25 **placing children with their biological parents on a trial reunification**
26 **basis, coordinating visits between children in state foster care and their**
27 **biological families, and having caseworkers make regular visits with the**
28 **children’s biological parents to monitor progress toward family**
29 **reunification.** These failures subject children in state foster care to an
30 unreasonable risk of suffering emotional harm while in state care. Moreover,
31 as a result of these deficiencies, children are subjected to unreasonable
32 delays in being reunified with their families, causing them to suffer further
33 emotional harm.

34 13. The state child welfare agency and DHS have failed to remedy these ongoing
35 failures.

36 14. Moreover, Arizona officials have long been aware of these deficiencies and
37 harms. As far back as 2003, the Maricopa County Attorney’s Office released a report on
38 the state’s child welfare system, *In Harm’s Way*, detailing the system’s deficiencies.
39 Among its findings, the report identified a shortage of foster homes and stated that “[p]art

1 of the reason many feel that children stay in a ‘risky’ situation is the inability to place them
2 elsewhere.” The report concluded that the state’s child welfare system was “overloaded
3 without the proper resources to ensure the safety of all children.”

4 15. That same year, then Governor Janet Napolitano acknowledged that “[t]he
5 system for protecting Arizona’s children from abuse and neglect, which has been falling
6 apart for years due to poor design and chronic under-funding, is in critical need of repair.”
7 Governor Napolitano convened an “Advisory Commission on CPS Reform” that issued an
8 *Action Plan for Reform of Arizona’s Child Protection System* in September 2003 (the
9 “*Action Plan*”). The *Action Plan* noted several systemic deficiencies in the state’s child
10 welfare system, including a shortage of foster homes and limited access to services for
11 foster children.

12 16. In the years since *In Harm’s Way* and the *Action Plan* were released, the child
13 welfare system has continued to suffer from a vast shortage of foster homes and inadequate
14 access to child services, despite the known harm that these structural impairments have
15 caused children in state foster care to suffer.

16 17. As a result of the state’s failure to remedy these problems, plaintiffs have been,
17 and continue to be, exposed to harm and an unreasonable risk of harm, in violation of their
18 federal constitutional and statutory rights.

19 **JURISDICTION AND VENUE**

20 18. This action is brought pursuant to 42 U.S.C. § 1983 to redress violations of the
21 United States Constitution and the provisions of the federal Medicaid Act, including
22 42 U.S.C. §§ 1396a(a)(10)(A)(i)(I), 1396a(a)(43)(C), 1396d(a)(4)(B) and 1396d(r), that
23 require states to provide early and periodic screening, diagnostic and treatment (“EPSDT”)
24 services. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and
25 authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

26 19. Venue is proper here pursuant to 28 U.S.C. § 1391(b) because the claims arise
27 in this district.
28

PARTIES

A. The Named Plaintiffs

B.K.

20. As of February 3, 2015, B.K. is a ten-year-old girl in state foster care with a permanency goal of permanent foster care, meaning that DCS has concluded that she has little, if any, chance of leaving foster care over the next eight years. She has spent more than half of her life in state foster care. During her time in state foster care, B.K. has been deprived of needed physical and mental health care, separated from her siblings, deprived of contact with her mother and siblings, and placed in institutional settings on two different occasions. As a result of these experiences, B.K. has been subjected to emotional harm and/or an ongoing unreasonable risk of harm.

21. B.K. first entered voluntary state custody in 2005 when she was five months old. At that time, B.K.'s mother had a substance abuse problem and could not care for her. B.K. remained in the legal custody of the state child welfare agency until September 2006 when she was returned to her mother.

22. In 2008, then three-year-old B.K. and her three siblings were removed from their mother's home. Upon assuming their care, the state child welfare agency immediately separated the four siblings, placing B.K. and her brother in a licensed foster home, and their two sisters in a second foster home. In late 2009, the state child welfare agency returned B.K. and her siblings to their mother's care.

23. In 2012, B.K. and her three siblings were again removed from their mother's home and placed in state foster care custody. Upon coming into state care for the third time, B.K. was diagnosed with Posttraumatic Stress Disorder ("PTSD"), a mood disorder, psychosis and anxiety. An investigation showed that B.K. had been physically abused by her mother, and had bumps and bruises on her head and behind her ears.

24. Despite her fragile emotional state, the state child welfare agency separated B.K. from all of her siblings, placing her in a group home on "emergency shelter" status.

1 Though such placements are supposed to be short-term, B.K. remained at the group home
2 for more than two years.

3 25. While at the group home, the state child welfare agency failed to ensure that
4 B.K. obtained the glasses she needed to see properly. The state child welfare agency also
5 failed to discover that B.K. was walking with a limp, and failed to make sure that she
6 received the orthopedic shoes she needed. Despite months of complaints from B.K. about
7 a toothache, the state child welfare agency failed to make sure she saw a dentist while she
8 was living at the group home.

9 26. From the time B.K. was placed at the group home in 2012 until early 2014, the
10 state child welfare agency and DHS also failed to ensure that B.K. received consistent
11 counseling and needed mental health services. During this time, B.K. was saying that she
12 was hearing voices that were telling her to hurt other people or that someone would die.
13 One time she was so scared by the voices that she called the police. The state child
14 welfare agency knew that the group home was failing to arrange for B.K.'s transportation
15 to appointments with health care providers, but failed to see to it that B.K. received
16 uninterrupted services. The group home also enrolled B.K. in a specialized school where
17 she was the only girl.

18 27. In May 2014, the state child welfare agency finally placed B.K. in a foster home
19 after she had spent 25 months in the group home. The state child welfare agency placed
20 her with a man and his great-nephew who went to the same specialized school as B.K.
21 The man told the state child welfare agency that he was concerned about B.K.'s mental
22 health and asked the state to make sure she received an updated psychological evaluation.
23 The last complete evaluation had been conducted five years earlier when B.K. was four.
24 The updated assessment was never performed. After only eight weeks, B.K. was moved to
25 a second foster home with neighbors of the man and his great-nephew. After two weeks at
26 this second home, the foster parents packed up B.K.'s things and dropped her off at a DCS
27 office.

28

1 28. In August 2014, DCS moved B.K. to a shelter. The move to shelter care caused
2 B.K. to have to change schools, resulting in educational and social disruption. Moreover,
3 the counselor who had been treating B.K. at the group home refused to drive to see B.K. at
4 the shelter because of the distance involved, and DCS again failed to ensure that B.K.
5 received transportation to her counseling sessions.

6 29. During August 2014, B.K.'s behavioral health coordinator concluded that B.K.
7 should be placed in a "Home Care Training to Home Care Client Services" ("HCTC")
8 therapeutic foster home. No such placement was made and B.K. remained in a shelter
9 until September. While at the shelter, B.K. had no contact with her mother or three older
10 siblings, even though her siblings have been returned to their mother's care. B.K.'s mental
11 health deteriorated at the shelter and she threatened to hurt herself and others. She was
12 admitted to a psychiatric hospital for a week to be stabilized.

13 30. In late September 2014, DCS moved B.K. from the hospital to a non-therapeutic
14 foster home. This resulted in another change in schools. DCS did not ensure that she had
15 regular contact with her mother or siblings.

16 31. In December 2014, still waiting to be placed in an HCTC home, B.K. had
17 another psychiatric crisis and threatened suicide. The state child welfare agency moved
18 her out of the foster home and DHS admitted her to another psychiatric hospital. She
19 stayed in the hospital for a week and a half.

20 32. In late December, months after her providers agreed she needed a therapeutic
21 foster home, B.K. was finally discharged from the hospital to an HCTC placement. This
22 resulted in yet another change in schools.

23 **C.P.**

24 33. As of February 3, 2015, C.P. is a seven-year-old boy who has been in state
25 foster care custody since June 2013, with a permanency goal of adoption. During his time
26 in state foster care, he has attended at least eight different schools and has had to live in at
27 least 11 different placements, including two stays in shelters and a placement in a foster
28 home where he was physically abused. While in state foster care, he has been separated

1 from his siblings, deprived of visits with them, and has been deprived of access to both the
2 mental health services and placements he desperately needs. As a result of these
3 experiences, C.P. has been subjected to physical and emotional harm and/or an ongoing
4 unreasonable risk of harm.

5 34. C.P. and his two sisters were taken into state foster care custody after being
6 exposed to neglect and domestic violence. They were initially placed in an unlicensed
7 foster home for four days before being moved to their grandmother's home. During the
8 two-month period that C.P. was with his grandmother, she repeatedly asked the state child
9 welfare agency for help with C.P.'s mental health needs, but C.P. did not receive any
10 mental health care services. Ultimately, his grandmother asked the state child welfare
11 agency to remove C.P. and his siblings from her home.

12 35. The state child welfare agency then separated C.P. and his older sister from their
13 younger sister. C.P. and his older sister were placed in a Spanish-speaking foster home,
14 even though the children do not speak Spanish. The home was almost an hour away from
15 C.P.'s grandmother and the foster home where C.P.'s younger sister was placed. Within
16 ten days of arriving at the Spanish-speaking foster home, C.P. and his older sister were
17 separated and placed in two different foster homes.

18 36. In early September 2013, the state child welfare agency moved C.P. to yet
19 another foster home. After months in foster care, C.P. was belatedly assigned a therapist.
20 Even then, however, C.P.'s foster mother refused to take C.P. to his appointments and the
21 state child welfare agency and DHS failed to arrange for other transportation. As a result,
22 C.P. did not have a single therapy session during the four months he lived at the foster
23 home.

24 37. The foster mother was also reported to the state Child Abuse Hotline, to C.P.'s
25 DES case manager and to the state licensing office, after she placed C.P. in the front seat
26 of her car without a car seat or booster seat. DCS did not conduct an investigation of these
27 reports. Moreover, the case manager acknowledged that she had made an earlier report to
28

1 the Child Abuse Hotline herself when it was discovered that the foster mother had left C.P.
2 unsupervised with another foster child. DCS did not investigate that report either.

3 38. In January 2014, C.P. began visiting at another home where his older sister was
4 living. When his foster mother failed to pick him up from a visit, the state child welfare
5 agency simply told the family whom C.P. was visiting to keep him. C.P. subsequently
6 disclosed that his former foster mother had hit him with a spoon. Though the state child
7 welfare agency investigated the reported abuse, DCS never entered any investigation
8 findings into the agency's Children's Information Library and Data Source ("CHILDS")
9 system, nor did the state child welfare agency close the investigation.

10 39. C.P. started living at the new foster home with his older sister in January 2014.
11 Shortly thereafter, he became suicidal. Though he had a crisis stabilization team in place,
12 it failed to promptly respond to this crisis, and the foster mother called the police who took
13 C.P. to the hospital. C.P. did not see his older sister again for nearly a year.

14 40. C.P. was admitted to a psychiatric hospital for a week. He was diagnosed with
15 PTSD and his doctors indicated that he needed immediate intensive trauma therapy and
16 specialized therapy at a therapeutic HCTC home. C.P.'s stabilization team agreed that
17 C.P. needed to be placed in a foster home equipped to respond to his needs. Nevertheless,
18 when C.P. left the hospital, the state child welfare agency took him directly to a shelter.
19 He spent ten days in that shelter before being moved to a second shelter, a move that also
20 resulted in C.P. having to change schools.

21 41. In February 2014, three weeks after arriving at the second shelter, C.P. became
22 suicidal again, telling staff about his plan to get a knife and hurt himself. He was
23 hospitalized for a second time and prescribed psychotropic medication. He remained in
24 the hospital for two weeks before being discharged in March 2014. Again, the doctors at
25 the psychiatric hospital recommended that C.P. be released to a therapeutic HCTC home.

26 42. Instead, the state child welfare agency placed C.P. in a non-therapeutic foster
27 home. C.P. had to switch schools again and was inappropriately placed in first grade
28 instead of kindergarten, where he should have been enrolled based on his age and school

1 experience. He stayed in first grade for a month before anyone realized he was in the
2 wrong grade.

3 43. In April 2014, the state child welfare agency finally placed C.P. in an HCTC
4 home. Unfortunately, he was required to switch schools again as a result of this latest
5 placement.

6 44. In December 2014, both of C.P.'s two sisters were adopted. During the year
7 before they were adopted, C.P. had only one sibling visit with one of his sisters, even
8 though his mental health assessments indicate that his sisters are the only people with
9 whom he has meaningful attachments. Moreover, as of February 3, 2015, not only has he
10 had no contact with either of them since they were adopted, but he has not received the
11 intensive trauma therapy that was recommended for him in January 2014, and because his
12 HCTC placement is temporary, his providers have decided that he should not receive
13 intensive trauma therapy until he is in a more stable home.

14 **B.T.**

15 45. As of February 3, 2015, B.T. is a fourteen-year-old boy diagnosed with PTSD
16 who has a permanency goal of adoption. During his many years in state foster care
17 custody, he has been shuffled through numerous institutional settings despite his young
18 age, separated from his siblings, denied sibling visitation, deprived of much needed mental
19 health care, and has had to endure repeated educational disruptions. As a result of these
20 experiences, B.T. has been subjected to emotional harm and/or an ongoing unreasonable
21 risk of harm.

22 46. In January 2005, B.T. was taken into foster care for the first time, along with his
23 two older brothers. B.T. and one of his older brothers were placed together in a group
24 home, and the other brother was separated and placed in a different group home.

25 47. A month after being taken into state foster care, B.T. had a psychological
26 evaluation, which indicated that he needed therapeutic treatment. He had to wait six
27 months before his first therapy session.

28

1 48. In June 2005, B.T. was removed from the group home and separated from the
2 brother with whom he was placed there. He was moved to a kinship foster home with a
3 paternal aunt. By December 2005, B.T. had spent six months in his new home without any
4 visits with his older brothers. He did not see his brothers again until January 2006.

5 49. In August 2006, B.T.'s aunt told the state child welfare agency that B.T. was not
6 receiving the counseling that he needed. She requested that B.T. have an updated
7 psychological evaluation, but no such evaluation was conducted. During this same time
8 period, the state child welfare agency was again failing to provide B.T. with regular visits
9 with one of his brothers.

10 50. In September 2006, B.T.'s aunt told the state child welfare agency that she
11 could no longer care for B.T. since the state was not providing him with the mental health
12 services he needed. Rather than DHS providing those services, the state child welfare
13 agency moved B.T. to an emergency receiving foster home.

14 51. In October 2006, B.T. threatened to kill himself and the foster family with
15 whom he was temporarily placed. Despite his mounting mental health issues, B.T. still
16 was not receiving regular therapy. The state child welfare agency responded to this latest
17 crisis by removing B.T. from the home. B.T., then six years old, was again placed in a
18 group home.

19 52. Shortly thereafter, the state child welfare agency received reports that B.T. was
20 struggling emotionally in the group home. Again, an updated psychological evaluation for
21 B.T. was requested, but the evaluation was not scheduled until December 2006. The state
22 child welfare agency and DHS also failed during this time to ensure that B.T. received
23 needed counseling.

24 53. B.T.'s evaluation indicated that he needed individual therapy every other week.
25 He was also prescribed psychotropic medication. A psycho-educational evaluation was
26 recommended, but never conducted.

27
28

1 54. In January 2008, B.T. was placed in a pre-adoptive home with one of his
2 brothers. A month later, the family told the state child welfare agency that B.T. needed
3 more intensive counseling and a different counselor who could better meet B.T.'s needs.

4 55. In August 2008, both B.T. and his brother were adopted. In March 2011,
5 however, they were both taken back into state foster care. Shortly after this occurred, B.T.
6 reported that his adoptive father had been beating him with a belt.

7 56. The state child welfare agency immediately separated B.T. from his brother,
8 placing the two boys in different non-therapeutic group homes. The group home where
9 B.T. was placed told the state child welfare agency that B.T. desperately needed
10 counseling. Despite this, B.T. did not receive any counseling while at the group home.

11 57. A month after being brought back into state foster care, B.T. was hospitalized in
12 an acute care mental health facility for two weeks. After leaving the hospital, the state
13 child welfare agency returned B.T. to the group home.

14 58. Once back at the group home in May 2011, B.T.'s mental health worsened.
15 DHS approved B.T. for a therapeutic HCTC placement, but did not have one available for
16 him.

17 59. Stuck in the group home, B.T. responded by trying to run away. B.T. spent the
18 night at a juvenile detention center. In that one night, his group home filled his open bed
19 with another child. As a consequence, the state child welfare agency moved B.T. to a new
20 group home hours away from his prior placement.

21 60. In July 2011, B.T. was moved to an HCTC home, but he was still not receiving
22 trauma therapy and no psycho-sexual evaluation had been completed, despite one having
23 been recommended months earlier. It was not until October 2011 that a psycho-sexual
24 evaluation was conducted.

25 61. During April 2012, the state child welfare agency and DHS began looking for
26 another HCTC placement to better meet B.T.'s needs. Unable to find one, the state child
27 welfare agency instead moved him to a non-therapeutic group home/shelter in August
28 2012. By October 2012, B.T. reported "I feel like I get tossed around like a bag of chips."

1 He threatened to kill himself three times while in this non-therapeutic congregate care
2 placement.

3 62. In November 2012, the shelter told the state child welfare agency that B.T.
4 needed a higher level of care. The next month he was moved again, this time to a
5 therapeutic group home. While placed there, B.T. continued to express suicidal thoughts.

6 63. In January 2013, B.T. was returned to the same non-therapeutic group
7 home/shelter that had told the state just two months earlier that B.T. needed a higher level
8 of care. B.T. remained at that shelter for a few more weeks before the state child welfare
9 agency moved him again to a therapeutic group home two hours from his home
10 community. In May 2013, the brother with whom B.T. was adopted in 2008 was placed in
11 a pre-adoptive placement with a family that ultimately adopted him. B.T. felt defeated and
12 said he thought he would never get out of the group home. The following month, B.T.
13 grabbed the steering wheel of a van driven by group home staff, saying, "I want us all to
14 die." That same day, the state's therapeutic team coordinating B.T.'s behavioral health
15 services reported that "with a few exceptions, B.T. is doing well over the last 2 weeks."

16 64. Following the apparent suicide attempt, B.T.'s treating psychiatrist
17 recommended that B.T. be placed in a residential treatment facility. An application was
18 made the following month. While that request was pending, the state child welfare agency
19 moved B.T. to another therapeutic group home far from his home county. In September
20 2013, the state child welfare agency moved B.T. to yet another therapeutic group home.

21 65. In March 2014, the state child welfare agency moved B.T. to a non-therapeutic
22 family foster home, but this placement disrupted after DHS failed to provide B.T. with any
23 therapy to support his transition to a family home. In July 2014, B.T. was moved to
24 another non-therapeutic foster home. By September, B.T. had only had a single therapy
25 session.

26 66. In October, DCS moved B.T. to a shelter where he stayed for more than a
27 month. B.T. did not receive any therapy sessions in the placement. In early November,
28 his Child and Family Team ("CFT") recommended and the state child welfare agency and

1 DHS approved B.T. for a therapeutic HCTC placement. No such placement was made.
2 Instead, DCS placed B.T. in another therapeutic group home.

3 67. Almost every time the state child welfare agency has moved B.T. over the last
4 three and a half years, he had to go to a new school.

5 68. In December 2014, B.T. threatened to commit suicide while living in the
6 therapeutic group home. In January 2015, B.T. was placed in juvenile detention in
7 Maricopa County following an incident in a prior group home.

8 69. Now 14 years old, B.T. has spent half his life in Arizona foster care custody and
9 does not expect to find a permanent family.

10 **A.T.**

11 70. As of February 3, 2015, A.T. is a ten-year-old boy in state foster care living in a
12 non-therapeutic group home, with a permanency goal of adoption. He was taken into state
13 foster care custody most recently in September 2011 with his nine-year-old brother.
14 During his time in state foster care, A.T. has been placed in institutional care; deprived of
15 necessary physical, dental and mental health care services; separated from his brother and
16 deprived of sibling visitation; and, has been subject to missed visits by his state child
17 welfare caseworker. As a result of these experiences, A.T. has been subjected to emotional
18 harm and/or an ongoing unreasonable risk of harm.

19 71. A.T. and his younger brother were taken into state foster care custody after their
20 father committed suicide in mid-2011. This was their second time in state foster care.
21 They had also been in state foster care custody prior to 2007. Their mother's parental
22 rights were terminated in January 2007.

23 72. Following their father's suicide, the state child welfare agency placed A.T. and
24 his brother in an unlicensed kinship home with an uncle, his wife and their young son. In
25 November 2011, A.T.'s brother was removed from the home and placed in a therapeutic
26 group home. A.T. remained with his uncle's family.

27 73. During the period from November 2012 to March 2013, the state child welfare
28 agency failed to arrange for sibling visits between A.T. and his brother, and A.T.'s state

1 caseworker failed to make monthly visits, as required under state policy. In February
2 2013, the state child welfare agency was ordered to ensure that the boys had visitation with
3 each other twice weekly. The state child welfare agency was also ordered to transfer
4 A.T.'s case to the adoption unit to begin the process of finding a permanent family. As
5 alleged below, the state child welfare agency failed to comply with that order.

6 74. As of March 2013, A.T. had not had a routine physical or seen a dentist in a
7 year.

8 75. At a status hearing in April 2013, the juvenile court made a finding of "no
9 reasonable efforts" against the state child welfare agency for its failure to arrange for
10 sibling visitation, to help A.T. progress with his schooling, and to transfer A.T.'s case to
11 the adoption unit. Despite this ruling, and despite the fact that A.T. had been free for
12 adoption since he re-entered care in 2011, the state child welfare agency still failed to
13 transfer A.T.'s case to the adoption unit 13 months later, in May 2014.

14 76. In November 2013, a mental health evaluation was scheduled for A.T. and his
15 brother. The appointment could not proceed because the state child welfare agency and
16 DHS failed to arrange transportation for the boys. As a result, the evaluation had to be re-
17 scheduled for the following month.

18 77. The evaluation was not completed until February 2014. The evaluator
19 concluded that more information was needed with regard to A.T.'s response to his father's
20 suicide before any therapeutic services could be recommended. Nonetheless, the state
21 child welfare agency and DHS failed to request any further assessments.

22 78. In February 2014, A.T. also reported that his aunt and uncle left him for two to
23 three hours at a time to care for his five-year-old cousin while they delivered newspapers
24 in the early mornings. Around the same time, A.T.'s uncle posted a video on YouTube of
25 himself tasing a 15-year-old child living in the house while another child is heard crying
26 in the background. A.T.'s aunt and uncle were also using corporal punishment to
27 discipline A.T. While these facts were known to the state child welfare agency, it never
28 investigated them.

1 79. That same month, A.T.'s uncle and aunt announced that they were leaving the
2 state and would not be taking A.T. with them. A.T. was thereupon removed from the
3 uncle's home and placed in the same foster/adoptive home as his brother, but no services
4 were put in place for the first three weeks to help A.T. with the transition. Shortly after
5 being placed in the foster/adoptive home, A.T. started saying he wanted to die.

6 80. The state child welfare agency subsequently moved A.T. to an emergency
7 respite foster home. His brother's foster family told the state child welfare agency it was
8 willing to have A.T. return to live with them, but not until A.T. received the behavioral
9 health services he needed. Nevertheless, in April 2014, the state child welfare agency
10 moved A.T. to a non-therapeutic group home out of his home county and 1½ hours away
11 from his brother. The state child welfare agency did not arrange visits between the two
12 boys.

13 81. In May 2014, the juvenile court directed the state child welfare agency to
14 immediately place A.T. back in his home county. As A.T. was receiving no therapy or
15 counseling at the time, the court also ordered the state child welfare agency to obtain
16 therapy for A.T. immediately, beginning no later than the end of the month. However, in
17 July 2014, DCS and DHS again failed to coordinate A.T.'s transportation and A.T. was
18 unable to go to his scheduled psychological evaluation.

19 82. Despite the May 2014 court order, A.T. remained in a non-therapeutic group
20 home two hours away from his home community for five months. During that time he had
21 to travel nearly two hours each way to obtain needed mental health services. DCS moved
22 A.T. to a non-therapeutic group home in his home county in September 2014.

23 **The C-B Siblings**

24 83. The C-B siblings include two brothers, A.C-B and M.C-B, and two sisters, J.C-
25 B and D.C-B, all of whom were taken into state foster care custody in January 2014. As of
26 February 3, 2015, A.C-B is six years old, M.C-B is eight years old, J.C-B is three years old
27 and D.C-B is seven years old. Also as of that date, their permanency goal is reunification.
28 During their time in state foster care, they have been unnecessarily separated, deprived of

1 needed mental health care and parental visitation, and the sisters were placed in an
2 inappropriate institutional setting. As a result of these experiences, they have been
3 subjected to emotional harm and/or an ongoing unreasonable risk of harm.

4 84. Because of the traumatizing circumstances that led to their being taken into
5 foster care, the siblings' lawyer requested at the first juvenile court hearing of the case in
6 January 2014 that DHS immediately provide the children with trauma therapy. As alleged
7 further below, the state child welfare agency and DHS delayed those services for nine
8 months.

9 85. The state child welfare agency initially placed the four siblings with a relative
10 2½ hours away from the home from which they were removed. Because of this distant
11 placement, their urgent response assessments, required for every child taken into foster
12 care, were delayed, and the children never received any behavioral health services while in
13 this placement.

14 86. In March 2014, the state child welfare agency removed the children from the
15 relative and placed them in separate locations. The state child welfare agency placed
16 eight-year-old M.C-B and five-year-old A.C-B in a licensed family foster home. Six-year-
17 old D.C-B and two-year-old J.C-B were placed in a non-therapeutic group home. None of
18 the siblings received behavioral health services while in these placements.

19 87. That same month, M.C-B and A.C-B's foster parents requested that M.C-B
20 receive a psychological evaluation. The evaluation was not conducted for eight months.

21 88. In April 2014, the state child welfare agency moved all four of the C-B siblings
22 to their father's home. The children's state child welfare case manager never visited them
23 in the home. The state child welfare agency and DHS also failed to ensure that any of the
24 children received behavioral health services or counseling, even though D.C-B and A.C-B
25 were exhibiting sexualized behaviors indicative of possible sexual abuse. Only two weeks
26 after being placed there, the children's father requested that the state child welfare agency
27 remove them.

28

1 89. In May 2014, the state child welfare agency again split up the siblings, this time
2 into three different foster homes. M.C-B and A.C-B were placed in the same foster home
3 where they had previously been placed. The state child welfare agency placed each of the
4 girls, D.C-B and J.C-B, in separate foster homes.

5 90. From the time they were taken into custody to May 2014, none of the siblings
6 had any visits with their biological mother.

7 91. Following a juvenile court hearing in early June 2014, DCS agreed to ensure
8 that all four children receive therapy – not just an intake or enrollment – with a trauma
9 therapist by June 20. DCS also agreed to pay for the services if DHS would not pay. In
10 addition, the court directed DCS to provide the children with relational therapy with both
11 parents. DCS further agreed to work with the children’s father to help meet his
12 transportation needs in order to facilitate visitation with the children, including providing
13 him with a gas card. DCS failed to provide any of these services or supports.

14 92. Consequently, on July 2, 2014, the juvenile court made a “no reasonable
15 efforts” finding with regard to DCS’s failure to provide services for the siblings. The court
16 called the agency’s conduct “appalling.”

17 93. In late July 2014, D.C-B was placed in the same foster home as M.C-B and
18 A.C-B. As of February 3, 2015, J.C-B remains in a separate foster home.

19 94. In August 2014, eight months after being brought into foster care, the three
20 eldest siblings finally had their behavioral health evaluations completed.

21 95. In mid-September 2014, nine months after being taken into foster care, M.C-B
22 and A.C-B had received only one therapy session. Though their CFT recommended that
23 they receive weekly therapy sessions, the facility where the therapist is located can only
24 accommodate therapy sessions every other week.

25 96. By September 2014, D.C-B had received only two sessions with a therapist.
26 J.C-B had an intake meeting with her therapist, but her therapy sessions had not yet started.

27
28

1 97. In December 2014, DHS had only just begun the psychological evaluation that
2 M.C-B's foster parents first requested in March 2014. In addition, M.C-B and A.C-B are
3 both struggling in school with attention problems.

4 **J.M.**

5 98. As of February 3, 2015, J.M. is a nine-year-old boy with a permanency goal of
6 adoption. He was taken into state foster care when he was six years old. During his time
7 in state foster care custody, J.M. has been deprived of needed mental health care, placed in
8 institutions on numerous occasions, and has had his education repeatedly disrupted. As a
9 result of these experiences, J.M. has been subjected to emotional harm and/or an ongoing
10 unreasonable risk of harm.

11 99. J.M. was brought into state foster care in May 2012. The state child welfare
12 agency initially placed him in a shelter for five days, then moved him to live with his
13 grandmother. When she could not care for him, the state child welfare agency moved J.M.
14 to a group home in a different county. J.M. remained there for two months.

15 100. In July 2012, the state child welfare agency moved J.M. to an unlicensed
16 kinship home back in his home community. J.M. entered first grade that summer. The
17 state child welfare agency failed to ensure that J.M. had transportation to and from school.
18 As a consequence, J.M. missed sixty days of schooling.

19 101. In September 2013, J.M. was moved to another kinship placement two hours
20 from his home county. As a result of this placement change, J.M. had to start second grade
21 at a new school. The move also resulted in a change in J.M.'s mental health providers,
22 disrupting his mental health care.

23 102. In October 2013, the state child welfare agency moved J.M. to a licensed
24 family foster home back in his home county, resulting in yet another school change for
25 J.M.

26 103. In February 2014, the state child welfare agency moved J.M. to a non-
27 therapeutic group home in another county two hours away. As a result, he had to enroll at
28 his fourth school in less than two years since being brought into state foster care. His

1 teachers began developing an Individualized Education Program (“IEP”) for him, but it
2 was not finalized or implemented. He was also diagnosed with ADHD.

3 104. Between February and June 2014, J.M. had to move among four different
4 group homes, all two hours from his home community. During this period, DHS took the
5 position that J.M. could not be placed in an HCTC therapeutic foster home until he had
6 first received, and exhausted, out-patient counseling. But each time J.M. was forced to
7 move to a different group home, he had to start his therapy over again with a new therapist.

8 105. J.M.’s visitation with his mother was also disrupted when he was moved
9 among these various group homes. J.M. has no siblings and his mother is his only intimate
10 family relationship. She had trouble traveling the two hours by bus to see J.M. at his group
11 homes and the state child welfare agency refused to coordinate alternative transportation
12 for her. Instead, the state child welfare agency required eight-year-old J.M. to travel three
13 hours each way in a transport van for a two-hour visit with his mother.

14 106. In June 2014, DCS removed J.M. from his most recent group home and
15 returned him to a shelter. This placement resulted in another disruption in his education
16 and mental health treatment. With each educational disruption, J.M.’s new school has had
17 to re-start the IEP process of assessment and planning. DCS has failed to ensure that his
18 IEP was completed or provided to his new school, which had to be ordered by the juvenile
19 court.

20 107. Later in June 2014, the state child welfare agency and DHS finally approved
21 J.M. for an HCTC placement after counseling proved inadequate. However, at that time,
22 there were no HCTC placements available and J.M. continued to live at the shelter for four
23 months. In late October, DCS moved him to a licensed non-therapeutic foster home. It
24 was not until November 2014 that his current school concluded the necessary evaluations
25 and finalized his IEP.

26 **J.C.**

27 108. As of February 3, 2015, J.C. is a ten-year-old boy with a permanency goal of
28 adoption. He was taken into state foster care when he was eight. During the 2½ years he

1 has been in Arizona foster care, J.C. has suffered delays in needed health care treatment
2 after being diagnosed with PTSD; he has been placed in inappropriate institutional
3 settings; and he has been shuffled through numerous schools. He was also physically
4 abused while in state foster care custody. As a result of these experiences, J.C. has been
5 subjected to emotional and physical harm and/or an ongoing unreasonable risk of harm.

6 109. J.C. was brought into state foster care custody in March 2012. He displayed
7 behaviors that suggested he had been sexually abused, and was placed in an HCTC home.
8 However, in September 2012, he was moved from that home and placed in a non-
9 therapeutic group home. Not surprisingly, his mental health immediately deteriorated.
10 Among other things, he soiled his pants and banged his head against the wall. Despite this,
11 the state child welfare agency kept J.C. in the group home for seven months.

12 110. The state child welfare agency moved J.C. back with his father in March 2013,
13 while retaining legal custody over J.C. J.C.'s father did not take J.C. to his therapy
14 sessions. Nonetheless, the state child welfare agency left J.C. with his father and failed to
15 ensure that J.C. received the care he needed.

16 111. Two months later, nine-year-old J.C. attempted suicide by taking an overdose
17 of his psychotropic medication. He was transported to the emergency room and admitted
18 to a psychiatric hospital for ten days. The state child welfare agency then returned him to
19 his father's home, still retaining legal custody over J.C.

20 112. In March 2014, J.C. disclosed that his father had been physically abusing him
21 by hitting him with a belt. The state child welfare agency then removed J.C. from his
22 father's home. The abuse was so severe that the police criminally investigated J.C.'s
23 beating.

24 113. After removing him from his father, the state child welfare agency placed J.C.
25 in a non-therapeutic group home. As a result of this placement change, J.C. had to change
26 schools and has had significant problems adjusting. In July, DCS moved J.C. again, this
27 time to a therapeutic group home in another county, resulting in another school disruption.
28

1 In August 2014, DCS moved J.C. to an HCTC foster home. As of February 3, 2015, he is
2 still living there.

3 **B. The Next Friends**

4 114. Pursuant to Fed. R. Civ. P. 17(c)(2), Named Plaintiffs A.T., A.C-B, M.C-B,
5 J.C-B, D.C-B, J.M., and J.C. appear through their next friend Susan M. Brandt. Ms. Brandt
6 is Social Work Supervisor at the Office of Children's Counsel in Tucson, Arizona. She
7 resides in Tucson.

8 115. Pursuant to Fed. R. Civ. P. 17(c)(2), Named Plaintiffs B.T. and C.P. appear
9 through their next friend Jennifer L. Kupiszewski. Ms. Kupiszewski is an attorney in
10 private practice in Scottsdale who has previously represented children and parents in
11 dependency matters. She resides in Scottsdale, Arizona.

12 116. Pursuant to Fed. R. Civ. P. 17(c)(2), Named Plaintiff B.K. appears through her
13 next friend Margaret R. Tinsley, a retired attorney who has previously represented children
14 and parents in dependency matters. Ms. Tinsley resides in Tempe, AZ.

15 **C. The Defendants**

16 117. Defendant Gregory McKay is the Director of DCS and is being sued in his
17 official capacity. Director McKay maintains his principal office at the Department of
18 Child Safety, 1717 West Jefferson S/C005A, Phoenix, Arizona 85007. Director McKay is
19 mandated under state law to carry out the purposes of DCS, including the formulation of
20 policies, plans and programs to effectuate DCS's missions and purposes.

21 118. Defendant Cara M. Christ, M.D., is the Director of DHS and is being sued in
22 her official capacity. Director Christ maintains her principal office at the Department of
23 Health Services, 150 North 18th Avenue, Phoenix, Arizona 85007. Director Christ is
24 mandated under state law to administer DHS, including the formulation of policies, plans
25 and programs to provide mental and behavioral health services to children in DCS foster
26 care custody.

27 119. Defendant Thomas J. Betlach is the Director of AHCCCS and is being sued in
28 his official capacity. Director Betlach maintains his principal office at the Arizona Health

1 Care Cost Containment System, 801 E. Jefferson Street, MD 4100, Phoenix, Arizona
2 85034. AHCCCS is charged with administering and supervising Arizona's Medicaid
3 program.

4 **FIRST CAUSE OF ACTION – VIOLATION OF PLAINTIFFS' SUBSTANTIVE**
5 **DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION**

6 120. Paragraphs 1-119 above are repeated and re-alleged as if fully set forth herein.

7 121. This claim is asserted against defendants McKay and Christ in their official
8 capacities on behalf of a class of children who are or will be in the legal custody of the
9 Arizona Department of Child Safety due to a report or suspicion of abuse or neglect (the
10 "General Class").

11 122. DCS provides and is legally obligated to provide members of the General
12 Class with physical and dental health care services through the state Comprehensive
13 Medical and Dental Program ("CMDP"). DCS administers the CMDP.

14 123. DHS provides and is legally obligated to provide members of the General
15 Class with mental and behavioral health services through ADHS Behavioral Health
16 Services ("BHS"). BHS delivers these services through contracts with Regional
17 Behavioral Health Authorities ("RBHAs") across the state.

18 124. DCS is also responsible for monitoring the physical, behavioral and emotional
19 health status and needs of all members of the General Class and coordinating the physical,
20 behavioral and mental health services provided to those children to ensure that they receive
21 the health care services they need while in state foster care.

22 125. Many children in state foster care need such services to help them cope with
23 the significant trauma to which they were exposed before being removed from their homes.
24 For example, according to the Arizona Office of the Auditor General, "as of September
25 2013, approximately 31 percent of the children in out-of-home care aged 13 or older were
26 clinically diagnosed as emotionally disturbed."

27 126. DCS and DHS are failing to fulfill their obligations to provide, coordinate and
28 monitor medical, dental, mental and behavioral health services to members of the General

1 Class. As a result, members of the General Class are being harmed and subjected to an
2 unreasonable risk of harm and deterioration while in DCS state foster care custody.

3 127. In both its 2011 and 2012 annual reports, Arizona's state-wide Citizen Review
4 Panel ("CRP") found that many children in state foster care were not receiving adequate
5 mental and behavioral health assessments and services. The CRP "repeatedly observed
6 untreated mental health problems" among children in state foster care. It also found that a
7 "lack of access to comprehensive and timely mental health assessments and services
8 exacerbated the problems of the children" and resulted in, among other things, "multiple
9 disrupted foster and adoptive placements, delays in children obtaining permanency, and
10 CPS involvement in the next generation of children."

11 128. Moreover, according to the CRP's 2012 report, "[w]hen services were
12 provided, they were observed to be brief and limited with cases being closed without
13 observation of sustained behavior changes and few aftercare services in place. When
14 children were removed, delays between the time of referral and assessment were observed
15 to cause even longer delays before intervention was provided."

16 129. Similarly, in its 2013 Report, the CRP found that "the continuum of services . .
17 . for families is limited." According to the report, "comprehensive services were lacking
18 and existing services are unable to maintain long term change in these families."

19 130. The CRP is not alone in noting unacceptable shortages and delays in the
20 provision of needed services. According to a 2012 report issued by DES's own consultant,
21 "[a]s much as half of the time a child spends in [foster care] is spent waiting on services."
22 More recently, the Office of the Auditor General's report on DCS policy and practice
23 recognized the "[i]nadequate access to behavioral health services" for youth in foster care.

24 131. The Arizona Chapter of the Foster Family-Based Treatment Association
25 ("FFTA") has also noted the severe shortage of mental health services delivered by
26 professional foster homes (also known as "therapeutic foster homes") to children in state
27 foster care. These services, referred to in Arizona as "Home Care Training to Home Care
28 Client Services" ("HCTC"), are supposed to be available to children in state foster care

1 who need therapeutic family-based intervention. These therapeutic foster homes are
2 administered by DHS through RBHAs. DCS pays room and board for children in state
3 foster care placed in HCTC homes.

4 132. There are currently only about 400 HCTC homes for more than 16,500
5 children in state foster care. Moreover, most of these homes are only licensed for 1 or 2
6 placements, severely limiting the number of children for whom these homes are available.
7 The severe shortage of HCTC homes places members of the General Class at an
8 unreasonable risk of deteriorating while in state foster care.

9 133. The shortage of HCTC providers, coupled with the short-term nature of HCTC
10 services (DHS has a practice of requiring such services to be re-authorized every 90 days),
11 also subjects children in state foster care to emotionally harmful placement instability, as
12 children are moved out of HCTC homes far too soon after being placed there. The CRP's
13 2013 Report specifically found that the HCTC placement structure "causes disruption
14 when a specialized placement is required to meet a child's needs." This placement
15 disruption causes children with higher needs to "yo-yo" up and down in terms of their
16 behaviors, thereby driving additional placement moves, which results in even further
17 unnecessary re-traumatization.

18 134. The Arizona Auditor General has also recognized the state child welfare
19 agency's and DHS's practice of failing to provide "long-term solutions for children in need
20 of continued support" for their mental health needs. According to the Auditor General's
21 Report, "[c]hildren whose behavioral health improves in therapeutic foster homes may be
22 moved to less restrictive family settings, but without the same continued support, their
23 behaviors may worsen, resulting in placement disruptions and subsequent placement in
24 congregate care."

25 135. DCS and DHS further abdicate their legal duty to provide care for members of
26 the General Class by leaving the decision whether children should be placed in HCTC
27 homes to the six RBHAs that operate throughout the state, rather than allowing that
28 decision to be made by the children's Child and Family Teams ("CFTs"). Making matters

1 worse, the RBHAs have different processes for determining whether HCTC should be
2 provided to the children in their geographic regions. As a result, the availability of HCTC
3 turns in part on the fortuitous circumstance of where the member of the General Class
4 happens to live at the time HCTC is requested.

5 136. DCS caseworkers also fail to meet their obligation under agency policy to
6 participate in CFT meetings, including inter-agency meetings with DHS, that are a
7 prerequisite to members of the General Class receiving behavioral health services. When
8 DCS caseworkers do not join CFT meetings, essential information about a child's needs is
9 not shared, treatment planning and referrals are held up, and services are delayed. These
10 deficiencies expose members of the General Class to an undue risk that they will not
11 receive the behavioral services they require, leading to a deterioration of the child's
12 condition while in state foster care custody.

13 137. Remarkably, even former DES Director Carter acknowledged at an
14 October 17, 2013 meeting of the CPS Oversight Committee that DES does not collect data
15 in a way that enables the child welfare agency to show that a particular set of family
16 interventions is effective. At the same meeting, Ms. Sotomayor, then Assistant Director
17 for the former DES Division of Children, Youth and Families, agreed that it is unclear
18 whether a number of services provided by DES "are appropriate or adequate" for families.

19 138. In addition to the lack of adequate mental health services, far too many
20 children in state foster care fail to receive needed physical health care services. According
21 to the state's Practice Improvement Case Review ("PICR") for 2013, DCS failed to
22 properly assess and address the children's physical health needs in a third (34%) of the
23 cases reviewed. The same review found that 22% of children who had been in foster care
24 for more than 12 months had not received a comprehensive physical health examination.
25 In addition, more than 40% of children who had been in care for less than a year did not
26 receive an examination within 30 days as required by agency policy. Based on the same
27 2013 PICR, DCS had failed to assess and provide necessary services to address the
28 children's mental health needs in nearly one in five cases reviewed.

1 139. Based on the 2012 PICR, the state child welfare agency failed to meet the
2 physical health care needs of children in state foster care in 49% of the cases reviewed.

3 140. Moreover, according to the state child welfare agency's own data, during
4 federal fiscal year 2012, 36% of children in state foster care ages three to six did not
5 receive well-care visits required under the periodicity schedule that the state is required to
6 establish under the EPSDT provisions of the federal Medicaid Act. A nearly identical
7 percentage of adolescents in foster care likewise failed to receive such required health care
8 visits. Similar failures in providing such services to these age groups were reported for
9 federal fiscal years 2009, 2010 and 2011.

10 141. In addition, according to the state's PICR for 2013, 34% of children who had
11 been in state foster care for more than six months were found not to have had a dental
12 examination within the most recent six months. During 2012, the number of children who
13 had missed required dentist visits was nearly four in ten.

14 142. The inadequacy of the health care services provided to the General Class
15 subjects these children to harm and/or an unreasonable risk of suffering ongoing physical
16 and emotional harm and deterioration while in state foster care.

17 143. A state assumes an affirmative duty under the Fourteenth Amendment to the
18 United States Constitution to protect a child from an unreasonable risk of harm once it
19 takes that child into its legal foster care custody.

20 144. Defendant McKay directly and indirectly controls and is responsible for the
21 child welfare policies and practices of DCS. The foregoing DCS policies and practices fail
22 to satisfy its affirmative duty to protect the General Class, including the Named Plaintiffs,
23 from an unreasonable risk of physical and emotional harm. These failures are a substantial
24 factor leading to, and proximate cause of, the ongoing violation of the General Class's
25 constitutionally protected liberty and privacy rights.

26 145. Defendant Christ directly and indirectly controls and is responsible for the
27 policies and practices regarding the provision of mental and behavioral health services by
28 DHS. The foregoing DHS policies and practices fail to satisfy its affirmative duty to

1 protect the General Class, including the Named Plaintiffs, from an unreasonable risk of
2 emotional harm. These failures are a substantial factor leading to, and proximate cause of,
3 the ongoing violation of the General Class's constitutionally protected liberty and privacy
4 rights.

5 146. The foregoing policies and practices of DCS and DHS described herein
6 constitute a policy, pattern, custom and/or practice that shocks the conscience, is outside
7 the exercise of any professional judgment, and amounts to deliberate indifference to the
8 constitutionally protected rights and liberty and privacy interests of the Named Plaintiffs
9 and other members of the General Class. As a result, all members of the General Class
10 have been harmed or are being subjected to an ongoing unreasonable risk of harm, in
11 deprivation of their substantive due process rights guaranteed by the Fourteenth
12 Amendment to the United States Constitution.

13 147. These substantive due process rights include, but are not limited to: the right
14 of members of the General Class to protection from harm and unreasonable risk of harm
15 while in state foster care custody; the right to a living environment that protects the
16 physical, mental and emotional safety and well-being of the General Class; the right to
17 necessary treatment, care and services to prevent members of the General Class from
18 deteriorating or being harmed physically, psychologically or otherwise while in state foster
19 care; and the right to adequate caseworker supervision and monitoring of the General
20 Class's safety and well-being.

21 148. As of September 30, 2014, there were 16,990 members of the General Class.
22 The General Class is sufficiently numerous to make individual joinder impracticable.

23 149. Named Plaintiffs' First Cause of Action raises questions of fact and law that
24 are common to, and typical of, all members of the General Class. Such common questions
25 of fact include:

- 26 a. Whether DCS has a practice of failing to provide members of the
27 General Class with legally required medical and dental services necessary to keep
28

1 the General Class safe and properly cared for, and to prevent them from
2 deteriorating physically while in state foster care custody;

3 b. Whether DHS has a practice of failing to provide members of the
4 General Class with legally required mental and behavioral health services necessary
5 to keep the General Class safe and properly cared for, and to prevent them from
6 deteriorating emotionally and psychologically while in state foster care custody; and

7 c. Whether DCS has a practice of failing to coordinate and ensure that
8 the General Class are provided with the legally required mental and behavioral
9 health services to keep the General Class safe and properly cared for, and to prevent
10 them from deteriorating emotionally and psychologically while in state foster care
11 custody.

12 150. Such common questions of law include whether DCS's and DHS's actions and
13 inactions violate the General Class's substantive due process rights to be free from harm
14 and an unreasonable risk of harm while in state foster care custody.

15 151. Named Plaintiffs will fairly and adequately protect the interests of the General
16 Class they seek to represent.

17 152. Named Plaintiffs and the putative General Class are represented by:

18 a. Attorneys employed by Perkins Coie LLP, an international law firm
19 with an office in Phoenix, Arizona, whose attorneys have extensive experience in
20 complex civil and public interest litigation, including class action litigation;

21 b. Attorneys employed by the Arizona Center for Law in the Public
22 Interest, a nonprofit legal organization based in Phoenix whose attorneys also have
23 extensive experience in complex civil and public interest litigation, including class
24 action litigation; and

25 c. Attorneys employed by Children's Rights, Inc., a nonprofit legal
26 organization whose attorneys have substantial experience and expertise in child
27 welfare class actions nationally.

28

1 153. The attorneys and organizations listed above have investigated all claims in
2 this action and have committed sufficient resources to represent the General Class.

3 154. Each Named Plaintiff appears by a next friend, and each next friend is
4 sufficiently familiar with the facts of the child's situation to fairly and adequately represent
5 the child's interests in this litigation.

6 155. Defendants McKay and Christ have acted or failed to act on grounds generally
7 applicable to the General Class, necessitating declaratory and injunctive relief. Plaintiffs'
8 counsel know of no conflicts between or among members of the General Class.

9 **SECOND CAUSE OF ACTION – VIOLATION OF PLAINTIFFS' RIGHTS**
10 **UNDER THE EPSDT PROVISIONS OF THE MEDICAID ACT**

11 156. Paragraphs 1-155 above are repeated and re-alleged as if fully set forth herein.

12 157. This claim is asserted against defendants McKay, Christ and Betlach in their
13 official capacities on behalf of all members of the General Class who are eligible for
14 Medicaid (the "Medicaid Subclass").

15 158. Medicaid is a joint federal-state program under Title XIX of the Social
16 Security Act, 42 U.S.C. § 1396, *et seq.*, designed to provide medically necessary physical
17 and mental health care to, among others, eligible children.

18 159. States that choose to participate in the Medicaid program are reimbursed by
19 the federal government for a portion of the cost of providing Medicaid benefits. To
20 receive federal funds, states must comply with the requirements set forth in Title XIX of
21 the Social Security Act and its implementing regulations. Among those requirements,
22 states are required to develop state plans that identify the medical services available to
23 eligible beneficiaries.

24 160. Children in state foster care are eligible beneficiaries of Medicaid services
25 under 42 U.S.C. § 1396a(a)(10)(A)(i)(I).

26 161. Under 42 U.S.C. § 1396a(a)(10)(A) and 42 U.S.C. § 1396d(a)(4)(B), states are
27 required to provide EPSDT services to eligible children in state foster care. The required
28 screening services are set forth in 42 U.S.C. § 1396d(r)(1), while §§ 1396a(a)(43)(C) and

1 1396d(r)(5) require states to provide necessary health care, diagnostic services and treatment
2 to correct or ameliorate defects or physical and mental illnesses and conditions discovered
3 by those screening services.

4 162. Under 42 U.S.C. § 1396d(r)(1)(A)(i) and 42 C.F.R. § 441.58, states are
5 required to establish periodicity schedules setting forth when the screening services
6 required under the Medicaid Act must be provided.

7 163. Moreover, under 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930(a), states
8 must provide EPSDT services with reasonable promptness.

9 164. The policy underlying the EPSDT mandate is to prevent illness, as well as to
10 ensure that health problems are comprehensively diagnosed and then treated as soon as
11 they are detected, before they become more complex and their treatment more costly.

12 165. Pursuant to a contract with AHCCCS, DCS serves as the statewide
13 administrator responsible for the provision of physical, dental, vision and hearing health
14 care services, including screening, diagnostic and treatment services, to members of the
15 Medicaid Subclass. DCS and AHCCCS are legally obligated to ensure that members of
16 the Medicaid Subclass receive such medical services. DCS provides such medical services
17 through CMDP.

18 166. DCS also determines the Medicaid eligibility of every child in state foster care
19 custody.

20 167. Pursuant to a contract with AHCCCS, DHS serves as the statewide
21 administrator responsible for the provision of mental and behavioral health care services,
22 including screening, diagnostic and treatment services, to members of the Medicaid
23 Subclass. DHS and AHCCCS are legally obligated to ensure that members of the
24 Medicaid Subclass receive such medical services. DHS provides such services through
25 BHS, which, in turn, delivers these services through contracts with RBHAs across the
26 state.

27 168. Under Arizona's EPSDT Periodicity Schedule, DCS is required to provide
28 annual physical examinations to members of the Medicaid Subclass who are age three and

1 older, and more frequent physical examinations to members of the Medicaid Subclass
2 under age three. The state's Periodicity Schedule further requires DCS to provide annual
3 vision screenings to members of the Medicaid Subclass ages 4-6, 8, 10 and 12 years old,
4 and semi-annual dental examinations to members of the Medicaid Subclass who are six
5 months of age or older.

6 169. DCS's Policy and Procedure Manual further provides that it is the
7 responsibility of the DCS foster care caseworker to ensure that a child entering foster care
8 be given a complete medical examination that meets EPSDT requirements within 30 days
9 after initial placement in out-of-home care.

10 170. As for mental and behavioral health services, DHS is required under Arizona's
11 EPSDT Periodicity Schedule to provide members of the Medicaid Subclass age three and
12 older with annual psychosocial/behavioral assessments. For members of the Medicaid
13 Subclass under the age of three, the Periodicity Schedule requires DHS to provide more
14 frequent psychosocial/behavioral assessments.

15 171. Under DHS Policy, DHS is also responsible for conducting an Urgent
16 Response assessment of every child within 24 hours of removal from his or her home to
17 detect both initial and delayed effects of trauma.

18 172. AHCCCS is charged under state statutes and the federal Medicaid Act with
19 the responsibility to administer and supervise Arizona's Medicaid program.
20 Notwithstanding its contracts with DCS and DHS, AHCCCS has the authority and
21 responsibility to determine the state's Medicaid eligibility policies and criteria, its service
22 coverage and its payment policies. AHCCCS is also responsible for ensuring the state's
23 compliance with federal Medicaid requirements, including the provision of EPSDT
24 services, and for supervising the compliance of DCS and DHS under their contacts with
25 AHCCCS.

26 173. Defendants McKay, Christ and Betlach have a practice of failing to provide
27 members of the Medicaid Subclass with the screening, diagnostic and treatment services
28

1 required under the EPSDT provisions of the Medicaid Act, in violation of 42 U.S.C. §§
2 1396a(a)(10)(A)(i)(I), 1396a(a)(43)(C), 1396d(a)(4)(B) and 1396d(r).

3 174. Defendants McKay, Christ and Betlach also have a practice of failing to provide
4 such services with reasonable promptness, in violation of 42 U.S.C. § 1396a(a)(8) and 42
5 C.F.R. § 435.930(a).

6 175. The foregoing policies and practices of defendant McKay, who directly and
7 indirectly controls and is responsible for the policies and practices of DCS, defendant
8 Christ, who directly and indirectly controls and is responsible for the policies and practices
9 of DHS, and defendant Betlach, who is responsible for supervising the compliance of DCS
10 and DHS under their contracts with AHCCCS and ensuring their compliance with federal
11 law, violate the rights of Named Plaintiffs and the Medicaid Subclass under the Medicaid
12 Act.

13 176. As of September 30, 2014, there were over 10,000 members of the Medicaid
14 Subclass. The Medicaid Subclass is sufficiently numerous to make individual joinder
15 impracticable.

16 177. Named Plaintiffs' Second Cause of Action raises questions of fact and law that
17 are common to, and typical of, all members of the Medicaid Subclass. Such common
18 questions of fact include:

19 a. Whether DCS has a practice of failing to provide members of the
20 Medicaid Subclass with screening services that comply with the state's Periodicity
21 Schedule;

22 b. Whether DCS has a practice of failing to provide members of the
23 Medicaid Subclass with medically necessary diagnostic and treatment services;

24 c. Whether DHS has a practice of failing to provide members of the
25 Medicaid Class with screening services that comply with the state's Periodicity
26 Schedule; and

27 d. Whether DHS has a practice of failing to provide members of the
28 Medicaid Subclass with medically necessary diagnostic and treatment services.

1 178. Such common questions of law include whether DCS's, DHS's and
2 AHCCCS's actions and inactions violate the Medicaid Subclass's rights under the EPSDT
3 provisions of the federal Medicaid Act.

4 179. Named Plaintiffs will fairly and adequately protect the interests of the
5 Medicaid Subclass they seek to represent.

6 180. Named Plaintiffs and the putative Medicaid Subclass are represented by:

7 a. Attorneys employed by Perkins Coie LLP, an international law firm
8 with an office in Phoenix, Arizona, whose attorneys have extensive experience in
9 complex civil and public interest litigation, including class action litigation;

10 b. Attorneys employed by the Arizona Center for Law in the Public
11 Interest, a nonprofit legal organization based in Phoenix whose attorneys also have
12 extensive experience in complex civil and public interest litigation, including class
13 action litigation; and

14 c. Attorneys employed by Children's Rights, Inc., a nonprofit legal
15 organization whose attorneys have substantial experience and expertise in child
16 welfare class actions nationally.

17 181. The attorneys and organizations listed above have investigated all claims in
18 this action and have committed sufficient resources to represent the Medicaid Subclass.

19 182. Each Named Plaintiff appears by a next friend, and each next friend is
20 sufficiently familiar with the facts of the child's situation to fairly and adequately represent
21 the child's interests in this litigation.

22 183. Defendants McKay, Christ and Betlach have acted or failed to act on grounds
23 generally applicable to the Medicaid Subclass, necessitating declaratory and injunctive
24 relief. According to Director Betlach's May 17, 2015 motion to intervene in this action, it
25 is not possible to enter the relief sought in this Cause of Action without AHCCCS as a
26 defendant. Plaintiffs' counsel know of no conflicts between or among members of the
27 Medicaid Subclass.

1 **THIRD CAUSE OF ACTION – VIOLATION OF PLAINTIFFS’ SUBSTANTIVE**
2 **DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION**

3 184. Paragraphs 1-183 above are repeated and re-alleged as if fully set forth herein.

4 185. This claim is asserted on behalf of the General Class against defendant McKay
5 in his official capacity.

6 **Members of the General Class Are Not Receiving Timely Investigations of**
7 **Reports That They Have Been Maltreated in State Foster Care Custody.**

8 186. In late 2013, it was publicly disclosed for the first time that the state child
9 welfare agency had failed to investigate 6,600 reports of alleged child abuse and neglect
10 between 2009 and 2013, choosing instead to simply set those reports aside. In July 2014,
11 it was disclosed that in another 14,000 cases, no documentation had been entered in the
12 child’s or family’s case file for 60 days or more through April 2014.

13 187. While the legislation passed on May 29, 2014 attempts to address those
14 enormous backlogs, DCS’s failure to complete child maltreatment investigations in a
15 timely manner is not limited to those 20,600 reports and cases. In fact, DCS is also failing
16 to initiate and complete investigations in a timely manner of reports that children have
17 been abused or neglected *while in state foster care*. DES’s own consultants acknowledged
18 in 2012 that foster care workers “often have a backlog” of new maltreatment reports
19 involving children in state foster custody.

20 188. According to the state child welfare agency’s own data, during federal fiscal
21 year 2012, the state child welfare agency failed to initiate investigations into 36% of all
22 reports that children in state foster care custody had been abused or neglected, within the
23 time frames required under state policy. During the six-month period from October 1, 2012
24 through March 31, 2013, 54% of all investigations involving children in state foster care
25 were initiated late.

26 189. State law and agency policy further requires that the outcomes of child
27 maltreatment investigations be entered into the State’s child welfare information database
28 within 45 days and that investigations be closed within 60 days. However, according to

1 state data, during the six-month period from October 1, 2012 to March 31, 2013, the state
2 child welfare agency failed to meet this 60-day deadline in the large majority of
3 investigations involving children already in state foster care, regardless of the level of risk
4 to which members of the General Class were exposed. In fact, 72% of investigations into
5 high risk reports involving a present danger to children in state foster care were still not
6 closed after 60 days; 73% of investigations into reports involving an impending danger to
7 children in care were not closed in a timely manner; 72% of investigations into reports that
8 children in care had been abused or neglected within the past 30 days were not closed
9 within the required period; and 78% of investigations were not closed within the required
10 timeframe where the reports involved children in state foster care who had been abused or
11 neglected more than 30 days prior, the date of the last occurrence of abuse or neglect was
12 unknown, or the child was exposed to an unreasonable risk of harm.

13 190. These widespread delays in initiating and completing investigations into
14 reported child abuse and neglect subject members of the General Class to an unreasonable
15 risk of physical and emotional harm while in state foster care.

16 191. A state assumes an affirmative duty under the Fourteenth Amendment to the
17 United States Constitution to protect a child from an unreasonable risk of harm once it
18 takes that child into its legal foster care custody.

19 192. Defendant McKay directly and indirectly controls and is responsible for the
20 child welfare policies and practices of DCS. The foregoing DCS policies and practices fail
21 to satisfy its affirmative duty to protect the General Class, including the Named Plaintiffs,
22 from an unreasonable risk of physical and emotional harm. These failures are a substantial
23 factor leading to, and proximate cause of, the ongoing violation of the General Class's
24 constitutionally protected liberty and privacy rights.

25 193. The foregoing policies and practices of DCS described herein constitute a
26 policy, pattern, custom and/or practice that shocks the conscience, is outside the exercise
27 of any professional judgment, and amounts to deliberate indifference to the constitutionally
28 protected rights and liberty and privacy interests of the Named Plaintiffs and other

1 members of the General Class. As a result, all members of the General Class have been
2 harmed or are being subjected to an ongoing unreasonable risk of harm, in deprivation of
3 their substantive due process rights guaranteed by the Fourteenth Amendment to the
4 United States Constitution.

5 194. These substantive due process rights include, but are not limited to: the right of
6 members of the General Class to protection from harm and unreasonable risk of harm
7 while in state foster care custody; the right to a living environment that protects the
8 physical, mental and emotional safety and well-being of the General Class; the right to
9 necessary treatment, care and services to prevent members of the General Class from
10 deteriorating or being harmed physically, psychologically or otherwise while in state foster
11 care; and the right to adequate caseworker supervision and monitoring of the General
12 Class's safety and well-being.

13 195. As of September 30, 2014, there were 16,990 members of the General Class.
14 The General Class is sufficiently numerous to make individual joinder impracticable.

15 196. Named Plaintiffs' Third Cause of Action raises questions of fact and law that
16 are common to, and typical of, all members of the General Class. Such common questions
17 of fact include whether DCS has a practice of failing to conduct timely investigations into
18 reports that members of the General Class have been abused or neglected while in state
19 foster care custody.

20 197. Such common questions of law include whether DCS's actions and inactions
21 violate the General Class's substantive due process rights to be free from harm and an
22 unreasonable risk of harm while in state foster care custody.

23 198. Named Plaintiffs will fairly and adequately protect the interests of the General
24 Class they seek to represent.

25 199. Named Plaintiffs and the putative General Class are represented by:

26 a. Attorneys employed by Perkins Coie LLP, an international law firm
27 with an office in Phoenix, Arizona, whose attorneys have extensive experience in
28 complex civil and public interest litigation, including class action litigation;

1 b. Attorneys employed by the Arizona Center for Law in the Public
2 Interest, a nonprofit legal organization based in Phoenix whose attorneys also have
3 extensive experience in complex civil and public interest litigation, including class
4 action litigation; and

5 c. Attorneys employed by Children’s Rights, Inc., a nonprofit legal
6 organization whose attorneys have substantial experience and expertise in child
7 welfare class actions nationally.

8 200. The attorneys and organizations listed above have investigated all claims in
9 this action and have committed sufficient resources to represent the General Class.

10 201. Each Named Plaintiff appears by a next friend, and each next friend is
11 sufficiently familiar with the facts of the child’s situation to fairly and adequately represent
12 the child’s interests in this litigation.

13 202. Defendant McKay has acted or failed to act on grounds generally applicable to
14 the General Class, necessitating declaratory and injunctive relief. Plaintiffs’ counsel know
15 of no conflicts between or among members of the General Class.

16 **FOURTH CAUSE OF ACTION – VIOLATION OF PLAINTIFFS’ SUBSTANTIVE**
17 **DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION**

18 203. Paragraphs 1-202 above are repeated and re-alleged as if fully set forth herein.

19 204. This claim is asserted against Defendant McKay in his official capacity on
20 behalf of all members of the General Class, except those children who are or will be in a
21 kinship placement (the “Non-Kinship Subclass”).

22 **A. The Non-Kinship Subclass Suffers from a Severe Shortage of Foster**
23 **Homes.**

24 205. The state child welfare agency has failed to provide members of the Non-
25 Kinship Subclass with an adequate number and array of foster care placements. The
26 severe shortage of foster care placements frequently results in the state child welfare
27 agency placing members of the Non-Kinship Subclass in the first available bed, rather than
28 selecting placements based on the children’s needs.

1 206. While Arizona’s population of children in out-of-home care has grown by 56%
2 from September 2009 to March 2014, the number of Arizona foster families has only
3 increased by 9%, and the percentage of children placed in licensed foster homes has
4 decreased by 9%, during the same time period.

5 207. As of September 30, 2014, there were 9,418 children in state foster care who
6 were not placed with relatives or in trial home reunification settings. Nevertheless, the
7 state child welfare agency reported that it had licensed only 4,397 foster homes to accept
8 children in state foster care. Moreover, these foster homes provided only 5,669 available
9 spaces that could potentially match the needs of the children in DCS’s custody. Even
10 assuming that each of these spaces matched the needs of the Non-Kinship Class, 3,749
11 class members would still be without a foster home.

12 208. A spokeswoman for DCS acknowledged in July 2014 that the department
13 “desperately needs more foster families to care for the increased number of children in out-
14 of-home care.”

15 209. A recent DCS report stated that “[h]omes are needed for children of all ages,
16 however the most significant shortages of homes are for teens, sibling groups, and children
17 who have complex medical needs.” The agency admits that “[t]here is a significant need
18 for additional foster and adoptive homes in all areas of Arizona.”

19 210. According to a recent audit by the Arizona Auditor General, the state child
20 welfare agency “has not adequately implemented” performance-based contracting in the
21 contracts it has entered into with private child placing agencies to recruit foster parents,
22 identify and arrange child placement options, and supervise and monitor licensed foster
23 parents. The audit also found that the state child welfare agency has not developed
24 policies and procedures for monitoring the performance measures in its contracts, has not
25 used performance measure data to assess contractor performance, and has not adequately
26 designed the contracts to incentivize performance.

27 211. In addition to the inadequate recruiting of new foster homes, a 2012 survey
28 conducted by Arizona State University noted that programs and financial benefits available

1 to foster families have been drastically cut in recent years due to severe budget constraints.
2 For example, in 2009, the state cut foster family reimbursement rates and allowances for
3 clothing.

4 212. The scarcity of foster homes in Arizona is a well-known problem. In 2012,
5 *The Arizona Republic* reported that “[t]he state is in dire need of families to care for
6 children removed from their homes because of suspected abuse or neglect. But families
7 leave the foster care system faster than new ones come in. Many who leave say it’s not
8 necessarily the children who have caused them to turn in their license but their frustration
9 with the system’s inability to help them.”

10 213. Former DCS director Charles Flanagan has also acknowledged to members of
11 the state legislature that there are many instances when children have slept in agency
12 offices because the agency did not have a placement for them.

13 214. In fact, according to a recent press account, over just a six-day span from
14 September 28 to October 4, 2014, 36 members of the Non-Kinship Subclass spent at least
15 one night in DCS office buildings in Maricopa and Pima counties. Of those 36 children,
16 10 were between 2 and 5 years old, 11 were between 6 and 12 years old, and 15 were
17 between 13 and 18 years old. According to Gene Burns, who supervises DCS after-hours
18 units, “[i]n the 17 years [he has] been here, the biggest shock to [him] is when [DCS]
19 bought cribs” for the young children sleeping at DCS’s offices. As he acknowledged,
20 “[t]his is not the place to put a kid.”

21 **B. Because of the Shortage of Foster Homes, Members of the Non-Kinship**
22 **Subclass Are Frequently Placed Far from Their Home Communities.**

23 215. DCS’s failure to maintain an adequate array of foster homes harms members
24 of the Non-Kinship Subclass by causing them to be placed, or putting them at an
25 unreasonable risk of being placed, far from their home communities. Such placements
26 disconnect members of the Non-Kinship Subclass from family, friends, and neighbors, and
27 frequently lead to highly disruptive changes in schooling.
28

1 216. Only 31% of all children in foster care as of September 30, 2012, for whom
2 removal and current zip code information was available, were placed within the same zip
3 code as their homes. Moreover, nearly half of these children were placed outside their
4 home city.

5 217. Consultants retained by DES reported that in 2011, almost 60% of children in
6 state foster care were placed over an hour from their homes. As the consultant recognized,
7 “[t]his makes parent visits and services difficult and contributes to Ongoing staff driving
8 more hours and spending more time away from their other cases.”

9 **C. Because of the Shortage of Foster Homes, Members of the Non-Kinship**
10 **Subclass Are Frequently Separated from Their Siblings.**

11 218. For children entering state foster care, siblings can serve as a crucial buffer
12 against the emotional upheaval of being separated from their parents. Sibling relationships
13 can also promote resilience as children navigate the trauma of removal. In recognition of
14 the importance of maintaining sibling relationships, federal law requires states to make
15 reasonable efforts to place siblings together, unless contrary to a sibling’s safety or well-
16 being – a requirement echoed in Arizona state policy.

17 219. DCS’s failure to maintain an adequate array of foster homes harms members
18 of the Non-Kinship Subclass by causing them to be separated, or putting them at an
19 unreasonable risk of being separated, from their siblings. As of September 30, 2013, the
20 state child welfare agency failed to place all siblings together in 35% of cases, and failed to
21 place at least two siblings together in 24% of cases. Based on information the state child
22 welfare agency submitted to the federal government in 2012, in nearly 40% of cases when
23 at least two siblings entered out-of-home care, the state child welfare agency failed to
24 place them together. The Sstate child welfare agency’s performance was nearly as bad
25 every year from 2008 through 2011. A DES official acknowledged in 2012 that it had
26 become more difficult to place siblings in the same home because of the shortage of foster
27 families and because more children stay in care longer.

28

1 220. A state assumes an affirmative duty under the Fourteenth Amendment to the
2 United States Constitution to protect a child from an unreasonable risk of harm once it
3 takes that child into its legal foster care custody.

4 221. Defendant McKay directly and indirectly controls and is responsible for the
5 child welfare policies and practices of DCS. The foregoing DCS policies and practices fail
6 to satisfy its affirmative duty to protect the Non-Kinship Subclass, including the Named
7 Plaintiffs, from an unreasonable risk of physical and emotional harm. These failures are a
8 substantial factor leading to, and proximate cause of, the ongoing violation of the Non-
9 Kinship Subclass's constitutionally protected liberty and privacy rights.

10 222. The foregoing policies and practices of DCS described herein constitute a
11 policy, pattern, custom and/or practice that shocks the conscience, is outside the exercise
12 of any professional judgment, and amounts to deliberate indifference to the constitutionally
13 protected rights and liberty and privacy interests of the Named Plaintiffs and other
14 members of the Non-Kinship Subclass. As a result, all members of the Non-Kinship
15 Subclass have been harmed or are being subjected to an ongoing unreasonable risk of
16 harm, in deprivation of their substantive due process rights guaranteed by the Fourteenth
17 Amendment to the United States Constitution.

18 223. These substantive due process rights include, but are not limited to: the right
19 of members of the Non-Kinship Subclass to protection from harm and unreasonable risk of
20 harm while in state foster care custody; the right to a living environment that protects the
21 physical, mental and emotional safety and well-being of the Non-Kinship Subclass; the
22 right to necessary treatment, care and services to prevent members of the Non-Kinship
23 Subclass from deteriorating or being harmed physically, psychologically or otherwise
24 while in state foster care; and the right to adequate caseworker supervision and monitoring
25 of the Non-Kinship Subclass's safety and well-being.

26 224. As of September 30, 2014, there were 9,454 members of the Non-Kinship
27 Subclass. The Non-Kinship Subclass is sufficiently numerous to make individual joinder
28 impracticable.

1 225. Named Plaintiffs' Fourth Cause of Action raises questions of fact and law that
2 are common to, and typical of, all members of the Non-Kinship Subclass. Such common
3 questions of fact include:

4 a. Whether DCS maintains an adequate number and array of foster home
5 placements for members of the Non-Kinship Subclass; and

6 b. Whether a shortage of foster homes subjects members of the Non-
7 Kinship Subclass to an unreasonable risk of being placed far from their families,
8 schools and home communities.

9 226. Such common questions of law include whether DCS's actions and inactions
10 violate the Non-Kinship Subclass's substantive due process rights to be free from harm
11 and an unreasonable risk of harm while in state foster care custody.

12 227. Named Plaintiffs will fairly and adequately protect the interests of the Non-
13 Kinship Subclass they seek to represent.

14 228. Named Plaintiffs and the putative Non-Kinship Subclass are represented by:

15 a. Attorneys employed by Perkins Coie LLP, an international law firm
16 with an office in Phoenix, Arizona, whose attorneys have extensive experience in
17 complex civil and public interest litigation, including class action litigation;

18 b. Attorneys employed by the Arizona Center for Law in the Public
19 Interest, a nonprofit legal organization based in Phoenix whose attorneys also have
20 extensive experience in complex civil and public interest litigation, including class
21 action litigation; and

22 c. Attorneys employed by Children's Rights, Inc., a nonprofit legal
23 organization whose attorneys have substantial experience and expertise in child
24 welfare class actions nationally.

25 229. The attorneys and organizations listed above have investigated all claims in
26 this action and have committed sufficient resources to represent the Non-Kinship Subclass.
27
28

1 230. Each Named Plaintiff appears by a next friend, and each next friend is
2 sufficiently familiar with the facts of the child’s situation to fairly and adequately represent
3 the child’s interests in this litigation.

4 231. Defendant McKay has acted or failed to act on grounds generally applicable to
5 the Non-Kinship Subclass, necessitating declaratory and injunctive relief. Plaintiffs’
6 counsel know of no conflicts between or among members of the Non-Kinship Subclass.

7 **FIFTH CAUSE OF ACTION – VIOLATION OF PLAINTIFFS’ RIGHTS TO**
8 **FAMILY INTEGRITY UNDER THE U.S. CONSTITUTION**

9 232. Paragraphs 1-231 above are repeated and re-alleged as if fully set forth herein.

10 233. This claim is asserted against Defendant McKay in his official capacity on
11 behalf of all members of the General Class who have been assigned a permanency goal of
12 family reunification (the “Reunification Subclass”).

13 234. Despite the fact that over 50% of children in state foster care have a
14 permanency goal of family reunification, the state child welfare agency is failing to
15 preserve family relationships after children are removed from their homes.

16 235. One of the principal ways that states preserve the family relationships of
17 children in foster care is to place siblings together when they are removed from their
18 homes, as required under federal and state law. In 2012, however, Arizona failed to place
19 siblings together in nearly 40% of cases when at least two siblings entered out-of-home
20 care. As of September 30, 2013, the state child welfare agency failed to place all siblings
21 together in 35% of cases, and failed to place at least two siblings together in 24% of cases.

22 236. Moreover, as alleged in paragraphs 215-217 above, the state child welfare
23 agency routinely places children in its care far from their home communities, knowingly
24 interfering with their ability to maintain connections with their families.

25 237. Another way that states preserve the family relationships of children in foster
26 care is to place such children, when appropriate, with one or both biological parents on a
27 “trial reunification” basis, while maintaining legal custody over the child. Arizona,
28 however, systematically fails to do so. As of September 30, 2014, only 0.21% of children

1 in state foster care custody (36 out of 16,990 children) were placed with their parents on a
2 trial reunification basis.

3 238. As of September 30, 2013, only 0.29% of children in out-of-home care (23 of
4 the 7,875 children) who had a permanency goal of family reunification were in a trial
5 reunification placement.

6 239. Similarly, only 1.6% of the children in care who exited to reunification during
7 federal fiscal year 2012 (60 out of 3,684) were in a trial home visit placement at the time
8 of exit. The national average was 37.5%. Moreover, only 0.5% of children in custody
9 during federal fiscal year 2012 (97 out of 21,267) had a most recent placement type of trial
10 home visit. The national average was 11.0%.

11 240. When children in state foster care custody are not placed with their families on
12 a trial reunification basis, DCS is under a legal duty to coordinate contact between these
13 children and their biological parents, as well as any siblings from whom the child may
14 have been separated when taken into custody. The state child welfare agency has
15 recognized that “there is a strong correlation between consistent and timely visitation and
16 positive outcomes for children who have been removed from their home. Regular parent-
17 child visitation, along with CPS Specialists’ visits with the child, are both associated with
18 achieving permanency and other indicators of child well-being.”

19 241. For 2012, however, the state child welfare agency reported that barely half
20 (51%) of children in out-of-home care whose cases were reviewed as part of the child
21 welfare agency’s PICR had visits with their parents and siblings at a frequency consistent
22 with the child’s safety and best interests. During calendar year 2013, a similarly low
23 percentage of children (56%) whose cases were reviewed in connection with the PICR had
24 adequate visits with parents and siblings.

25 242. The state child welfare agency’s poor performance in coordinating family
26 visits is no surprise given the long wait lists that children in foster care face before being
27 provided with transportation to and from, and supervision of, family visits. As of October
28 2013, there were 475 families waiting for such visitation services. Remarkably, the state

1 child welfare agency does not even track how long families have been waiting for those
2 services.

3 243. The state child welfare agency further impairs family relationships by
4 routinely failing to comply with its obligation to make monthly contact with the biological
5 parents of children in state foster care. During the six-month period from April 1, 2014
6 through September 30, 2014, 1,213 out of 2,528 (48.0% of) parents of children in foster
7 care with a case plan goal of reunification did not receive required visits from a state child
8 welfare caseworker.

9 244. Likewise, during the six-month period from October 1, 2013 through
10 March 31, 2014, 1,152 out of 2,496 (46.2% of) parents of children in foster care with a
11 case plan goal of reunification did not receive required visits from a state caseworker.

12 245. DCS recently reported that during 2013, caseworkers made concerted efforts to
13 have adequate contact with mothers in only 36% of cases reviewed, and with fathers in
14 only 18% of cases reviewed.

15 246. Not surprisingly, given the state child welfare agency's failure to make
16 adequate contact with the biological parents of children in foster care, the agency also
17 systematically fails to involve those parents in their children's case planning. During
18 2013, the state child welfare agency made concerted efforts to actively involve the child's
19 mother in case planning in only slightly more than half (54%) of cases reviewed, and to
20 involve the father in little more than a third (36%) of cases. According to DCS, "[c]ase
21 plans are not consistently developed and reassessed within required timeframes."

22 247. An all too predictable result of the state child welfare agency's failure to
23 preserve family relationships is that far too few members of the Reunification Subclass are
24 reunified with their families. Moreover, when reunification does occur, it takes far too
25 long.

26 248. The amount of time that members of the Reunification Class spend in out-of-
27 home care before being reunified with their families has also increased over time.
28 According to data prepared for the state child welfare agency, the percentage of children

1 who reunified within 90 days decreased from 30% for children who entered state foster
2 care in 2008 to 18% for children who entered such care in 2012; the percentage of children
3 who reunified within six months fell from 35% for the 2008 entry group to 23% for the
4 2012 entry group; and the percentage of children who reunified within one year fell from
5 44% for the 2008 entry group to 37% for the 2012 entry group.

6 249. DCS is aware of its poor performance. According to a 2014 agency report,
7 “[c]ompared to prior years, children are now less likely to exit to reunification, and they
8 experience longer lengths of stay before reunifying.”

9 250. The foregoing DCS practices interfere with the right to family integrity held by
10 members of the Reunification Subclass, and subject them to emotional harm and an
11 unreasonable risk of emotional harm.

12 251. Defendant McKay directly and indirectly controls and is responsible for the
13 policies and practices of DCS. The foregoing policies and practices fail to satisfy DCS’s
14 affirmative duty to protect the welfare of the Reunification Subclass, which failure is a
15 substantial factor leading to, and a proximate cause of, the violation of the constitutionally
16 protected liberty interests, privacy interests and associational rights of all members of the
17 Reunification Subclass.

18 252. The foregoing policies and practices of DCS amount to a policy, pattern,
19 custom and/or practice that is outside the exercise of any professional judgment and
20 amounts to deliberate indifference to the Reunification Subclass’s constitutional rights.
21 As a result, all members of the Reunification Subclass are being deprived, or are at
22 unreasonable risk of being deprived, of their liberty interests, privacy interests and
23 associational rights conferred on them by the First, Ninth, and Fourteenth Amendment to
24 the United States Constitution not to be deprived of child-parent or child-sibling family
25 relationships.

26 253. The Reunification Subclass has thousands of members and is therefore
27 sufficiently numerous to make individual joinder impracticable.
28

1 254. Named Plaintiffs' Fifth Cause of Action raises questions of fact and law that
2 are common to, and typical of, all members of the Reunification Subclass. Such common
3 questions of fact include:

4 a. Whether DCS engages in a practice of placing members of the
5 Reunification Subclass far from their home communities;

6 b. Whether DCS engages in a practice of failing to place members of the
7 Reunification Subclass in trial home reunification settings;

8 c. Whether DCS engages in a practice of failing to coordinate contact
9 between members of the Reunification Class and their biological families;

10 d. Whether DCS engages in a practice of failing to make required
11 monthly contact with the biological parents of members of the Reunification
12 Subclass; and

13 e. Whether DCS engages in a practice of failing to involve the biological
14 parents of members of the Reunification Subclass in the case planning of those
15 children.

16 255. Such common questions of law include whether DCS's actions and inactions
17 violate the Reunification Subclass's rights to family integrity, guaranteed by the First,
18 Ninth, and Fourteenth Amendments to the United States Constitution.

19 256. Named Plaintiffs will fairly and adequately protect the interests of the
20 Reunification Subclass they seek to represent.

21 257. Named Plaintiffs and the putative Reunification Subclass are represented by:

22 a. Attorneys employed by Perkins Coie LLP, an international law firm
23 with an office in Phoenix, Arizona, whose attorneys have extensive experience in
24 complex civil and public interest litigation, including class action litigation;

25 b. Attorneys employed by the Arizona Center for Law in the Public
26 Interest, a nonprofit legal organization based in Phoenix whose attorneys also have
27 extensive experience in complex civil and public interest litigation, including class
28 action litigation; and

1 c. Attorneys employed by Children’s Rights, Inc., a nonprofit legal
2 organization whose attorneys have substantial experience and expertise in child
3 welfare class actions nationally.

4 258. The attorneys and organizations listed above have investigated all claims in
5 this action and have committed sufficient resources to represent the Reunification
6 Subclass.

7 259. Each Named Plaintiff appears by a next friend, and each next friend is
8 sufficiently familiar with the facts of the child’s situation to fairly and adequately represent
9 the child’s interests in this litigation.

10 260. Defendant McKay has acted or failed to act on grounds generally applicable to
11 the Reunification Subclass, necessitating declaratory and injunctive relief. Plaintiffs’
12 counsel know of no conflicts between or among members of the Reunification Subclass.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, the Named Plaintiffs respectfully request that this Court:

15 A. Assert jurisdiction over this action;

16 B. Order that this action be maintained as a class action pursuant to Rule 23(b)(2),
17 Fed. R. Civ. P.;

18 C. Declare unconstitutional and unlawful pursuant to Rule 57, Fed. R. Civ. P.:

19 1. DCS’s and DHS’s violation of plaintiffs’ substantive rights to be free
20 from harm and unreasonable risk of harm under the Due Process Clause of the
21 Fourteenth Amendment to the United States Constitution;

22 2. DCS’s violation of the Reunification Subclass’s rights to family
23 integrity under the First, Ninth, and Fourteenth Amendments to the United States
24 Constitution;

25 3. DCS’s, DHS’s and AHCCCS’s violation of plaintiffs’ rights under 42
26 U.S.C. §§ 1396a(a)(8), 1396a(a)(10)(A)(i)(I), 1396a(a)(43)(C), 1396d(a)(4)(B) and
27 1396d(r);
28

1 D. Permanently enjoin DCS, DHS and AHCCCS from subjecting plaintiffs to
2 practices that violate their rights;

3 E. Order appropriate remedial relief to ensure DCS's, DHS's and AHCCCS's
4 future compliance with their legal obligations to plaintiffs, including, but not limited to, the
5 following:

6 **1. Health Care Services Provided to Children in State Foster Care.**

7 DCS and DHS shall establish and implement practices to ensure that all members of
8 the General Class receive the physical, mental and behavioral health services to
9 which they are entitled under the federal substantive Due Process Clause. Likewise,
10 DCS, DHS and AHCCCS shall establish and implement practices to ensure that all
11 members of the Medicaid Subclass receive the physical, mental and behavioral
12 health services to which they are entitled under the EPSDT provisions of the federal
13 Medicaid Act.

14 **2. Availability of Necessary Resources for the Placement of**
15 **Children.** DCS shall establish and implement practices to ensure a minimally
16 adequate capacity and array of placements to meet the placement needs of the Non-
17 Kinship Class, including foster and HCTC homes.

18 **3. Family Contact and Visitation.** DCS shall establish and implement
19 practices providing for minimally adequate visitation between members of the
20 Reunification Subclass and their biological parents and siblings. DCS shall also
21 establish and implement practices to adequately provide for siblings in the
22 Reunification Subclass to be placed together in foster care.

23 **4. Caseworker Investigations.** DCS shall establish and implement
24 practices providing for minimally adequate investigations into reports that members
25 of the General Class have been abused or neglected.

26 **5. Parent-Caseworker Contacts.** DCS shall establish and implement
27 practices providing for minimally adequate caseworker visits with the biological
28

1 parents of members of the Reunification Subclass and for the involvement of such
2 parents in the case planning of members of the Reunification Subclass.

3 **6. Monitoring/Enforcement.** The provisions of the Court order entered
4 pursuant to Fed. R. Civ. P. 65(d) shall be monitored by a neutral expert monitor
5 appointed by the Court. In addition, the Court shall have continuing jurisdiction to
6 oversee compliance with that order;

7 F. Award to the Named Plaintiffs the reasonable costs and expenses incurred in
8 the prosecution of this action, including reasonable attorneys' fees, pursuant to 28 U.S.C.
9 § 1920 and 42 U.S.C. § 1988, and Fed. R. of Civ. P. 23(e) and (h); and

10 G. Grant such other and further equitable relief as the Court deems just,
11 necessary and proper to protect Named Plaintiffs, the General Class, the Medicaid
12 Subclass, the Non-Kinship Subclass and the Reunification Subclass from further harm and
13 unreasonable risk of harm by DCS, DHS and AHCCCS.

14
15 Respectfully submitted this 8th day of June, 2015.

16 **CHILDREN'S RIGHTS, INC.**

17 By s/ William Kapell

18 William Kapell
19 Julia L. Davis
20 Rachel B. Nili
21 Adriana T. Luciano
22 330 Seventh Avenue, Fourth Floor
23 New York, New York 10001

24 **PERKINS COIE LLP**

25 Shane Swindle
26 2901 N. Central Avenue, Suite 2000
27 Phoenix, Arizona 85012-2788

28 **ARIZONA CENTER FOR LAW IN THE
PUBLIC INTEREST**

Anne C. Ronan
Timothy M. Hogan

1 514 West Roosevelt Street
2 Phoenix, Arizona 85003

3 *Attorneys for Plaintiffs*

4
5
6
7 **CERTIFICATE OF SERVICE**

8
9 I hereby certify that on June 8, 2015, I electronically transmitted the attached
10 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
11 Notice of Electronic Filing to the following CM/ECF registrants:

12
13 David Daniel Weinzweig
14 david.weinzweig@azag.gov
15 Robert Lawrence Ellman
16 robert.ellman@azag.gov
17 OFFICE OF THE ATTORNEY GENERAL
18 1275 West Washington Street
19 Phoenix, Arizona 85007-2997

20 Daniel P. Struck
21 dstruck@swlfirm.com
22 Kathleen L. Wieneke
23 kwieneke@swlfirm.com
24 STRUCK WIENEKE & LOVE PLC
25 3100 West Ray Road, Suite 300
26 Chandler, Arizona 85226

27 Logan T. Johnston
28 ltjohnston@live.com
JOHNSTON LAW OFFICES, P.L.C.
1402 E. Mescal Street
Phoenix, Arizona 85020
Telephone: (602) 452-0615

/s/ William Kapell