IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

94-1381

BABY NEAL, et al.,

Plaintiffs-Appellants,

v.

ROBERT P. CASEY, et al.,

Defendants-Appellees.

Appeal from Order of the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR *AMICI CURAE*

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Philadelphia Citizens for Children and Youth (PCCY) is a citizen's watchdog group which since 1981 has dedicated itself to improving the lives and life chances of the children of Philadelphia and environs. PCCY has undertaken numerous studies of Philadelphia's foster care system, sponsored "court watch" programs, held conferences, educated the public, issued reports on the status of dependent children, and spoken out to improve practices and expand resources to children in the region.

The Juvenile Law Center (JLC) is a public interest law firm that has provided free legal services to children in Pennsylvania since 1975. JLC has represented hundreds of abused and neglected children in Philadelphia Family Court, and has been involved in federal litigation, at trial and appellate levels, aimed at vindicating the rights of children served by county child welfare agencies. JLC has participated in amicus briefs in the U.S. Supreme Court and Third Circuit Court of Appeals. In recent years, JLC has focused its efforts on enforcing P.L. 96-272, the federal Adoption Assistance and Child Welfare Act of 1980, in Pennsylvania.

ARGUMENT

I. INTRODUCTION

Amici Philadelphia Citizens for Children and Youth (PCCY) and Juvenile Law Center (JLC) urge this Court to reverse the District Court's denials of Appellants' motions for class certification. Class litigation holds special importance for children involved with public systems. For instance, in this case, Appellants alleged that they and other children are routinely harmed by the very system that is designed to serve and protect them. However, rather than focusing on the children's shared systemic claims, the District Court focused on the large number of different ways in which a system can fail. The District Court's decision, that children who depend on a county child welfare system for their well-being cannot together challenge its breakdown, jeopardizes the ability of children in general to challenge practices that deny them their rights. The District Court's class certification decisions fail to reflect concern for the dual values of access to courts and judicial economy that are at the heart of Rule 23 of the Federal Rules of Civil Procedure.

PCCY and JLC also urge this Court to reverse the trial court's ruling that children whose caretakers voluntarily placed them in foster care do not have a constitutional right to be free from harm while in state custody. Voluntary versus involuntary commitment to state custody is, in the context of child welfare law and practice, a distinction without a difference.

Particularly from the viewpoint of the child, whose rights are here at issue, voluntary dependence on the state child welfare system is a meaningless concept.

II. THIS COURT SHOULD REVERSE THE DENIAL OF CLASS CERTIFICATION.

A. The rights of children who depend on public systems for service cannot be protected without class litigation.

This case has broad implications for children involved with public systems. For example, children may suffer violations of their rights while receiving services from a mental retardation facility, *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979)(en banc)(lengthy case history omitted) (affirming class certification at liability stage while recognizing utility of subclasses at relief stage); or from a delinquency institution, e.g., *Milonas v. Williams*, 692 F.2d 931 (10th Cir. 1982)(factual differences in the claims of the class members should not result in denial of class certification where there are common questions of law), *cert. denied*, 460 U.S. 1069 (1983). Courts routinely certify classes of plaintiffs in cases brought to remedy systemic violations; this gives plaintiffs the opportunity to prove at trial that they are sufficiently similarly situated to justify the trial court's entering relief that will benefit the class as a whole.

Persons served by a single public system will often suffer individualized harms, even if they are all harmed by the inadequacy under law of the system that is supposed to serve or protect them. For example, a mentally retarded person has a

right when in state custody to have the state exercise professional judgment in the rendering of treatment. *Youngberg v. Romeo*, 457 U.S. 307 (1982). If a sufficient number of patients in a facility suffer harm because staff fail to exercise such professional judgment, they would certainly be able, under Rule 23, to assert their claims as a class, even if they experience the harm in various ways.

Whether or not plaintiffs in public law litigation are permitted access to federal courts through the class action device should hinge on the nature of the legal claims they assert. Appellants here challenged violations of generally applicable federal and state laws and of their constitutional rights under the Fourteenth Amendment. The District Court, however, substituted its own level of generality for Appellants'; it focused on the least generalizable claims and prospective harms raised in their pleadings. The District Court's insistence on this perspective ensured that Appellants would not be able to pursue their claims as a class, regardless of their attempts to satisfy the District Court with the proposal of subclasses. Either their class would be too broad to fit the District Court's imposed parameters, or, in the absence of further discovery, subclasses would be too specific to define in terms of the harms on which the District Court focused. If permitted to stand, the District Court's approach will be a major setback to public law litigation.

B. The District Court abused its discretion in refusing to certify a class.

Appellants alleged a number of systemic deficiencies that prevented the Department of Human Services from providing children in DHS custody legally mandated child welfare services. Appellants alleged the following systemic deficiencies:

1. An insufficient number of trained caseworkers.

2. An insufficient number of medical, psychiatric, psychological and educational service providers.

3. An insufficient number of trained foster parents.

4. An insufficient number of placements for children who need environments that are more structured than foster homes.

5. An insufficient number of potential adoptive parents.

6. Cumbersome policies and procedures.

7. Insufficient administrative supports, including an automated information system, xerox machines, telephones, cars, etc.

Appellants also alleged that these failures prevented DHS from providing to children the following child welfare services to which they are legally entitled:

1. Protective service investigations that are in conformity with the Constitution; CAPTA, 42 U.S.C. § 5106a(b); and state law, 11 P.S. §§ 2201-24, recodified as 23 Pa.C.S.A. §§ 6301 *et seq.*; 55 Pa. Code §§ 3490.51 - 3490.73.

2. Monitoring and supervision as required by the Constitution and state law, 55 Pa.Code § 3490.61.

3. Safe and secure foster care placements, as required by the Constitution; the Adoption Assistance Act, 42 U.S.C. § 671(a)(10); and state law, 55 Pa. Code § 3130.67.

4. Written case plans, as required by the Constitution; the Adoption Assistance Act, 42 U.S.C. §§ 627(a)(2)(B), 675;

and state law, 55 Pa.Code §§ 3130.61, 3130.63, 3130.66, 3130.67, 3130.73, 3490.59, and 3810.35.

5. Necessary medical, psychiatric, psychological and educational services, as required by the Constitution; and by state law, 55 Pa.Code §§ 3130.12(c), 3130.34, 3130.35, 3130.73, 3490.60, 3700.51, 3810.51.

6. The planning and steps required to return children to their families or to find them alternative permanent placements, as required by the Constitution; the Adoption Assistance Act, 42 U.S.C. § 627(a)(2)(C); and state law, 55 Pa.Code §§ 3130.36, 3130.37.

7. Periodic judicial reviews, as required by the Constitution; the Adoption Assistance Act, 42 U.S.C. §§ 627(a)(2)(B), 675; and state law, 55 Pa.Code §§ 3130.71, 3130.72.

In its January 6, 1992, order denying Appellants' motion for class certification, the District Court found that the proposed class did not satisfy requirements of commonality and typicality under Federal Rule of Civil Procedure 23. On the issue of commonality, the court wrote, "There are no questions of fact or law common to all members of the proposed class." (Order at 6.) On the issue of typicality, it wrote, "The services required by DHS under the law differs depending upon a child's individual situation. Thus, the essence of each child's claim is not based upon the same legal theory." (Order at 9.) The District Court misinterpreted Rule 23 under the law of this Circuit.

The standard of review of a trial court's class certification decision is abuse of discretion. *Winston v. Children & Youth Servs.*, 948 F.2d 1380, 1392 (3d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2303 (1992). In applying this standard, this Court should consider the liberality with which federal courts have construed Rule 23, particularly in the

context of civil rights as opposed to commercial litigation. *Wilder v. Bernstein*, 499 F.Supp. 980, 993 (S.D.N.Y. 1980)(lengthy case history omitted).[1] The "hospitality that this Circuit has shown to class actions seeking to enforce federally created rights," *Serritella v. Engelman*, 339 F.Supp. 738 (D.N.J.), *later proceeding*, 462 F.2d 601 (3d Cir. 1972), has long been noted.

1. Differences in the factual circumstances of proposed class members do not bar class certification.

In this case, the trial court abused its discretion by ruling, in essence, that differences in the factual circumstances of the proposed class members acted as a bar to class certification. In *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), the Supreme Court ruled that, at least in that case, "class relief is consistent with the need for case-by-case adjudication." In reviewing the appropriateness of a class certified to challenge the adequacy of procedures used by the Department of Health, Education, and Welfare for recouping overpayments under the Social Security Act by withholding future benefits, the Court wrote, "It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue

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[1] The *Wilder* court quoted the Ninth Circuit's observation that "[w]hile Rule 23 has no 'civil rights version,' it is not surprising that its interpretation is more generous in this type of case than in others." *Id.* at 993 (citing *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 469-70 (9th Cir. 1973)).

potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23." *Id.*

Ample precedent from this Circuit supports certification of the proposed class or subclasses despite the differences in the members' factual circumstances. As stated by this Court in *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992), "[f]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." (citing *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123 (3d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), quoting 1 Herbert B. Newberg, *Newberg on Class Actions* § 3.15, at 168 (2d Ed. 1985)).

In *Hassine v. Jeffes*, 846 F.2d 169, 176 (3d Cir. 1988), this Court vacated an order denying class certification on "commonality" and "typicality" grounds, noting that the trial court had too narrowly interpreted Rule 23 requirements. In *Hassine*, prisoners brought an Eighth Amendment challenge to the "aggregate" conditions of their confinement at the State Correctional Institute at Graterford, Pennsylvania, *id.* at 172, conditions that they attributed primarily to overcrowding and secondarily to an inadequately diverse staff. This Court implicitly recognized that the alleged causes of the complaints were, given their allegedly pervasive consequences, appropriate matters for class action challenge in the face of "colorable

claims of constitutional violation." *Id.* at 174. This Court in *Hassine* made clear that the commonality in the prisoners' fate was not their personal, specific experiences in the prison, and that the named representatives could be "typical" of the class without having suffered under each alleged condition. Rather, the justification for class status lay in the possibility that any one of the prisoners could have been made to suffer under each alleged condition at any time. The same is true in the instant case. Just as an inmate could be double-bunked on a moment's notice by the warden, so could a child in DHS custody, for example, be moved to an inadequate foster home any day, for virtually any reason. In fact, this Court's statement that the *Hassine* plaintiffs were "vulnerable to injury," *id.* at 176, n.3, takes on added resonance when applied to the most vulnerable among us.

In *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), this Court vacated an order denying class certification for the operators of service stations challenging as antitrust violations the "tie-in" practices of major oil companies.[2] In *Bogosian*, plaintiffs claimed that the oil companies, through consciously parallel business behavior, conditioned the leasing of station sites upon exclusive purchase

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[2] The station operators sought certification of a class under Rule 23(b)(3). Therefore, the trial court had to identify all issues involved in the suit that were common to the proposed class. The court then had to determine whether those issues predominated over questions specific to individuals. This Court's review included a review of whether the trial court had correctly identified common issues.

of their gasoline and conditioned the use of their trademark pumps upon the exclusive use of their gasoline. The alleged injury was the elimination of wholesale competition and resultant effects on the price of gasoline. The operators were required to prove the existence of a tie, the sellers' economic power in the relevant marketplace, and some effect on a substantial amount of interstate commerce. While this antitrust case was hardly similar in substance to child welfare reform litigation, at least two aspects of this Court's Rule 23 decision in *Bogosian* support certification of Appellants' proposed class. First, on the leasing claim, this Court decided, *inter alia*, that the variety of contractual forms (over four hundred) involved in the operator/oil company relationships was not dispositive of the class certification issue:

> Plaintiffs' claim is not that each defendant imposed a tie-in on every dealer, but that all defendants conspired to impose tie-in arrangements on each dealer and that without the agreement of all, none could do so successfully . . . While the nature of the claim is such that proof will be detailed and lengthy, the factual and legal questions presented in this phase will be precisely the same in a class action as they would be in an individual suit.

Id. at 453. Second, on both the leasing and trademark claims, this Court held that the trial court had presumed rather than found that the "fact of damage" question, a requirement in private suits under § 4 of the Clayton Act, could not be tried on a class basis. This Court also suggested a bifurcated trial if the determinative issues going to who had suffered damages were not triable on a class basis. The *Bogosian* opinion instructs

both (1) that a class can be certified if its members are allegedly affected by an (again, allegedly) unlawful pattern of defendants' behaviors, whether or not defendants actually treated the class members uniformly, and (2) that even when class members do not suffer damage or harm in identical ways or measures, the question of whether defendants' violations caused injury to plaintiffs may, in some circumstances, appropriately be tried on a class basis.

The principle that factual differences need not defeat class certification was also applied in *Troutman v. Cohen*, 661 F.Supp. 802 (E.D.Pa. 1987). In *Troutman*, plaintiffs in three separate but related class actions challenged state practices concerning skilled nursing and intermediate care facilities operated under federal medicaid law. The court initially certified one of the plaintiffs' proposed classes (which it called the *Holland* class) of all persons in Pennsylvania who were eligible to receive medical assistance and who were or would be receiving intermediate care facility services, but only with respect to the issue of the state's reimbursement scheme for those services. In its published opinion, the court ruled on a renewed motion for subclass certification, focusing on two specific issues which concerned the administrative hearing process afforded patients who had seen their level of care reduced from skilled care to intermediate care: (1) whether defendants violated federal law by affirming decisions of hearing officers that omitted relevant findings and adequate statements of reasons, and (2) whether

defendants violated federal law by denying specialized legal and medical training to its hearing officers. The court restated defendants' argument that "the scope for variations on crucial disputed factual matters would be extensive, if not infinite," *id.* at 810, but held that "it is not the unique facts of the individual appeals which give rise to this action but rather the decision making process." *Id.* at 811. The court granted the renewed motion for certification under Rule 23(b)(2), certifying as a subclass all nursing home residents who had or would in the future appeal reductions in their level of nursing care designations in the medical assistance program.

Other Circuits have also considered the significance to class certification decisions of background factual distinctions among proposed class members. In *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985), for instance, plaintiffs asked the court for declarations that Alabama's medicaid level of care admission criteria for nursing homes (and related policies and practices surrounding eligibility determinations) were invalid, for the reinstatement of previous criteria as an interim measure, and for an injunction against the denial of benefits without full compliance with law. The district court refused to certify the proposed class of financially eligible persons who had applied for nursing home admission under the challenged criteria. In vacating that order, the Eleventh Circuit responded to the "typicality" argument raised by defendants and accepted by the trial court, the argument that the plaintiffs' varying medical

conditions precluded class certification: "It does not appear that the factual differences surrounding the medical conditions of the various plaintiffs would preclude the district court from determining whether the plaintiffs are entitled to the relief they seek." *Id.*

Appellant children and those similarly situated in their relationship to Appellees do have varying needs. However, plaintiffs here adequately alleged that the failure of Appellees to adhere to the structure of the child welfare edifice-- case plans, decision-making by trained caseworkers, thorough judicial reviews, and access to treatment services and to safe and appropriate placements--harms children regularly. The differences in the proposed class members' factual situations is not material to the elements of the causes of action they bring nor to the relief that they seek.

Differences in the family circumstances and personal needs of Appellant children do not make systemic violations of law irrelevant or systemic remedies unnecessary. Rather, these differences highlight the need for a child welfare system that operates to respond to individual circumstances. Appellant children allege that they have such a system in theory, but not in practice. That is why they have come to federal court.

2. Proposed class members share a common legal theory: Appellees routinely violate basic elements of a complex legal framework designed to protect children in need of welfare services.

The District Court erred in denying class certification on

the grounds that, by alleging violations of different laws and rules, Appellants must be bringing claims under separate legal theories. In the face of a complex legal framework, Appellees maintain a dysfunctional system in which the arbitrariness of state action harms children daily. Resolution of this litigation would certainly be simpler if a single source of law outlined the rights of children who are exposed to the state's awesome power through contact with DHS. However, the existence of a number of interdependent laws and regulations only increases the importance of the type of systemic reform that the Appellant children strive to bring about with class litigation, for this complexity decreases the likelihood that individual actions will be brought to challenge the related systemic breakdowns that Appellant children allege. The District Court did not consider the overall legal structure of the child welfare system in arriving at its ruling.

In 1980, Congress amended the Social Security Act to provide fiscal incentives to states to reduce the unnecessary placement of children in foster care and to ensure periodic review of the cases of children in placement. The amendments, codified as the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 42 U.S.C. §§ 608, 620-628, 670-676, require, *inter alia*, that before a state may receive federal reimbursement for a child in foster care: (1) a judge must in each case find that the state has made "reasonable efforts" to prevent placement of the child or to reunite the child with her family; (2) the state must

develop a written case plan for the child; and (3) the state must ensure that the case is reviewed every six months by a court or administrative body, with a full judicial review within 18 months of the child's placement.[3]

Federal law, of course, only sets out minimum standards that state child welfare systems must satisfy in order to receive federal funds. Pennsylvania has integrated the requirements of P.L. 96-272 into its laws and regulations. Pennsylvania's child welfare system is governed by a set of integrated statutes, as well as by various sections of Pennsylvania regulations promulgated by the Department of Public Welfare. The Child Protective Services Law (CPSL), the Juvenile Act, the Adoption Act, and DPW regulations set the basic framework for the delivery of services to Pennsylvania's most vulnerable children.

The CPSL, 23 P.S. § 6301, *et seq.*, establishes mandates for the reporting, investigating, and recording of information about child abuse and neglect. The CPSL also contains a mechanism for taking children into protective custody for a short period of time when necessary for their safety.[4] Chapter 3490 regulations of 55 Pennsylvania Code set out the corresponding obligations of of Child Protective Service Agencies. Philadelphia's Department

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[3] Of course, the Supreme Court has held that the Adoption Assistance and Child Welfare Act does not grant a private right of action for enforcement of the "reasonable efforts" requirement. *Suter v. Artist M.*, 503 U.S. ___, 112 S.Ct. 1360 (1992). The Court did not decide whether children could privately enforce other provisions of the Act.

[4] However, the CPSL cross-references the Juvenile Act with respect to protective custody.

of Human Services is such an agency.

The Juvenile Act governs state intervention in families when protective custody for abused or neglected children is necessary for periods of time that exceed that authorized by the CPSL. However, the Juvenile Act also provides for state services to troubled families where children have not already suffered the severe harms defined as abuse and neglect by the CPSL. The purposes of the Juvenile Act include: (1) to preserve families while protecting and caring for children, (2) to offer services in family environments whenever possible, and (3) to provide means of enforcing the legal rights of parties under the Act. 42 Pa. C.S. § 6301(b).

The Juvenile Act delineates the role of the juvenile court in the dependency system. A case comes before the court when a petition is filed pursuant to section 6334. At the adjudicatory hearing, the court must find from clear and convincing evidence that the child is dependent. 42 Pa. C.S. § 6341(c).[5] Once a child is found to be dependent, the court selects an initial disposition (at the dispositional hearing) such as permitting the child to remain with her parents under prescribed conditions or transferring temporary custody of the child to a private or public agency. 55 Pa.Code § 3130.67. The Juvenile Act also calls for periodic dispositional review hearings at which the

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[5] Under the Juvenile Act, a "dependent child" is defined as a child who meets one of nine separate definitions. 42 Pa. C.S. § 6302. Most "dependent child" cases involve the first definition: "a child who: (1) is without proper parental care or control necessary for his physical, mental, or emotional health or morals."

court determines the appropriateness of the child's placement and the child's placement goal. The court also must evaluate progress made toward addressing the circumstances that necessitated placement. 42 Pa. C.S. § 6351(e).

While the Juvenile Act defines the role of the court in the dependency process, the Public Welfare Code, 62 P.S. § 701 *et seq.*, and its implementing regulations, 55 Pa. Code 3130 *et seq.*, define the responsibilities of the county children and youth agency. The children and youth agency is required to prepare a family service plan for each dependent child who receives services from the agency. 55 Pa. Code § 3130.61. The family service plan must identify service objectives. The placement goal for a child (that is reviewed at dispositional hearings, as discussed above) may be return home, placement in the home of another relative, adoption, placement with a legal guardian, independent living, or long-term placement.

When the child's goal is "return home," the agency must provide "reunification services." The Department of Public Welfare requires children and youth agencies to provide, as reunification services, counseling services, parent education, homemaker/caretaker services, and part day service. 55 Pa. Code § 3130.35. However, the regulations also state that agencies must provide additional court-ordered services, child protective services as required by Chapters 3480 and 3490, and services required by family service plan reviews. 55 Pa. Code § 3130.38.

The Adoption Act grants the children and youth agency

standing to petition for the termination of parental rights when, in order to guarantee a child permanency, the agency finds it necessary to pursue adoption for a child in its care. 42 Pa. C.S. §2512. The agency's duties in providing adoption assistance services, pursuant to federal law, are defined in 55 Pa.Code §§ 3140.201 *et seq*.

Appellant children do not allege that Appellees violate every rule every day with respect to every child entitled to protection from that rule. Rather, the children argue that the state's actions are far more random and arbitrary than that. They allege that the state subjects the children in its custody to a chaotic world of changing caseworkers, unplanned moves, disrupted services, and confusing messages about the future.

In a discussion of class action standing doctrine in *Wilder v. Bernstein*, 499 F.Supp. 980, 994 (S.D.N.Y. 1980)(lengthy case history omitted), the trial court wrote, "[I]nsofar as they [plaintiffs] allege that the voluntary agencies, acting together with public officials, have created an <u>overall child-care system</u> which discriminates on the basis of race and religion, plaintiffs have stated a claim against the entire system and each of its components." [emphasis added] In this case, Appellants challenge the operation of an <u>overall child welfare system</u> that is arbitrary rather than discriminatory, and whose arbitrariness harms sufficient numbers of children in legally cognizable ways that their claims should be heard through the vehicle of a class action.

According to its Annual Plan, the Philadelphia Department of Human Services files approximately five thousand petitions alleging that children are "dependent" within the meaning of Pennsylvania law. 42 Pa. C.S. § 6302. The Department provides services to more than 30,000 children, more than 6,000 of whom are in out-of-home care. *See*, Philadelphia Department of Human Services, **Annual Plan for Fiscal Year 1994**, pp. IV-3, V-3. For all of these children there are common issues such as risk management, case planning, staffing, and fidelity to legal mandates of family preservation and permanency planning. Because of these common issues, in similar cases federal courts have approved class certification. *See, e.g., L.J. by and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989); *Lynch v. King*, 550 F.Supp. 325 (D.Mass. 1982), *aff'd sub nom. Lynch v. Dukakis*, 719 F.2d 504 (1983). *See also, Suter v. Artist M.*, 503 US ____, ___ n.4, 112 S.Ct. 1360, ___ n.4, 118 L.Ed.2d 1, 9 n.4 (1992) (discussing without comment the composition of a class of children "who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ('Juvenile Court'), who are or will be in the custody of [DCFS] or in a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.")

C. The District Court required a showing for class certification that could only be satisfied after class-wide discovery, which the District Court denied.

Public documents and statements already available to Appellants more than present a prima facie case of the existence of systemic deficiencies common to the proposed class. However, to the extent that the District Court remained unconvinced of the pervasiveness of common causes for individualized harms, its proper course was to allow class-wide discovery rather than to deny certification based on his own assumptions. As this Court found in *Hassine*, evidence regarding named plaintiffs' individual circumstances is no substitute for class-wide discovery on contentions that concern systemic deficiencies. *Hassine*, 846 F.2d at 175.

"The propriety of a class action cannot be determined in some cases without discovery, as for example, where discovery is necessary to determine the existence of a class or set of subclasses." *Kamm v. California City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). As stated by the First Circuit, "To pronounce finally, prior to allowing any discovery, the nonexistence of a class or set of subclasses, when their existence may depend on information wholly within defendants' ken, seems precipitate and contrary to the pragmatic spirit of Rule 23." *Yaffee v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). Failure to allow class-wide discovery may constitute reversible error in certain circumstances. *Kamm*, 509 F.2d at 210. *See also, Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir. 1977).

In the Eleventh Circuit, in fact, the trial court is

required to conduct an evidentiary hearing on class certification "when there is any doubt about the issue, even when counsel fails to move for such a hearing." *Morrison v. Booth*, 730 F.2d 642, 643 (11th Cir. 1984). In that Circuit, true value is attached to "the special and important role of the trial court as manager of the class action, a responsibility not raised by individual civil litigation." *Id.* at 644.

The Court of Appeals for the District of Columbia Circuit has addressed a similar issue, the necessity of explicit findings on the issue of class certification when it is disputed. "While there is no explicit requirement in this Circuit that a District Court grant a hearing or provide findings on the class issue, our reviewing task here, however limited, is rendered impossible in their absence." *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 960 (1985). In *Fink*, the Court remanded for further consideration of the class issue.

III. This Court should reverse the District Court's ruling that voluntarily placed children do not have a Fourteenth Amendment right to be free from harm while in state custody.

The District Court granted Appellees' motion for summary judgment insofar as it argued that children whose caretakers voluntarily placed them in foster care do not have a constitutional right to be free from harm while in state custody. In doing so, the District Court erred. This Court's review of the grant of summary judgment is plenary. *Moore v. Warehouse Club, Inc.*, 992 F.2d 27, 29 (3d Cir. 1993). This Court should reverse the District Court since the Appellees were not entitled

to prevail on their argument to limit the scope of Fourteenth Amendment protections.

A. Initial placement status is less important to due process analysis than Appellant children's dependence on the state.

Children who are placed voluntarily by their custodians into the care of the Department of Human Services are identically situated to those who are placed at the outset by court order. Pennsylvania Department of Public Welfare regulations, 55 Pa.Code §§ 3130 *et seq.*, set forth a scheme of service delivery that does not distinguish voluntary from involuntary placements. *See* 55 Pa.Code §§ 3130.5, 3130.12, 3130.31, 3130.35, 3130.61. The only difference is that when children are placed "voluntarily," their placement may not extend beyond 30 days without a court order. 55 Pa.Code § 3130.65(b).

Similarly, the requirements for service providers in Pennsylvania do not differentiate voluntary from involuntary placements. *See, e.g.*, 23 Pa.C.S. § 6344 (Child Protective Services Law requiring background checks for anyone who becomes a caretaker of any child); 55 Pa.Code §§ 3700 *et seq.* (governing standards for foster family care).

In *United States v. Commonwealth of Pennsylvania*, 832 F.Supp. 122 (E.D.Pa. 1993), the court addressed the question of "whether the state owes a constitutional duty to afford substantive due process rights to voluntarily confined residents of Embreeville [a state-run mental health facility]." *Id.* at 123. The court rejected arguments that a resident's initial

commitment status was more important to a substantive due process analysis than the resident's total dependence on the state once in custody. The court reasoned that "where the initial institutionalization of an individual is made pursuant to a 'voluntary' decision, such institutionalization in its course may become one which necessarily curtails an individual's liberty." *Id.* at 124.[6] When that is the case, "the constitutional right to treatment or habilitation extends to both involuntarily and voluntarily confined residents alike." *Id.* at 125. If a voluntarily commited individual has a right to treatment, he or she also must have a right to be kept free from harm.

The distinction between voluntary and involuntary placement is, as stated by the trial court in *Halderman v. Pennhurst State School and Hospital*, 446 F.Supp. 1295, 1310-11 (E.D. Pa. 1977), *aff'd in part and rev'd in part on other grounds,* 612 F.2d 84 (3d Cir. 1979)(en banc), an "illusory" one.[7]

B. Voluntary placement is not voluntary for Appellant children, whose rights are at issue.

Children are not parties to voluntary placement agreements.

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[6]The court found that neither *Youngberg v. Romeo*, 457 U.S. 307 (1982), nor *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)(holding that a child who is harmed by a private party while outside state custody has no 14th Amendment right to be protected by the public child protection agency even when that agency is aware of the specific risk of harm) suggested a different result.

[7]*See also Parham v. J.R.*, 442. U.S. 584, 601 (1979), where the Court assumed for purposes of the decision that a child "voluntarily" placed by a parent into a secure mental health facility had "a protectible [14th Amendment] interest . . . in being free of unnecessary bodily restraints . . ."

Minors who are subject to voluntary placement agreements cannot remove themselves from DHS custody. They also cannot remain in DHS custody if the Family Court agrees to discharge their cases. Children are not asked for their consent to being placed; the term "voluntary" has little if any relationship to the persons whose rights are at stake in this litigation.

Moreover, it is the experience of amici that voluntary placement agreements are often not truly voluntary, even from the perspective of the caretakers who place their children into care. Rather, the agreements are often entered under the threat of near-certain court action against parents and the embarassment and stigma that such proceedings involve.

Thus, in the context of placements of children in the child welfare system, the substantive due process right to be free of harm while in state care, *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987)(en banc); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981); *see also, D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1372 (3d Cir. 1992), should not hinge on the artificial distinction between "voluntary" and "involuntary" placements.

IV. CONCLUSION

Arbitary or ad hoc action in the face of interdependent legal frameworks, while inherently difficult to analyze in terms of "commonality" and "typicality," is no less anathema to the due process protected by the Fourteenth Amendment than deliberate and apparently consistent violations of a single provision of law. Systemic failure to satisfy a legal requirement is as worthy of injunctive relief, if harder to remedy, as is an isolated breach. Deprivations experienced in different ways by large numbers of children are as real, if harder to prove without extensive discovery, as single instances of abuse.

Harm to a child whose parents agreed not to fight Appellees for custody hurts as much as harm to a child whose parents contested the placement. At the hands of the state acting as legal custodian, it is also equally unjustified.

This Court should reverse the District Court's refusal to certify a class of Appellant children to challenge systemic violations of their rights. This Court should also correct the District Court's unsustainable reading of precedent involving the substantive due process rights of individuals in state custody; this Court should reverse the District Court's ruling that a child's right to be free from harm <u>today</u> depends on the legal

form of yesterday's (or last year's) adult decision that she should be committed to the care of the state actors who now inflict that harm.

Respectfully submitted,

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Date: May 9, 1994

CERTIFICATE OF SERVICE

I Robert G. Schwartz, hereby certify that I have on this 9th day of May, 1994, served a copy of the foregoing Brief in Support of the Motion to Participate as *Amicus Curiae* on the following counsel for parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

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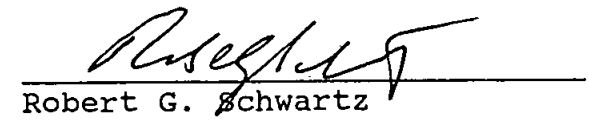

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