

U.S. District Judge Barbara J. Rothstein

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

D.S. by and through her next friend TARA URS;  
D.Y. by and through his next friend JULIE  
KELLOGG-MORTENSEN; H.A. by and through his  
next friend KRISTEN BISHOPP; and DISABILITY  
RIGHTS WASHINGTON, a nonprofit membership  
organization for the federally mandated Protection  
and Advocacy Systems,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF  
CHILDREN, YOUTH, AND FAMILIES; and ROSS  
HUNTER, in his official capacity as Secretary of the  
Washington State Department of Children, Youth,  
and Families,

Defendants.

No. 2:21-cv-000113

PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTIVE RELIEF

**I. INTRODUCTION**

Tonight, and every night for the foreseeable future, children in Washington's foster care system run the risk of being relegated to what is called "after hours." This is not a formal program governed by policies or minimum guidelines. Instead, this is the "crazy, bad idea" that far too many children in the custody of Washington's Department of Children, Youth, and Families (DCYF) experience when the system designed to care for them fails to provide them

1 with a placement.<sup>1</sup> DCYF may instead provide these children a one-night hotel stay or a cot on  
2 the floor at a DCYF office, or even force them to sleep in a social worker’s car. DCYF calls  
3 these nights without a proper home “placement exceptions,” but these “exceptions,” as well as  
4 one-night stays in emergency foster homes that last from bedtime to early morning, are  
5 happening with alarming frequency, and disproportionately to children with disabilities.

6 The widespread use of placement exceptions and one-night stays indicates a systemic  
7 failure, but DCYF’s unwillingness to provide even basic protections for the “after hours”  
8 children makes this harm even more intolerable and destabilizing, particularly for children with  
9 underlying behavioral health or developmental disabilities. Children experiencing placement  
10 exceptions and one-night stays spend their days sitting in a DCYF office, waiting to find out  
11 where they will sleep that night. They have no predictable routines, structure, supports, or even  
12 access to adequate nutrition. When situations inevitably escalate, the rotating “after hours” staff  
13 often lack skills to support these traumatized children, who are being triggered by their constant  
14 state of uncertainty.

15 Plaintiffs ultimately seek to reform the broken system that has precipitated this placement  
16 crisis, but the daily harm children are currently experiencing due to DCYF’s “after hours”  
17 practices can and should be alleviated while this case is litigated. Plaintiffs seek a preliminary  
18 injunction pursuant to Federal Rule of Civil Procedure 65 requiring Defendants to implement  
19 urgent, targeted modifications to DCYF’s “after hours” practices to mitigate the harm to  
20 Plaintiffs in the interim, including: (a) placing youth experiencing multiple-night hotel stays in  
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22 <sup>1</sup> Nina Shapiro, ‘Crazy bad idea’: Top Washington Official Reacts to ‘Alarming’ Rise in Children in State Care Sent  
23 to Hotels, SEATTLE TIMES (Dec. 16, 2019, 6:00 AM), [https://www.seattletimes.com/seattle-news/report-reveals-  
alarming-increase-in-number-of-children-in-state-care-sent-to-hotels-its-a-crazy-bad-idea-top-official-agrees](https://www.seattletimes.com/seattle-news/report-reveals-alarming-increase-in-number-of-children-in-state-care-sent-to-hotels-its-a-crazy-bad-idea-top-official-agrees)  
(hereinafter “Shapiro, ‘Crazy bad idea’”).

1 the same hotel and the same room from night to night, and permitting them to leave their  
 2 belongings in their rooms during the day; (b) ensuring that no children in DCYF custody spend  
 3 the night in cars or offices; (c) ensuring that youth experiencing placement exceptions or one-  
 4 night stays have access to healthy meals and snacks throughout the day; (d) providing adequate  
 5 support and resources, including dedicated office space, staffing, and transportation, for youth  
 6 experiencing placement exceptions or one-night stays to engage in school and other  
 7 developmentally appropriate activities; (e) providing training for “after hours” staff in trauma-  
 8 informed care, crisis response, de-escalation, and basic first aid; (f) providing individualized  
 9 accommodations and crisis response planning to support youth experiencing placement  
 10 exceptions and one-night stays; and (g) developing and disseminating policies and procedures  
 11 formalizing the requirements in (a)-(f) above.<sup>2</sup>

12 The Court should grant this preliminary injunctive relief pursuant to Federal Rule of Civil  
 13 Procedure 65 because Plaintiffs are likely to succeed on the merits of their claims, Plaintiffs are  
 14 likely to suffer irreparable harm in the absence of the requested relief, the balance of equities tips  
 15 in Plaintiffs’ favor, and the requested injunction is in the public interest. *See Winter v. Nat’l Res.*  
 16 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

## 17 II. STATEMENT OF FACTS

### 18 A. DCYF Routinely Houses Foster Children with Disabilities in Hotel Rooms, 19 Offices, and One-Night Stays.

20 When DCYF lacks an appropriate placement, it uses placement exceptions – hotel rooms,  
 21 DCYF offices, and cars – and one-night stays as emergency housing alternatives for children.

22  
 23 <sup>2</sup> Plaintiffs request that (a) and (b) be immediately implemented, and (c)-(g) be implemented within fifteen days of the Court order.

1 The Office of the Family and Children’s Ombuds (“OFCO”) has tracked DCYF’s use of  
2 placement exceptions since 2015, and in its 2020 Annual Report, describes increasing use of this  
3 practice, with no signs of slowing down. Kas Decl. ¶ 3, Exh. 1 at 13, fig. 1. OFCO’s data for  
4 September 2020 through March 2021 reflects 1,263 placement exceptions, suggesting that  
5 DCYF is on track to exceed its prior annual records. *Id.* ¶ 4, Exh. 2. These numbers do not  
6 include children in one-night stays, which OFCO opined in giving testimony to the Washington  
7 State House Children, Youth and Families Committee are “equally disruptive.” *Work Session:  
8 Hotel Stays for Youth Involved with Child Welfare, before the H. Comm. on Children, Youth &  
9 Families*, 2021 Leg., 67th Sess. (Wash. 2021), [https://www.tvw.org/watch/?eventID=  
10 2021011326](https://www.tvw.org/watch/?eventID=2021011326), at 6:10 (statement of Patrick Dowd, Director Ombuds, OFCO) (hereinafter “*H.  
11 Comm. Work Session*”); *see also* Kas Decl. ¶ 5, Exh. 3 (DCYF statement admitting overnight  
12 emergency placements do “not provide children with the stability they need”).

13 Plaintiff Disability Rights Washington (DRW), in its capacity as the federally mandated  
14 statewide Protection and Advocacy System for the State of Washington, has identified numerous  
15 constituents – youth with disabilities – who have experienced DCYF placement exceptions and  
16 one-night stays. Eaton Decl. ¶¶ 3-5. Under its federal mandates, DRW conducts monitoring,  
17 investigations, and advocacy on behalf of its constituents, including all Washingtonians with  
18 mental health, developmental, and physical disabilities. *Id.* ¶ 3. In July of 2020, DRW  
19 investigated exceptional placements and one-night stays pursuant to its federal mandates and  
20 requested from DCYF a list of all foster children who (1) have a mental health diagnosis,  
21 learning disability, or developmental disability, and (2) have experienced placement exceptions  
22 in DCYF offices or hotels, placement at a quarantine center, or placement in a short-term single-  
23 night foster home since March 1, 2020. *Id.* ¶ 4, Exh. 2. DCYF provided lists that identified

1 eighty-eight (88) children who met the requested criteria. *Id.* ¶ 5. Named Plaintiff D.S. is among  
2 the DRW constituents that DCYF identified, and she is currently living in hotels and offices  
3 along with other children, several of whom may also have disabilities. *Id.* ¶ 5; D.S. Decl. ¶¶ 4,  
4 14, 18-19; *see also* Answer ¶¶ 54, 56, ECF No. 23 (admitting D.S. has mental health diagnoses  
5 and has been subjected to temporary stays including at hotels during the last year). Other DRW  
6 constituents in DCYF custody, including Named Plaintiffs D.Y and H.A., have likewise endured  
7 placement exceptions, and remain imperiled by the risk that if their current placements disrupt,  
8 DCYF will once again subject them to these conditions. Bishopp Decl. ¶¶ 3-4, 8; Kellogg-  
9 Mortensen Decl. ¶¶ 3-4; *see also* Answer ¶¶ 49, 59 (admitting D.Y. and H.A. have experienced  
10 temporary stays including in DCYF offices or hotels).

11         The foster children who suffer extensive periods without a foster or group home  
12 placement are most often constituents of DRW who have behavioral health or developmental  
13 disabilities. *See* Kas Decl. ¶ 3, Exh. 1 at 18 (reporting over 70% of children with twenty or more  
14 exceptional placements had mental health needs); *id.* ¶ 6, Exh. 4 (DCYF June 12, 2020  
15 memorandum stating that “there are children with acute needs or behaviors who have  
16 necessitated extensive hotel stays while awaiting beds in residential placements.”). As DCYF  
17 Secretary Hunter explained in testimony before the House Children, Youth and Families  
18 Committee, many of the children who have experienced the most placement exceptions are  
19 children who, like D.Y. and H.A., were coming from Behavioral Rehabilitation Services (BRS)  
20 group homes that primarily serve DRW constituents, as well as hospitals that house youth with  
21 developmental disabilities or provide mental health treatment. *H. Comm. Work Session* at 18:01-  
22 18:59. Additionally, in DCYF’s 2020-2024 Child and Family Services Plan (hereinafter “2020-  
23 2024 CFSP”), DCYF acknowledges that “[c]hildren or youth who need more intensive

1 behavioral supports are perhaps the subgroup with the greatest unmet need for appropriate  
2 licensed placements,” and “*at least 94%* of hotel stays were attributable to the need for  
3 behavioral or mental health supports and the lack of licensed capacity to provide those supports.”  
4 Kas Decl. ¶ 7, Exh. 5 at 28 (emphasis added).

5 **B. DCYF’s “After Hours” Practices are Harmful.**

6 OFCO’s 2020 report described extraordinarily destabilizing conditions for children  
7 experiencing placement exceptions. The report describes how children leave the hotel or office  
8 they have slept in with all of their belongings “with the expectation they will not be returning to  
9 the same room, or perhaps even the same hotel,” how they typically eat improvised meals  
10 consisting of fast food or food from grocery or convenience stores, and how they may even sleep  
11 in cars. Kas Decl. ¶ 3, Exh. 1 at 23. Children in one-night stays spend their sleeping hours at an  
12 emergency foster home, but otherwise spend their waking hours in the same way as children in  
13 exceptional placements. *Id.* ¶ 5, Exh. 3 (DCYF statement that children are “dropped off close to  
14 bedtime and picked up by the caseworker before breakfast”).

15 Declarations recounting DRW’s constituents’ individual experiences similarly detail the  
16 ways DCYF has failed to mitigate the intolerable and unpredictable conditions of its “after  
17 hours” services. First, DCYF does not guarantee children the right to sleep in an appropriate  
18 setting and has forced children to spend sleepless nights in offices and even cars. For example,  
19 DCYF “after hours” staff made D.S. spend the night at DCYF offices as a consequence for not  
20 following rules and forced A.I. to spend the night on an office floor for declining a one-night  
21 stay where she did not feel safe. D.S. Decl. ¶¶ 5-6, 25; A.I. Decl. ¶¶ 9-10. H.A. spent more  
22 nights at the office than a hotel during the weeks he had no placement. Bishopp Decl. ¶¶ 6-7. In  
23 addition, echoing OFCO’s findings, constituents of DRW testify that when they spend the night

1 at a hotel, office, car, or one-night stay, they do not have access to adequate nutrition, and instead  
2 live on snacks, fast food, and microwave meals. D.S. Decl. ¶ 24; A.I. Decl. ¶ 6. Lastly, DCYF  
3 does not meet each youth’s individual needs, requiring children with mental health conditions to  
4 conform to abnormal conditions without accommodations, and providing few or no opportunities  
5 for age-appropriate structured activities. A.I. describes having nothing to do and no one to talk  
6 to all day, stating, “[n]obody made me feel like I was cared for or wanted.” A.I. Decl. ¶ 5. H.A.  
7 was “incredibly bored” and became “dark and hopeless” during the weeks he spent living in  
8 DCYF offices. Bishopp Decl. ¶ 5. D.S. has not received the individualized accommodations  
9 and supports she needs to engage in school or manage her anxiety. D.S. Decl. ¶¶ 20-23. When  
10 youth struggle to cope with these traumatizing circumstances, DCYF “after hours” staff do not  
11 demonstrate understanding of the children’s behaviors or how to provide adequate support to  
12 keep children safe. D.S. Decl. ¶¶ 13-19 (describing several incidents in which staff failed to  
13 respond to youth in crisis); Farina Decl. ¶¶ 23-24, 31; *see also* Bishopp Decl. ¶ 6.

14 According to Plaintiffs’ expert, Anne Farina, Ph.D., LCSW, DCYF’s practices “are  
15 unsafe and harmful to children in foster care, particularly for those with behavioral health  
16 conditions and developmental disabilities.” Farina Decl. ¶ 4. Based on her review of OFCO  
17 reports, as well as declarations and DCYF’s own case notes regarding DRW’s constituents who  
18 have been in multiple placement exceptions and one-night stays, she concludes that DCYF’s  
19 practices are unsafe, and harm children’s physical health, as well as their cognitive, behavioral,  
20 emotional, and social functioning. *Id.* ¶¶ 9-19. In particular, she notes that services to  
21 adequately meet children’s needs are especially crucial for “children with physical and mental  
22 health issues” who are “at risk for worse long term outcomes.” *Id.* ¶ 17. She warns that DCYF’s  
23 failures to provide for safety, stability, structure, adequate nutrition, and opportunities to develop

1 socialization skills are placing children at risk of injury, physical and mental health problems,  
2 and “being limited to future placements that may be more restrictive environments.” *Id.* ¶¶ 10-  
3 19. She further concludes that Plaintiffs’ proposed changes “would have an immediate impact  
4 on the safety and well-being of children.” *Id.* ¶¶ 35-36.

5 **C. DCYF has Failed to Appropriately Redress its Destabilizing Practices.**

6 DCYF has long recognized that its use of placement exceptions and one-night stays is a  
7 “crisis.” *See* Kas Decl. ¶ 7, Exh. 5 at 28. DCYF acknowledged that “[t]he use of hotels and  
8 short-term placements creates instability that can escalate negative behaviors making it more  
9 difficult to find a placement able to meet the child’s needs.” *Id.* at 30. Indeed, Defendant DCYF  
10 Secretary Ross Hunter admitted in December 2019 that having children in foster care sleep in  
11 hotel rooms and offices is “an enormous problem,” and that “[r]epeated stays in hotels is a crazy,  
12 bad idea.” Shapiro, ‘*Crazy bad idea.*’ More recently, DCYF social worker Selena Deer testified  
13 before the House Children, Youth and Families Committee about the “detrimental” impact on  
14 what she described as the “most vulnerable” foster children, explaining: “It creates instability,  
15 lack of consistency and expectations, trust issues, and it intensifies their mental and behavioral  
16 health. These children end up feeling hopeless, inadequate and unwanted.” *H. Comm. Work*  
17 *Session* at 23:43-24:42. She concludes that the message foster children receive is “we do not  
18 care enough.” *Id.* at 29:30-29:35. At this same hearing, Secretary Hunter stated that his  
19 department had been “excoriated” by the OFCO 2020 report, but agreed this was “incredibly  
20 appropriate.” *Id.* at 13:35-13:57.

21 DCYF, however, has ignored recommendations to mitigate the harm children in “after  
22 hours” are suffering. In its 2020 report, OFCO “recommend[ed] that, at a minimum, DCYF  
23 amend their current practice regarding placement exceptions and allow youth to stay in the same

1 hotel room from night to night.” Kas Decl. ¶ 3, Exh. 1 at 23. OFCO further suggested that  
2 DCYF should “ensure that children do not sleep in cars;” “establish office kitchen facilities  
3 stocked with healthy foods;” and “create dedicated office space and [provide] adequate staffing  
4 for children out of placement to engage in school work and activities.” *Id.* Yet, in his testimony  
5 before the House committee as well as his response to the OFCO report, Secretary Hunter’s  
6 solution has focused largely on expanding inpatient and congregate beds, with only limited plans  
7 to slightly increase single family therapeutic foster homes over the next year and no indication of  
8 any plans to implement OFCO’s urgent recommendations in the meantime. *H. Comm. Work*  
9 *Session* at 19:05-20:30; *See also* Kas Decl. ¶ 8, Exh. 6. Because the harmful “after hours”  
10 conditions are continuing unabated, Plaintiffs seek urgent Court intervention.

### 11 III. LEGAL STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

12 A plaintiff seeking preliminary relief under Federal Rule of Civil Procedure 65 must  
13 establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in  
14 the absence of preliminary relief, that the balance of equities tips in his favor, and that an  
15 injunction is in the public interest.” *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20  
16 (2008). The Ninth Circuit applies a “sliding scale” approach to balancing these elements; “a  
17 stronger showing of one element may offset a weaker showing of another.” *All. for the Wild*  
18 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, when the likelihood of grave  
19 irreparable injury is palpable and the balance of equities tips sharply in plaintiffs’ favor, the  
20 plaintiffs need only “demonstrate a fair chance of success on the merits or questions serious  
21 enough to require litigation.” *Arc of Cal. v. Douglas*, 757 F.3d 975, 993-94 (9th Cir. 2014)  
22 (internal quotations and citation omitted). Further, Plaintiffs must show likelihood of success on  
23 the merits of only one of their claims. *Rodde v. Bonta*, 357 F.3d 988, 998 n.13 (9th Cir. 2004).

1           **IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.**

2       **D. DCYF’s “After Hours” Practices Violate the Fourteenth Amendment.**

3           DCYF is abdicating its responsibility under the Fourteenth Amendment to the U.S.  
4 Constitution to provide children in its care with “reasonable safety and minimally adequate care  
5 and treatment appropriate to the age and circumstances of the child.” *See B.K. v. Snyder*, 922  
6 F.3d 957, 968 (9th Cir. 2017) (internal citation omitted). To prevail on their substantive due  
7 process claim, Plaintiffs must show that “state officials acted with such deliberate indifference to  
8 the plaintiffs’ liberty interest that their actions ‘shock the conscience.’” *Id.* This standard  
9 requires proof of : “(1) an objectively substantial risk of harm, and (2) the official’s subjective  
10 awareness of that risk.” *Id.* (quoting *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 844-  
11 45 (9th Cir. 2010)). “The second part may be proven by showing (1) that the official was aware  
12 of facts from which an inference of risk may be drawn and that the official made that inference,  
13 (2) that the official was aware of facts from which an inference of risk may be drawn and that  
14 any reasonable official would have been compelled to draw that inference, or (3) that the risk of  
15 harm is obvious.” *Id.* The Ninth Circuit has also held that courts may enforce the Fourteenth  
16 Amendment “when there is a substantial departure from accepted professional judgment or when  
17 there has been no exercise of professional judgment at all.” *Sharp v. Weston*, 233 F.3d 1166,  
18 1171 (9th Cir. 2000).

19           Here, Plaintiffs can establish an objectively substantial risk of harm to the physical,  
20 psychological, and emotional health of children forced to live in an unpredictable cycle of hotel  
21 rooms, offices, cars, and one-night stays in foster care. As illustrated by the declarations  
22 attached hereto, DCYF is even further compounding the harm and trauma that foster children  
23 have suffered by failing to meet children’s most basic needs for sufficient nutrition, a suitable

1 place to sleep, and adequate care and supervision. D.S. Decl. ¶¶ 4-24; A.I. Decl. ¶¶ 5-10; *see*  
 2 *also* Farina Decl. ¶¶ 20-22 (explaining how the “trauma-informed” approach that foster children  
 3 need “is not even possible without the presence of safety and stability”).

4 Plaintiffs will also show Defendant DCYF Secretary Ross Hunter’s subjective awareness  
 5 of the harm his agency is inflicting. Indeed, Defendants have reviewed OFCO’s reports and  
 6 have publicly acknowledged that subjecting children to repeated hotel stays as well as one-night  
 7 stays is harmful and destabilizing. *See* Shapiro, ‘*Crazy bad idea*’; *H. Comm. Work Session* at  
 8 13:35; *see also* Kas Decl. ¶¶ 5, 7, Exhs. 3, 5 at 30. Yet, in spite of DCYF’s subjective  
 9 knowledge that its practices are egregiously harmful, DCYF has continued this “crazy, bad idea,”  
 10 while also refusing to institute changes that would mitigate the harm it is inflicting.

11 **E. DCYF’s Practices Violate Plaintiffs’ Rights Under Title II of the ADA and Section**  
 12 **504 of the Rehabilitation Act.**

13 Although Plaintiffs need only to show likelihood of success on the merits for one claim,  
 14 Plaintiffs are also likely to successfully demonstrate that DCYF’s “after hours” practices further  
 15 violate both Title II of the Americans with Disabilities Act (“ADA”) and Section 504 of the  
 16 Rehabilitation Act, which each require DCYF to provide children with disabilities equal  
 17 opportunities to benefit from its child welfare program.<sup>3</sup> To establish a violation of either  
 18 statute, Plaintiffs must show that: (1) they are persons with disabilities; (2) they are “otherwise  
 19 qualified” for DCYF’s services; (3) they were excluded from participation in, denied the benefits  
 20 of, or subjected to discrimination in DCYF’s program or services by reason of their disabilities  
 21 (or “solely by reason of” their disabilities for the Section 504 claim); and (4) DCYF is a public

22 \_\_\_\_\_  
 23 <sup>3</sup>*See Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (“There is no significant difference  
 in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. Thus, courts have applied  
 the same analysis to claims brought under both statutes.” (internal citations omitted)).

1 entity (for the ADA claim) and receives federal financial assistance (for the Rehabilitation Act  
2 claim). *See Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999).

3 Plaintiffs meet each of these requirements. Named Plaintiffs, as well as other DRW  
4 constituents in DCYF custody, are children with disabilities who are qualified to receive services  
5 from DCYF, a state entity that receives federal funding. Answer ¶¶ 16, 70, 115 (admitting  
6 receipt of federal funding). DCYF discriminates against children with disabilities by providing  
7 less effective services and using methods of administration that have the effect of defeating or  
8 substantially impairing the accomplishment of the objectives of DCYF’s program with respect to  
9 individuals with disabilities and by failing to make necessary reasonable modifications to their  
10 policies, practices, and procedures. 28 C.F.R. § 35.130(b)(1)(iii), (3)(ii), (7); 45 C.F.R.  
11 § 84.4(b)(1)(iii), (4). Exceptional placements and one-night stays, which are most often suffered  
12 by children with exceptional needs, constitute less effective services and methods of  
13 administration that defeat DCYF’s core purpose to protect and promote the rights of children to  
14 “basic nurturing,” as well as “a safe, stable, and permanent home.” WASH. REV. CODE  
15 § 13.34.020; *see also* Kas Decl. ¶ 7, Exh. 5 at 28 (94% of hotel stays are attributable to  
16 behavioral and mental health needs and “lack of licensed capacity”); Farina Decl. ¶ 18 (finding  
17 increased risk of placement in “more restrictive environments”). Furthermore, the failure to  
18 provide safe and stable conditions to support trauma-informed care by the “after hours” staff is  
19 particularly detrimental to children with disabilities, who are at even greater risk of suffering  
20 worse long term outcomes. *See id.* ¶¶ 17-22.

21 DCYF’s proposed solution for children like H.A. and D.S. has been to attempt to place  
22 them in group homes and expand the capacity of these settings for other disabled children.  
23 Kellogg-Mortensen Decl. ¶ 3; Bishopp Decl. ¶ 8; *see also* Answer ¶ 50; *H. Comm Work Session*

1 at 19:05-21:03 (Defendant Secretary Hunter’s testimony that DCYF has been increasing group  
2 home “BRS” beds and will continue to use out-of-state institutions). This approach is not only  
3 ineffective for many children, but contravenes statutory mandates under the ADA and Section  
4 504 to administer services, programs, and activities in the least restrictive and most integrated  
5 setting appropriate to the needs of children with disabilities. *M.R. v. Dreyfus*, 697 F.3d 706, 734  
6 (9th Cir. 2012) (“[A] plaintiff need only show that the challenged state action creates a serious  
7 risk of institutionalization.”); 28 C.F.R. § 35.130(d); 45 C.F.R. § 84.4(b)(2); *see also* Bishop  
8 Decl. ¶ 8. For children, the “most integrated setting appropriate” is in “family homes,” yet  
9 DCYF’s internal recommendations and plans for addressing its placement crisis bend towards  
10 more inpatient and group care. *See A. H. R. v. Wash. State Health Care Auth.*, 469 F. Supp. 3d  
11 1018, 1045 (W.D. Wash. 2016); *see also* Kas Decl. ¶ 8, Exh. 6.

12 **F. DRW has Standing to Seek Preliminary Injunctive Relief for its Constituents.**

13 Lastly, DRW satisfies all the elements of associational standing to seek relief on behalf of  
14 its constituents. DRW can show that its constituents have standing to sue in their own right; the  
15 interests it seeks to protect are germane to the organization’s purpose; and neither the claims nor  
16 the injunctive relief sought require the participation of individual constituents in the lawsuit. *See*  
17 *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977) (laying out associational  
18 standing requirements). As in *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1110 (9th Cir.  
19 2003), where the Ninth Circuit found that protection and advocacy systems’ constituents “are the  
20 functional equivalent of members for purposes of associational standing,” Plaintiff DRW is the  
21 statewide protection and advocacy system designated by the Governor to serve Washingtonians  
22 with disabilities. Eaton Decl. ¶ 3.

1 Here, D.S. has a mental health diagnosis and attests to the numerous ways she is being  
 2 injured by Defendants' conduct. D.S. Decl. ¶¶ 2-26; *see also* Answer ¶ 54. Because she and  
 3 other DRW constituents are suffering and will suffer under DCYF's "after hours" conditions,  
 4 DRW has associational standing to seek preliminary injunctive relief on their behalf. *See K.M. v.*  
 5 *Regence Blueshield*, No. 13-cv-1214-RAJ, 2014 WL 801204, at \*7 (W.D. Wash. Feb. 27, 2014)  
 6 (granting a preliminary injunction upon concluding that DRW's constituents "possess enough  
 7 indicia of membership to satisfy the purposes of associational standing"); *see also Ezell v. City of*  
 8 *Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (plaintiff Second Amendment advocacy membership  
 9 associations entitled to preliminary injunction barring enforcement of city ordinance); *Cal.*  
 10 *Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154, 1162 (S.D. Cal. 2020) (motor carrier  
 11 association had standing to seek preliminary injunction on behalf of its members).

12 **V. DCYF'S PRACTICES ARE LIKELY TO CAUSE IRREPARABLE INJURY ABSENT**  
 13 **INJUNCTIVE RELIEF.**

14 Plaintiffs meet their burden to show that irreparable injury is likely absent injunctive  
 15 relief. *See Winter*, 555 U.S. at 22; *see also Small v. Avanti Heath Sys., LLC*, 661 F.3d 1180,  
 16 1191 (9th Cir. 2011) ("while 'likely' is a higher threshold than 'possible,' the [plaintiff] need not  
 17 prove that irreparable harm is certain or even nearly certain"). "It is well established that the  
 18 deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v.*  
 19 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation omitted). Emotional and  
 20 psychological harm arising from a violation of disability rights law similarly meets the  
 21 irreparable injury requirement in the context of a preliminary injunction. *Chalk v. Orange Cty.*  
 22 *Superintendent of Schs.*, 840 F.2d 701, 710 (9th Cir. 1988).

1 Children with disabilities in DCYF custody, all constituents of DRW, are currently being  
2 harmed by the extraordinary instability caused by DCYF’s “after hours” practices. Farina Decl.  
3 ¶ 35. The anxiety, instability, and confusion caused by not knowing where they will be sleeping  
4 is exacerbated by the associated disruptions in education, lack of safety, lack of healthy food, and  
5 the chaotic environment devoid of individualized supports and crisis response planning. *See* D.S.  
6 Decl. ¶¶ 2, 26 (describing “chaos and uncertainty” and being “filled with fear and anxiety”); A.I.  
7 Decl. ¶ 12 (“I don’t think any kids should have to live the way I did.”); Farina Decl. ¶¶ 9-22.

#### 8 VI. THE BALANCE OF THE EQUITIES FAVORS A PRELIMINARY INJUNCTION.

9 When ruling on a preliminary injunction, “a court must balance the competing claims of  
10 injury and must consider the effect on each party of the granting or withholding of the requested  
11 relief.” *Arc of Cal.*, 757 F.3d at 991 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531,  
12 542 (1987)). The Ninth Circuit has had “little difficulty concluding that the balance of hardships  
13 tips decidedly in plaintiffs’ favor” when, as here, it is “[f]aced with . . . a conflict between  
14 financial concerns and preventable human suffering.” *Lopez v. Heckler*, 713 F.2d 1432, 1437  
15 (9th Cir. 1983); *see also M.R.*, 697 F.3d at 737-38 (“[T]he balance of hardship favors  
16 beneficiaries of public assistance who may be forced to do without needed medical services over  
17 a state concerned with conserving scarce resources.”); *R.G. v. Koller*, 415 F. Supp. 2d 1129,  
18 1162 (D. Haw. 2006) (finding the “administrative inconvenience” of ensuring a safe environment  
19 for children in a state institution outweighed by the harm of children being subjected to  
20 harassment and abuse); *McNearney v. Wash. Dep’t of Corr.*, No. 11-cv-5930 RBL/KLS, 2012  
21 WL 3545267, at \*15 (W.D. Wash. June 15, 2012) (“the Ninth Circuit expects lower courts to  
22 protect physical harm to an individual over monetary costs to government entities”).  
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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2021, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Daniel Judge	<a href="mailto:danielj@atg.wa.gov">danielj@atg.wa.gov</a>
William McGinty	<a href="mailto:WilliamM1@atg.wa.gov">WilliamM1@atg.wa.gov</a>
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of April, 2021.

*s/Mona Rennie*  
Mona Rennie, Legal Assistant  
Disability Rights Washington