IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRIAN A., by his next friend, Bobbi Jean Brooks; TRACY B., by her next friend, Pamela Pallas; JACK and CHARLES C., by their next friend, Linda Lloyd; AMY D., by her next friend, Frank Koon; DENISE E., by her next friend, Linda Lloyd; CHARLETTE F., by her next friend, Juanita Veasy; TERRY G., by her next friend, Carol Oldham; ANDREW H., by his next friend, Laura Hash; KENNETH I., by his next friend, Russell Morel; NANCY J., by her next friend, Laura Hash; and DONNA K., by her next friend, Laura Hash; and KIERA L., by her next friend, Laura Hash; on their own behalf and on behalf of all others similarly situated,	)	Civil Action No. 3-00-0445 Judge Campbell Magistrate Brown
Plaintiffs,	)	
--against--	)	
PHIL BREDESEN, Governor of the State of Tennessee; and VIOLA MILLER, Commissioner of the Tennessee Department of Children's Services,	)	
Defendants.	)	

SUPPLEMENTAL COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, Plaintiffs supplement their Complaint (Docket No. 1) (the "Original Complaint") as follows:

INTRODUCTION

1. Plaintiffs – children in the legal custody of the Tennessee Department of Children's Services ("DCS") – file this Supplemental Complaint in this action to address the

imminent risk of harm faced by the Supplemental Plaintiffs, named herein and all similarly situated *Brian A.* class members, from Section 30 of Tennessee Public Chapter No. 531, which created a new subsection "f" to Tennessee Code Annotated ("T.C.A.") § 37-2-205 and became effective on July 7, 2009.

2. T.C.A. § 37-2-205(f) (the "Over-Commitment Law") establishes a pre-set limit on the number of children committed to DCS custody for whom the state will allocate resources. The Over-Commitment Law places a limit on the number of child commitments for each county based purely on the county's child population and a pre-set figure called the "average state commitment rate per thousand children." If the pre-set limit is exceeded in a county – as a result of decisions of the Juvenile Court judge(s) employed by that county – that county must pay the state's "actual daily cost" for foster care for each child committed beyond the limit, for as long as that child remains in state custody.

3. The Over-Commitment Law was signed into law with the intended and inevitable result of pressuring Juvenile Court judges to commit fewer children to DCS custody, in order to save state funds. The new law was developed by DCS, and targets certain Juvenile Court judges who DCS believed were "over-committing" – i.e., committing children who should not have been committed – even though DCS initiates nearly all petitions seeking the commitment of children to DCS custody as dependent and neglected, and even though DCS has the ability to seek *de novo* review on appeal of any commitment decision it believes improper or unlawful.

4. Fundamental due process and specific federal statutory law require that commitment decisions be based entirely on the facts of each child's case, and the Consent Decree specifically requires Defendants to ensure this protection for *Brian A.* class members.

However, the Over-Commitment Law affects and interferes with judges' decision-making by injecting into individual judicial commitment decisions a numbers game of how many children have already been committed to DCS custody in a particular county and whether that county will have the ability to provide resources for foster care if the pre-set limit is exceeded. The Over-Commitment Law thus places children at imminent risk of significant harm.

5. Since the Over-Commitment Law took effect in July of 2009, every single commitment decision made by any Juvenile Court judge in the state counts against the pre-set limit for the county in which the judge sits. The pre-set numbers have absolutely nothing to do with the factors affecting commitment decisions in any particular county, much less the facts of a particular child's individual case.

6. In at least one "high commitment" county targeted by the Over-Commitment Law, commitment decisions are in fact already being affected by the new law and children are being treated differently – to their detriment – as a result. These effects include:

a. children having to spend one or more nights in detention (jail) while DCS and the court search for appropriate placements that will not result in an official commitment to DCS custody;

b. children sleeping late into the evening on courtroom benches or in a DCS office, when before passage of the Over-Commitment Law they would have been committed to foster homes;

c. the consideration of the use of certain emergency shelters to house children who, before passage of the Over-Commitment Law, would have been committed to foster homes, because these shelter placements do not count as "commitments" for purposes of the Over-Commitment Law;

d. the exercise of jurisdiction over a child's case, when jurisdiction is proper in more than one county, based on the commitment rates of the counties involved and not on the convenience or best interests of the parties and witnesses; and

e. the approval of "tenuous" placements for children as an alternative to commitment to DCS custody, although the alternative commitments often later fail – for instance, when DCS promises but does not provide necessary services – resulting in those children being eventually committed to DCS custody, having been subjected to an uncertain situation and an additional placement move.

7. The Supplemental Plaintiffs are *Brian A.* class members in a "high commitment" county who are in DCS custody and awaiting hearings on commitment petitions. At those hearings, a Juvenile Court judge will determine whether to return the Supplemental Plaintiffs to their homes, place them with relatives or other non-DCS caregivers, or keep them in DCS custody as dependent and neglected. Their hearings will occur within 24 hours of the date of this Supplemental Complaint. The Supplemental Plaintiffs are therefore at risk of imminent harm from the effects of the Over-Commitment Law on their judge's decision-making.

8. The Over-Commitment law unlawfully affects all commitment decision-making, regardless of the outcome in a particular case, and thus all *Brian A.* class members who will come before judges for commitment decisions, particularly in "high commitment" counties deemed by DCS as historically at risk of exceeding their pre-set commitment limits, will be subjected to the same imminent risk of harm as Supplemental Plaintiffs.

9. This Supplemental Complaint is brought against the same Defendants as the Original Complaint – the Commissioner of DCS, in her official capacity, and the Governor of Tennessee, in his official capacity. Defendants together are responsible for the development, intent, signing, implementation and inevitable result of the Over-Commitment Law. Defendants are also responsible for the state's fulfillment of its binding obligations under the Consent Decree, over which this Court has continuing jurisdiction.

10. The Supplemental Plaintiffs assert claims for Defendants' non-compliance with and contempt of specific provisions of the *Brian A.* Consent Decree. The Over-Commitment Law violates § I(A)(13) of the Consent Decree, which expressly requires that "[D]efendants shall commit all necessary resources (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement." Because it establishes pre-set limits for the allocation of DCS resources for children placed in state custody, the intended and inevitable result of the Over-Commitment Law is to excuse the *Brian A.* Defendants from the binding Consent Decree obligation to provide *all* resources (including financial) to implement the decree for *all* foster children in DCS custody.

11. The Over-Commitment Law also violates § I(A)(2) of the Consent Decree, which provides specific protection to Plaintiff children from actions, practices or policies of Defendants that interfere with the capacity of judges to make case-specific decisions concerning efforts to preserve families, the removal of children from their homes, and the commitment of children to DCS custody.

12. Additionally, the Over-Commitment Law violates § I(A)(12) of the Consent Decree, which provides specific protection to Plaintiff children from any interference by Defendants with their constitutional and other legal rights, including their rights to fair hearings, in any judicial proceedings to which they are subjected. The Over-Commitment law violates Plaintiffs' rights to equal protection and to due process under the Fourteenth Amendment to the United States Constitution.

13. The Supplemental Plaintiffs seek declaratory and injunctive relief, including a preliminary injunction and an order permanently enjoining the implementation of the Over-Commitment Law.

JURISDICTION

14. This is an action pursuant to 42 U.S.C. § 1983, alleging violations of the United States Constitution and federal statutes, and of the Consent Decree in this action, which has the force of federal law. This court has jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). This Court also has continuing jurisdiction to enforce the terms of the Consent Decree in this matter.

SUPPLEMENTAL PLAINTIFFS AND NEXT FRIENDS

15. As of the date of the instant Supplemental Complaint, each of the Supplemental Plaintiffs has been removed from his or her home on an allegation of abuse and/or neglect, is the subject of a petition seeking his/her commitment to DCS custody as dependent and neglected, and is in the legal custody of DCS pursuant to an *ex parte* order issued by the Juvenile Court judge of his or her county. Under T.C.A. § 37-1-117, a child removed from his or her home must be provided a judicial hearing within 72 hours of removal from the home, at which a judge is to determine whether the child should remain in DCS custody, be returned to his or her home, or be placed with a relative or other non-DCS caregiver. Each of the Supplemental Plaintiffs is in DCS legal custody, awaiting a hearing under T.C.A. § 37-1-117.

16. Andrew H. is 23 months old and resides in Anderson County. [1] He was removed from his home by DCS on or about November 6, 2009, on an allegation of neglect. On or about November 6, 2009, a petition was filed in the Juvenile Court of Anderson County, requesting that Andrew H. be committed to DCS custody as dependent and neglected. On or about November 9, 2009, an *ex parte* order was issued by the Juvenile Court of Anderson County, authorizing the temporary placement of Andrew H. in the legal custody of DCS pending a hearing on the commitment petition, scheduled for November 9, 2009. At the time of the filing of the instant Supplemental Complaint, Andrew H. is in the legal custody of DCS awaiting his hearing, and is not committed to the legal custody of DCS based solely upon an allegation or adjudication of a delinquent or criminal act.

17. Supplemental Plaintiff Andrew H. appears through his Next Friend Laura Hash. Ms. Hash is the Guardian Ad Litem ("GAL") attorney for Andrew H. pursuant to an order issued by the Juvenile Court of Anderson County. Ms. Hash maintains her principal office at 109 Leinart Street, Suite 101, Clinton, TN 37716.

18. Kenneth I. is 2 years old and resides in Anderson County. He was removed from his home by DCS on or about November 6, 2009, on an allegation of neglect. On or about November 6, 2009, a petition was filed in the Juvenile Court of Anderson County, requesting that Kenneth I. be committed to DCS custody as dependent and neglected. On or about November 9, 2009, an *ex parte* order was issued by the Juvenile Court of Anderson County, authorizing the temporary placement of Kenneth I. in the legal custody of DCS pending a hearing on the commitment petition, scheduled for November 9, 2009. At the time of the filing

[1] Pseudonyms have been used in order to protect the identities of the minor Supplemental Plaintiffs.

of the instant Supplemental Complaint, Kenneth I. is in the legal custody of DCS awaiting his hearing, and is not committed to the legal custody of DCS based solely upon an allegation or adjudication of a delinquent or criminal act.

19. Supplemental Plaintiff Kenneth I. appears through his Next Friend Russell Morel. Mr. Morel is the Court Appointed Special Attorney ("CASA") for Kenneth I. pursuant to an order issued by the Juvenile Court of Anderson County. Mr. Morel maintains his principal office at 161-D Robertsville Road, Oak Ridge, TN 37830.

20. Nancy J. is 4 years old and resides in Anderson County. She was removed from her home by DCS on or about November 6, 2009, on an allegation of neglect. On or about November 6, 2009, a petition was filed in the Juvenile Court of Anderson County, requesting that Nancy J. be committed to DCS custody as dependent and neglected. On or about November 9, 2009, an *ex parte* order was issued by the Juvenile Court of Anderson County, authorizing the temporary placement of Nancy J. in the legal custody of DCS pending a hearing on the commitment petition, scheduled for November 9, 2009. At the time of the filing of the instant Supplemental Complaint, Nancy J. is in the legal custody of DCS awaiting her hearing, and is not committed to the legal custody of DCS based solely upon an allegation or adjudication of a delinquent or criminal act.

21. Supplemental Plaintiff Nancy J. appears through her Next Friend Laura Hash. Ms. Hash is the GAL attorney for Nancy J. pursuant to an order issued by the Juvenile Court of Anderson County.

22. Donna K. is 5 years old and resides in Anderson County. She was removed from her home by DCS on or about November 6, 2009, on an allegation of neglect. On or about

November 6, 2009, a petition was filed in the Juvenile Court of Anderson County, requesting that Donna K. be committed to DCS custody as dependent and neglected. On or about November 9, 2009, an *ex parte* order was issued by the Juvenile Court of Anderson County, authorizing the temporary placement of Donna K. in the legal custody of DCS pending a hearing on the commitment petition, scheduled for November 9, 2009. At the time of the filing of the instant Supplemental Complaint, Donna K. is in the legal custody of DCS awaiting her hearing, and is not committed to the legal custody of DCS based solely upon an allegation or adjudication of a delinquent or criminal act.

23. Supplemental Plaintiff Donna K. appears through her Next Friend Laura Hash. Ms. Hash is the GAL attorney for Donna K. pursuant to an order issued by the Juvenile Court of Anderson County.

24. Kiera L. is 6 years old and resides in Anderson County. She was removed from her home by DCS on or about November 6, 2009, on an allegation of neglect. On or about November 6, 2009, a petition was filed requesting that Kiera L. be committed to the custody of DCS as dependent and neglected. On or about November 9, 2009, an *ex parte* order was issued by the Juvenile Court of Anderson County, authorizing the temporary placement of Kiera L. in the legal custody of DCS pending a hearing on the commitment petition, scheduled for November 9, 2009. As of the date of the instant Supplemental Complaint, Kiera L. is in the legal custody of DCS awaiting her hearing, and is not committed to the legal custody of DCS based solely upon an allegation or adjudication of a delinquent or criminal act.

25. Supplemental Plaintiff Kiera L. appears through her Next Friend Laura Hash. Ms. Hash is the GAL attorney for Kiera L. pursuant to an order issued by the Juvenile Court of Anderson County.

26. As further alleged below, each of the Supplemental Plaintiffs is at imminent risk of harm from Defendants' implementation of the Over-Commitment Law.

ORIGINAL COMPLAINT ALLEGATIONS CONCERNING DEFENDANTS' FAILURE TO PROVIDE ADEQUATE RESOURCES FOR FOSTER CHILDREN IN DCS CUSTODY

27. The Plaintiffs incorporate herein by reference, in its entirety and as if set forth verbatim, their Original Complaint, including each and every allegation and each and every request for relief set forth therein.

28. The allegations in the Original Complaint concerned the failure of Defendants to provide adequate resources and services to meet their legal obligations to foster children in DCS custody. For example, Plaintiffs alleged that:

a. "Defendants have failed to provide the leadership, support, and resources necessary to adequately protect and care for the Plaintiff children as required by law." (Original Complaint, ¶ 9).

b. "Defendants' failure to protect foster care children in DCS custody and provide them and their families with appropriate, legally required services has harmed these children and endangered their safety, sense of stability and developmental well-being." (*Id.*, ¶ 7).

29. Accordingly, "Defendants' systemic failure to fulfill their legal obligations to protect Tennessee's most vulnerable children and provide them and their families with legally required services has subjected the Plaintiff children to significant harm and threatened their

safety and well-being, in violation of their rights under the United States Constitution, federal statutes, and federal common law." (*Id.*, ¶ 2). The Original Complaint sought "declaratory and injunctive relief against Defendants to stop these continued violations and to ensure that Defendants adequately care for and protect children in state custody as required by law." (*Id.*)

30. In the Original Complaint, Plaintiffs specified the services and resources that Defendants had failed to provide. For example, Plaintiffs alleged that:

a. There was "a fundamental lack of sufficient numbers and types of placements necessary to meet the needs of foster children in Tennessee." (*Id.*, ¶ 150).

b. DCS had "failed to recruit and retain a sufficient number of adequate foster families" (*id.*, ¶ 159), and that "[i]n addition to poor pre-placement and on-going support, inadequate compensation impedes both the recruitment and retention of foster families in Tennessee. The rates paid to foster parents to house, clothe and feed the children in their care are significantly below U.S. Department of Agriculture (USDA) figures concerning the cost of caring for a child in Tennessee with the result that children in state custody have less money available for basic necessities, like food and clothing, than the federal government has determined is necessary." (*Id.*, ¶ 160).

c. DCS had "fail[ed] to provide children with legally required services while in foster care, including providing access to education, services to enable children to return home or to have visits with siblings and other family members while in DCS custody, services to be freed for adoption and placed in permanent homes, and services to live independently once they are discharged from Defendants' custody at age eighteen." (*Id.*, ¶ 161).

d. Older youths in DCS custody "receive[d] inadequate or no preparation for independent living, although DCS is aware that the coping and survival skills of many older foster children are seriously deficient and that they are not prepared to live on their own when they are discharged from state custody." (*Id.*, ¶ 182).

THE CONSENT DECREE

31. On July 27, 2001, this Court approved the parties' agreement settling Plaintiffs' claims, and entered a Consent Decree which required comprehensive reform of the child welfare system in Tennessee. (Docket No. 112). On January 13, 2009, the Court signed a Modified Settlement Agreement. (Docket No. 289). All parties approved all terms of the Consent Decree and the Modified Settlement Agreement (collectively, the "Consent Decree"). The Consent Decree contains all of the terms and provisions currently operative in this matter.

32. The Consent Decree certified and defined the class of Plaintiffs entitled to the relief provided therein, and to enforce its terms. Section I(B) of the Consent Decree states:

> Pursuant to the terms of this Settlement Agreement, this case shall be certified as a class action and the class certified shall be defined as follows: All foster children who are or will be in the legal custody of the Tennessee Department of Children's Services. "Foster children" shall mean all children who are or will be in the legal custody of [DCS], excluding children who are or will be in the legal custody of [DCS] upon an allegation or adjudication of a delinquent or criminal act. Children who are or will be in the custody of [DCS] upon an allegation or adjudication of an unruly or status offense shall be included in the class, and children who are or will be in the custody of [DCS] upon an allegation of a delinquent or criminal act and which allegation is subsequently dropped or fails to result in an adjudication of a delinquent or criminal act and who remain in the legal custody of [DCS], shall be included in the class.

33. Critically, the Consent Decree specifically states that "[t]his court shall have continuing jurisdiction of this action to ensure compliance with the terms of this Settlement Agreement for as long as the Settlement Agreement remains in effect." (Preamble, ¶ C).

34. All provisions of the Consent Decree are enforceable. Section XVIII(A)(1) of the Consent Decree specifically states that "[a]ll of the provisions in this Settlement Agreement are separately and independently enforceable, as set forth in this Settlement Agreement."

35. On the issue of adequate resources, the Consent Decree requires Defendants to allocate all the resources, including financial resources, required to fulfill their obligations under the Consent Decree. Section I(A)(13) of the Consent Decree states:

> Except where a particular provision of this Settlement Agreement establishes a specific limit on the resources required to be allocated, defendants shall commit all necessary resources (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement.

36. For example, as a result of § I(A)(13) of the Consent Decree, Defendants must allocate and provide the resources required for the care of all *Brian A.* class members, such as the resources required to provide: assessments and case planning (*see* Consent Decree, §§ VI(D); VII (generally)); a reasonable and appropriate education (*see id.*, § VI(E)); diligent searches for parents and relatives (*see id.*, § VIII(C)); placements for foster children, including the daily cost of care in foster homes or, in certain circumstances, placements in certain facilities (*see id.*, §§ IX(D), (E)); the cost of front line case managers and supervisors to monitor the safety, well-being and permanency of foster children (*see id.*, § V); and independent living services for those children who qualify for them (*see id.*, § VI(I)).

37. The Consent Decree also provides specific protection to Plaintiff children from any actions, practices or policies of Defendants that interfere with the capacity of judges to make case-specific decisions concerning efforts to preserve families, the removal of children from their families, and the commitment of children to DCS custody. Section I(A)(2) of the Consent Decree states:

> The state should make reasonable efforts to avoid foster care placement by providing services to preserve the biological family whenever that is reasonably possible. However, *child welfare decision-makers must have the capacity to make determinations as to when making efforts to preserve the biological family,*

or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child. (Emphasis added).

38. The Consent Decree further provides specific protection to Plaintiff children from any interference by Defendants with their constitutional and other legal rights, including their rights to fair hearings, in any judicial proceedings. Section I(A)(12) of the Consent Decree states:

> All parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided with a fair hearing and their constitutional and other legal rights should be enforced and recognized.

39. The Consent Decree also provides that Plaintiffs may move this Court to enforce its terms. Section XVIII(B)(2)(c) of the Consent Decree states:

> Plaintiffs may bypass the dispute resolution provisions of this Settlement Agreement and seek immediate relief in court if plaintiffs clearly demonstrate that DCS action or inaction in contravention of this Settlement Agreement caused or is likely to cause an immediate and substantial risk of serious harm to children in the class.

FEDERAL STATUTORY AND REGULATORY REQUIREMENTS FOR CASE-SPECIFIC COMMITMENT DECISIONS

40. In addition to the basic requirements of a fair hearing and due process, and the specific requirement in the Consent Decree that judges as "child welfare decision-makers" have the "capacity" to make individualized commitment decisions, federal statutes and regulations and official issuances of the Federal Department of Health and Human Services ("HHS"), require that initial judicial determinations of "reasonable efforts" to avoid state custody be based on the facts of each child's case.

41. Title IV-E of the Social Security Act and, specifically, the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 670 *et seq*., (the "AAA") creates a joint federal- state program whereby states receive federal reimbursements for certain foster-care and adoption expenses if they enter into a "qualifying plan" approved by HHS, and comply with its terms.

42. Tennessee has entered into a qualifying State Plan pursuant to Title IV- E of the Social Security Act, and has availed itself of the funds offered by Congress through the AAA.

43. Under the Tennessee Title IV-E State Plan, the state has agreed to provide child welfare services in compliance with the statutes and administrative directives of the AAA, and with "all applicable Federal regulations and other official issuances" of HHS.

44. The AAA requires that, prior to the placement of a child in foster care, "reasonable efforts" shall be made "to prevent or eliminate the need for removing the child from the child's home," and that, in determining whether such reasonable efforts were made, "the child's health and safety shall be the paramount concern." (42 U.S.C. § 671(a)(15)).

45. The federal regulations implementing the AAA require that a judicial determination "that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child" be made "in the first court ruling that sanctions (even temporarily) the removal of a child from home." (45 C.F.R. § 1356.21(c)).

46. The federal regulations implementing the AAA require that the judicial determination regarding the child's welfare and whether reasonable efforts were made to prevent

removal "must be explicitly documented and must be made on a case-by-case basis." (45 C.F.R. § 1356.21(d)).

47. The HHS Child Welfare Policy Manual – an official issuance of HHS – states that the judicial determinations required by Title IV-E must be made on a "case by case basis" to ensure that the "individual circumstances of each child before the court are properly considered." (HHS Child Welfare Policy Manual, § 8.3A.9).

48. The HHS Child Welfare Policy Manual also states that "[i]n each individual case, the court and the State must determine the level of effort that is reasonable, based on safety considerations and the circumstance of the family." (*Id.*, § 8.3C.4).

49. The HHS Child Welfare Policy Manual further states that judicial determinations "made on a case-by-basis" serve as "important safeguard[s] against inappropriate agency action." (*Id.*, § 8.3A.7).

50. The requirement in these federal statutory provisions, regulations and official issuances of HHS that child-welfare judicial decisions be made on a case-by-case basis do not allow the considerations in the decision-making process in a particular child's case that are forced upon Tennessee's Juvenile Court judges as the intended and inevitable result of the Over-Commitment Law, such as the number of children already committed to DCS custody in their counties and whether their counties will have the ability to provide resources for foster care if their pre-set limits are exceeded.

THE OVER-COMMITMENT LAW

51. In late 2008, DCS was instructed by the administration of Tennessee Governor Phil Bredesen to find ways to reduce the agency's budget for the fiscal year beginning July 1, 2009 and ending June 30, 2010 ("FY 2010").

52. Defendants believed that Juvenile Court judges in some counties were overusing and improperly using their authority to commit children to DCS custody, and that those judges were "over-committing" – i.e., committing children to DCS custody who, in the view of the DCS officials, should not have been committed.

53. DCS determined it could achieve its required budget reductions by decreasing the number of children committed to DCS custody. The Budget for the State of Tennessee for FY 2010 included the following performance standard for DCS Custody Services: "Reduce the number of dependent/neglect, unruly children entering out-of-home care," by specifically reducing the number of "new entries" into DCS custody by over 600 children.

54. The state's "Base Budget Reductions" for FY 2010 included a "County Over-Commitment" budget reduction plan through which Defendants expected to save $7.5 million by reducing the number of children committed to DCS custody.

55. DCS developed and proposed legislation designed to achieve these budget reductions and reduce the number of children entering DCS custody by causing judges to commit fewer children.

56. On or about March 31, 2009, Tennessee State Representative Craig Fitzhugh introduced House Bill 2389 ("H.B. 2389") in the General Assembly of the State of Tennessee.

Also on or about March 31, 2009, Tennessee State Senator James Kyle introduced Senate Bill 2357 ("S.B. 2357") in the State Senate. H.B. 2389 and S.B. 2357 were omnibus budget bills. A section in each bill proposed that DCS should bill the counties for each child committed to state custody as dependent and neglected, or delinquent, in excess of 200% of the statewide average commitment rate.

57. In testimony before the Tennessee House Finance, Ways and Means Committee on March 31, 2009, DCS Commissioner Viola Miller stated that, if H.B. 2389 were to be enacted and implemented, the counties exceeding their defined commitment rates would be billed, collectively, a total of $7.5 million. Commissioner Miller stated:

> The way we track commitment rates in Tennessee and most states is the number of children per thousand that come into the custody of the state. In Tennessee we have an average and most states, I mean, most counties rock right around that average of somewhere between three and four kids per thousand, we have a few counties in this state that commit at 16, 20 per thousand. That is significant over-commitment of children. Children are coming into state custody who should not. Now, we have been addressing this problem aggressively and we've made a lot of progress, and as I said, I want to work with those counties in making sure those kids can stay safely in their home. I don't ever want to collect a nickel of that 7.5 million dollars, I want to reduce that commitment level.

58. On May 12, 2009, at a hearing of the Tax Study Subcommittee of the Finance, Ways and Means Committee of the Tennessee Senate, Senator Kyle said of the provision in S.B. 2357 that dealt with the commitment of children to DCS custody:

> [T]he policy consideration for this particular matter is to somewhat [] have our local governments be a little more judicious as to who they commit to state custody . . . . It makes people more responsible for their decisions, and when you're more responsible for your decisions you're going to be more careful with your decisions.

59. The May 15, 2009 newsletter of the Tennessee County Services Association, a nonpartisan, nonprofit public interest group representing the state's 95 counties, included the following commentary – which was approved by DCS - on the bills as then proposed:

> The Senate Finance Tax Subcommittee this week heard an amendment to the so-called "omnibus budget bill." . . . Outlined in the amendment this week to Senate Finance Tax Subcommittee, SB2357/BH2389 would have a major fiscal impact on counties. The following are some of the parts of this amended bill.
>
> **1) Over-committing children to state custody by the juvenile court judge** (or General Sessions judge where applicable). As amended, the bill authorizes the state to recoup costs from counties that are over-committing children to state custody at a level that exceeds 200 percent of the state average. For instance, the state average is 3.6 per 1,000 for children committed in the Dependent & Neglect and Unruly category. Anderson County's commitment rate is 17 per 1,000, some four times more than the state average.
>
> For children committed to state custody for Dependent & Neglect and Unruly, local governments under this amendment will pay the state portion . . . (49 percent of $106 per day per child) resulting in an increase in local expenditures of about $5.25 million. The state is prepared and has budgeted to receive as many as 5,798 total children statewide through commitments from county judges. . . .
>
> . . . If counties were required today to pay for children committed over the state average of 200 percent, the total cost would be more than $7.5 million paid primarily by a few counties who are having a high frequency of over-commitments. . . .
>
> The public policy implication is that in some cases juvenile judges are over-using their commitment authority and, thus, not offering alternatives to the family nor the child.
>
> * * *
>
> In summary . . . **what can you do** as a county official about this potential fiscal liability? First of all, counties will not be charged anything if your juvenile judge makes no commitments above the statewide average, or cap. . . . . [A]bout four judges appear to be making the most over-commitments. **I would make sure my county juvenile judge knows this DCS cap** number and uses other alternatives in dealing with the child. Otherwise, your county will be bill [*sic*] for these over-commitments in the future. This could be addressed with the juvenile judge in the county budget process.

(emphasis in original).

60. On May 28, 2009, at a hearing of the Legislative Committee of the Anderson County Board of Commissioners on the possible effects of S.B. 2357, DCS Budget Director Douglas Swisher testified:

> The Department was charged by the governor to come up with reduction plans. . . . We were required to reduce our budget, okay? Obviously I had to come up with ways to reduce our budget, okay? Obviously those are all painful, they were not easy . . . . Actually, this one reduction actually is the only one in our Department that actually is good for kids. Now, you as a county may say, well, no, this is affecting your county budget. Our goal with this is that we as a Department don't collect a dime from the county. And that would be what was in the best interest of kids. . . . It's about . . . leaving [kids] with their families.

61. Defendants' intent to pressure certain judges in what DCS perceived to be high-commitment counties is illustrated by an email dated June 2, 2009, from Aaron Campbell, DCS Legislative Director, to DCS Commissioner Miller, in which Campbell wrote:

> Anderson county [*sic*] clearly understands that they have a huge problem on their hands-their judge. . . . We have the support of their county commission to work with the judge to bring down unneeded commitments.

62. On or about June 25, 2009, Governor Bredesen signed S.B. 2357, as amended, into law as Tennessee Public Chapter No. 531, which became effective as of July 7, 2009. Section 30 of Public Chapter No. 531 amended T.C.A. § 37-2-205 by adding a new subsection "f."

63. T.C.A. § 37-2-205(f) states, in full:

> (f)(1)(A) Notwithstanding any state law to the contrary, the Department of Children's Services shall allocate resources for children placed in state custody based on a county's child population and the average state commitment rate per thousand children. In fiscal years 2009-2010 and 2010-2011 the department shall pay for a county's commitments of dependent and neglected children and delinquent children until such

commitments exceed three hundred per cent (300%) of the state average commitment rate.

(B) When a county exceeds the limit on either dependent and neglected children or delinquent children established in subdivision (f)(1)(A), the county shall be billed for the actual daily cost to the state for the duration of the length of stay of such child in state custody.

(C) The department shall develop statewide averages for:

(i) Dependent and neglected children; and

(ii) Delinquent children.

(D) The average state commitment rate shall be based on the higher of:

(i) 2007-2008 fiscal year statewide average commitments per thousand children; or

(ii) 2008-2009 fiscal year statewide average commitments per thousand children.

(2) The department shall initiate a collaborative planning process at any such time a county is believed to be likely to exceed two hundred percent (200%) of the state average commitment rate. Upon request of the county or the court, the department shall partner with the county or the court to develop and implement strategies to identify and address underlying problems contributing to over-commitment that may exist in such county. The department shall provide commitment data to the county or the court as needed to prevent a county from exceeding the limits established in subdivision (f)(1)(A).

(3) On or before January 15 of each year, the department shall provide a report to the general assembly listing the counties that have exceeded the state average commitment limits. The report shall also detail actions taken by the department to comply with subdivision (f)(2).

(4) The Select Committee on Children and Youth is directed to study commitment patterns of children entering state custody. Findings shall be provided to the Commissioner of the Department of Children's Services and to the members of the Select Committee on Children and Youth on or before January 15, 2010.

(5)(A) The Commissioner of the Department of Children's Services is authorized to promulgate rules and regulations to effectuate the provisions of this subsection (f).

(B) The provisions of subsection (f) shall expire June 30, 2011, unless reauthorized by the general assembly.

64. T.C.A. § 37-2-205(f), the Over-Commitment Law, thus establishes a maximum pre-set number of children in DCS custody for whom Defendants will provide resources. Past

that number, the state will not allocate resources or funding, regardless of how many children actually enter DCS custody and require services.

65. The Over-Commitment Law was signed into law by Governor Bredesen, on behalf of the executive branch of the state's government, with the intent to save state funds by influencing Juvenile Court judges to commit fewer children to DCS custody.

66. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law fail to take into account the fact that nearly all commitments to DCS custody as dependent/neglected are the result of petitions that DCS itself files, seeking such custody. DCS thus counts against judges, and against the counties in which they sit, commitments which DCS itself asks the judges to order.

67. The concept of "over-commitment" is entirely irrational because DCS can challenge any commitments it believes to be improper by seeking a *de novo* appeal of those decisions. The Over-Commitment Law is intended to reduce the number of purportedly "excessive" commitments, yet DCS rarely pursues the appeal remedy already available to it to reduce these purportedly "excessive" commitments.

68. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law diminish the significance of the individual factors of any one child's case.

69. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law fail to take into account the factors contributing to commitment numbers and rates in any given county or community. These

include socio-economic factors such as poverty and abuse rates, and the prevalence of certain drug problems such as methamphetamine production and use, which in some counties contribute to higher commitment rates.

70. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law fail to take into account the great disparities among counties in the provision by DCS of services designed to keep children safe in their homes, and to avoid removal and placement into custody.

71. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law are based solely on the number of commitments, without regard to whether the children remain in custody for one day or several years. The pre-set limits fail to take into account the fact that a county with a low commitment rate but longer average length of stay requires more state funds than a county with a high commitment rate but shorter average length of stay.

72. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law fail to take into account the fact that, in rural counties with small populations of children, a very small number of additional commitments can make a drastic change in their commitment rates and expose them to severe financial liability under the law.

73. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law fail to take into account the fact that, at the time of its passage, most counties' FY 2010 budgets had already been finalized and

no money had been allocated for the daily cost of care of any committed children over the pre-set limits.

74. The statewide average commitment rate and the pre-set commitment limits established for each county under the Over-Commitment Law fail to take into account the counties' varying abilities or inabilities to pay the state's entire share of the daily cost of foster care for any "excess" children. Under the Over-commitment Law, DCS "shall allocate resources for children placed in state custody based on a county's child population and the average state commitment rate per thousand children." If more children are abused and neglected beyond this pre-set limit and require commitment to DCS custody, Defendants have no responsibility under the Over-Commitment Law to provide resources for those children.

ADDITIONAL PROCEDURAL HISTORY

75. On September 9, 2009, Plaintiffs brought a Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction (Docket No. 296) ("Plaintiffs' Motion for a Preliminary Injunction") seeking to enjoin the Over-Commitment Law and enforce the Consent Decree.

76. On October 15, 2009, following expedited discovery and a hearing, this Court denied Plaintiffs' Motion for a Preliminary Injunction. (*See* Docket No. 330). The Court found that Plaintiffs had "raised substantial legal claims" about the Over-Commitment Law, but because the Court found them to be "new claims" for purposes of Article III standing, the original Named Plaintiffs in this action had no personal stake in challenging the Over-Commitment Law. The Court therefore denied the Plaintiffs' Motion for a Temporary Restraining Order, or, in the Alternative, a Preliminary Injunction for lack of standing.

IMMINENT RISK OF HARM TO SUPPLEMENTAL PLAINTIFFS AND SIMILARLY SITUATED CLASS MEMBERS

77. Because of the intended, inevitable and actual effect of the Over-Commitment Law on the decision-making of Juvenile Court judges, Supplemental Plaintiffs and all similarly situated class members are at risk of the deprivation of their constitutional rights in Juvenile Court proceedings, including the right to a fair hearing and to equal protection under the law. Thus, the Over-Commitment Law places Supplemental Plaintiffs and all similarly situated class members at imminent risk of harm.

78. The intended, inevitable and actual effect of the Over-Commitment Law is to force Juvenile Court judges to take an indirect pecuniary interest in their commitment decisions, based on the judges' total commitments, the costs to their counties, and the counties' ability or inability to pay the state's total cost of foster care for children committed beyond their counties' pre-set limits.

79. For example, the Judge of the Juvenile Court of Anderson County testified in a sworn videotaped deposition, taken on September 29, 2009 in this action, that she takes the Over-Commitment Law and its impact on the children of her county "into account every day."

80. The Over-Commitment Law thus biases judges against committing children to DCS custody because of factors entirely outside the facts of individual children's cases, placing the Supplemental Plaintiffs and all similarly situated class members at imminent risk of harm.

81. The intended, inevitable and actual effect of the Over-Commitment Law is to cause similarly situated children who are the subject of commitment decisions to be categorized and treated differently from one another without justification, based on factors having nothing to

do with their individual cases, thereby placing the Supplemental Plaintiffs and all similarly situated class members at imminent risk of harm. For example:

a. Within a given county, a child whose commitment hearing occurs early in the fiscal year, when the county is still comfortably below its pre-set limit on commitments, will be treated differently from a child whose commitment hearing occurs later in the fiscal year, if by then the county is near or over its pre-set limit. This is especially true in the "high-commitment" counties which historically have exceeded 200% of the statewide average commitment rate as set by the Over-Commitment Law.

b. A child who lives in a county that remains comfortably below its pre-set limit on commitments will be treated differently from a child who lives in a county that expects to approach or exceed its pre-set limit, such as those which historically have exceeded 200% of the statewide average commitment rate as set by the Over-Commitment Law.

c. A child who lives in a county with a small population of children – and whose commitment, if ordered, could drastically affect her county's rate – will be treated differently from a child who lives in a county with a large population of children, whose commitment if ordered would not have an appreciable effect on his county's commitment total.

82. The Over-Commitment Law has already had the actual result – as intended and inevitable – of causing the differential treatment of children in Anderson County, one of the historically "high-commitment" counties targeted by the Over-Commitment Law. In her deposition on September 29, 2009, the Judge of the Juvenile Court of that county described:

a. situations in which children are "sitting in a courtroom or a police officer's office," or "in a conference room at DCS," or are "sleeping on the pews" in her courtroom, "waiting out the Department to look for [a non-custodial] option," whereas before the passage of the Over-Commitment Law she would have "signed a bench order that placed that child in to custody [and] they at least would have been sleeping on someone's sofa in a foster home."

b. allowing "detention-eligible" children "to spend the night in detention," whereas before the passage of the Over-Commitment Law she would have committed those children to DCS custody "for that one night until [DCS] found . . . an Aunt Bessie somewhere."

c. her reluctance to accept jurisdiction in Anderson County over cases that originate in other counties, whereas before the passage of the Over-Commitment Law she would have accepted jurisdiction (where appropriate) for "the convenience of the parties and perhaps even the witnesses."

d. accepting DCS's proffered "option" of "tenuous" non-custodial placements, whereas before the passage of the Over-Commitment Law she would have committed the same children to DCS custody in stead. Some of these alternative placements later failed, to the detriment of the children, who were subjected to additional placements.

83. Under the Over-Commitment Law, children committed to DCS custody after their counties' pre-set limits are exceeded lose their rights under § I(A)(1 3) of the Consent Decree to the provision by Defendants of the resources required for the implementation of all Consent Decree obligations. Furthermore, the Over-Commitment Law denies resources and funding for the care of some children in DCS custody but not others without justification, thereby placing some class members at imminent risk of harm, but not others.

NO HARM TO DEFENDANTS BY A GRANT OF INJUNCTIVE RELIEF

84. The only harm that the state will suffer if the Over-Commitment Law is enjoined is the "harm" of having to fund the care of all children who are brought into DCS custody. Thus, an injunction will only require the state to continue doing what it is required now to do under the plain terms of the Consent Decree. This cannot be characterized as a harm.

85. There are no relevant third parties that would be harmed by the grant of injunctive relief.

THE PUBLIC INTEREST WILL BE SERVED
BY A GRANT OF INJUNCTIVE RELIEF

86. The vigorous enforcement of consent decrees is in the public interest. Additionally, the public interest is clearly served in ensuring that children receive case-by-case evaluations of their safety and other circumstances when critical decisions are made regarding their commitment to DCS custody. Finally, the public interest is served by preventing the enforcement of laws which are unconstitutional.

CAUSES OF ACTION

First Cause of Action

(Contempt of § I(A)(2) of the Consent Decree)

87. Each and every allegation in this Supplemental Complaint is incorporated herein as if fully set forth.

88. The Over-Commitment Law, on its face and as applied, violates the rights of Supplemental Plaintiffs and all other similarly situated class members under § I(A)(2) of the Consent Decree, and thus places Defendants in contempt of § I(A)(2) of the Consent Decree.

89. Because the Over-Commitment Law, as developed and implemented by Defendants in contravention of the Consent Decree, has caused and is likely to continue to cause an immediate and substantial risk of serious harm to children in the class, Plaintiffs seek immediate relief from this Court pursuant to § XVIII(B)(2)(c) of the Consent Decree.

Second Cause of Action

(Contempt of § I(A)(12) of the Consent Decree)

90. Each and every allegation in this Supplemental Complaint is incorporated herein as if fully set forth.

91. The Over-Commitment Law, on its face and as applied, violates the rights of Supplemental Plaintiffs and all other similarly situated class members under § I(A)(12) of the Consent Decree, and thus places Defendants in contempt of § I(A)(12) of the Consent Decree.

92. Because the Over-Commitment Law, as developed and implemented by Defendants in contravention of the Consent Decree, has caused and is likely to continue to cause an immediate and substantial risk of serious harm to children in the class, Plaintiffs seek immediate relief from this Court pursuant to § XVIII(B)(2)(c) of the Consent Decree.

Third Cause of Action

(Contempt of § I(A)(13) of the Consent Decree)

93. Each and every allegation in this Supplemental Complaint is incorporated herein as if fully set forth.

94. The Over-Commitment Law, on its face and as applied, violates the rights of Supplemental Plaintiffs and all other similarly situated class members under § I(A)(13) of the Consent Decree, and thus places Defendants in contempt of § I(A)(13) of the Consent Decree.

95. Because the Over-Commitment Law, as developed and implemented by Defendants in contravention of the Consent Decree, has caused and is likely to continue to cause

an immediate and substantial risk of serious harm to children in the class, Plaintiffs seek immediate relief from this Court pursuant to § XVIII(B)(2)(c) of the Consent Decree.

Fourth Cause of Action

(Equal Protection of the Laws under the Fourteenth Amendment to the United States Constitution)

96. Each and every allegation in this Supplemental Complaint is incorporated herein as if fully set forth.

97. The Over-Commitment Law, on its face and as applied, violates the rights of Supplemental Plaintiffs and all other similarly situated class members to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The Over-Commitment Law creates classifications among similarly situated children subject to commitment decisions and treats them differently without legally sufficient justification.

Fifth Cause of Action

(Due Process under the Fourteenth Amendment to the United States Constitution)

98. Each and every allegation in this Supplemental Complaint is incorporated herein as if fully set forth.

99. The Over-Commitment Law, on its face and as applied, violates the rights of Supplemental Plaintiffs and all other similarly situated class members awaiting judicial commitment decisions to a fair hearing and to due process under the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

100. WHEREFORE, Plaintiffs respectfully request that this Honorable Court, pursuant to its powers under Rule 57 of the Federal Rules of Civil Procedure and its continuing jurisdiction of this matter under the Consent Decree,

a. Declare that:

i. The Over-Commitment Law, on its face and as applied, violates §§ I(A)(2), I(A)(12), and I(A)(13) of the Consent Decree, and places Defendants in contempt of the Consent Decree;

ii. The Over-Commitment Law, on its face and as applied, violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

iii. The Over-Commitment Law, on its face and as applied, violates Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. Preliminarily and permanently enjoin the implementation of the Over-Commitment Law, T.C.A. § 37-2-205(f);

c. Award to Supplemental Plaintiff children the reasonable costs and expenses incurred in the prosecution of this action, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920, and Federal Rules of Civil Procedure 23(e) and (h); and

d. Grant such other and further equitable relief as the Court deems just, necessary and proper to protect Plaintiffs from further harm by Defendants.

DATED: November 9, 2009

Respectf ully Submitted,

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