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No Tears for Corey Greer: A Review of Foster Care in Florida. Is It Time to Ask the Court for Relief?

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Abstract

Many of Florida's children are dying in foster care homes - and in their own homes - due to the failure of the Department of Health and Rehabilitative Services (HRS) to exercise a reasonable degree of care in meeting its statutorily mandated duty to protect them from abuse and neglect.

KEYWORDS: foster care, children

No Tears for Corey Greer: A Review of Foster Care in Florida. Is It Time to Ask the Court for Relief?

I. Introduction

Many of Florida's children are dying in foster care homes - and in their own homes - due to the failure of the Department of Health and Rehabilitative Services (HRS) to exercise a reasonable degree of care in meeting its statutorily mandated duty to protect them from abuse and neglect. During the summer of 1985, Florida was shocked by the death of a four-month old infant in a Pinellas County foster home. The death of this child brought into sharp focus the urgent problems facing Florida's foster children.¹

In July of that year, St. Petersburg police responded to a report from neighbors that two children had been left unsupervised by their mother. As a result, Corey Greer and his two-year old sister were removed from their home and taken to their maternal grandmother's house. Police notified HRS, who began an investigation.² HRS officials had previously seen four-month old Corey when his parents brought him and his sister to Children's Medical Services (CMS) for a check up.³ At that time, Corey's sister was using a heart monitor; a second sibling had already died of Sudden Infant Death Syndrome.⁴ During this earlier visit, a heart monitor had been prescribed for Corey by

1. THE GOVERNOR'S CONSTITUENCY FOR CHILDREN, PROTECTING FLORIDA'S CHILDREN: A BLUEPRINT FOR THE NEXT DECADE 16 (1987) [hereinafter BLUEPRINT].

2. *Id.*

3. *Id.* Children's Medical Services is one of seven program areas in HRS. Its charge is to provide acute health care to poor children. It is one of the six programs that provides services to children in foster care and their families. The other five programs providing services to children are Health; Alcohol, Drug Abuse and Mental Health Services; Developmental Services; Children, Youth and Families; and Economic Services. The seventh program, Aging and Adult Services, does not directly impact children.

4. *Id.* Sudden Infant Death Syndrome is "the sudden and unexpected death of an apparently healthy infant, typically occurring between the ages of three weeks and five months and not explained by careful post-mortem studies. . . ." W.B. SAUNDERS, DURLAND'S ILLUSTRATED MEDICAL DICTIONARY 1298 (26th ed. 1981).

CMS physicians.⁵

HRS investigators learned from Corey's grandmother that a heart monitor had been available for his benefit, but that his mother's house had no electricity, so the monitor was left unused.⁶ Corey's mother requested that the children not remain with their grandmother, so HRS began a futile search for a shelter home.⁷ The children were then placed in one of the district's crowded foster homes. HRS borrowed a heart monitor for Corey's use and delivered it to the foster home several days after placement.⁸

Corey Greer died less than two weeks later. Police reported that the foster home was "filthy" and that twelve children were being housed there.⁹ Imagine: *twelve* foster children living in a home which had been licensed for only four.¹⁰ The sad truth is that two of Florida's children were removed from their natural mother's home and then placed in a "filthy" foster home where the infant's heart monitor continued to be unused. Commenting on the cold, harsh, official departmental reaction to this death, a long-time associate of the department said, "The problem is that there are no tears for Corey Greer."¹¹

A series of investigative reports in 1986 by the *Fort Lauderdale News/Sun Sentinel* reviewed the abuses and the deaths of children in their own homes and in foster homes in Broward County.¹² The headlines read like an indictment of Florida's HRS officials for malfeasance and misfeasance.¹³ In August, 1986, the *Miami Herald* reported that

5. *Id.*

6. *Id.* at 17.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION (NAPA), AFTER A DECADE, A PROGRESS REPORT ON THE ORGANIZATION AND MANAGEMENT OF THE FLORIDA STATE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES 11 (1986) [hereinafter NAPA]. HRS's employees are experiencing difficulties in coping with the problems of service delivery because of low morale, high turnover ratio, inadequate pay, and a restrictive formalized personnel system. Employees have lost respect for leadership and many do not demonstrate pride in their work. The Academy found that employees are frustrated and pervasively discontented. *Id.* at 43-59.

12. *Florida's Child Welfare System Needs Sweeping Reform*, Ft. Lauderdale News/Sun Sentinel, Oct. 9, 1986, at 22 A.

13. *Suffer the Children*, Ft. Lauderdale News/Sun Sentinel, Oct. 6, 1986, at 8 A; *Overloaded System*, Ft. Lauderdale News/Sun Sentinel, Oct. 6, 1986, at 1 A; *Slipping By the System*, Ft. Lauderdale News/Sun Sentinel, Oct. 6, 1986, at 9 A; *Turno-*

50 to 100 "bedroll" children were making their way through Broward's foster care system.¹⁴ Two editorials in the *Miami Herald* in February of 1987 followed actions taken by the new secretary of HRS dismissing Broward County District X administrators.¹⁵ The editorials focused on the failure of the legislature to adequately invest in programs to help children. They labeled the state's inaction as "official child abuse."¹⁶ After the 1987 legislative session concluded in June, foster parents and children's advocates continued to voice concern that legislators had failed to adequately fund children's programs. Lack of funds for adequate food and clothing, and concern for the personal liability which could result from the state's failure to provide minimally adequate services led to a threat by foster parents to "strike." The issue made headlines in Broward County and across the state of Florida during the summer of 1987.¹⁷

According to the Statewide Human Rights Advocacy Committee, mandatory placement agreements are being ignored. Children under HRS supervision have been improperly placed in restrictive settings, and are being abused.¹⁸ Similarly, minutes of the HRS District X Human Rights Advocacy Committee meetings reveal efforts by that group to monitor the abuse and neglect of HRS clients, and to alert HRS, the governor, and members of the Florida legislature to the magnitude of the problems in the system.¹⁹ Alternatives to foster care are

ver at *HRS Crippling System*, Ft. Lauderdale News/Sun Sentinel, Oct. 6, 1986, at 9 A; *Aid for Tot Came Too Late*, Ft. Lauderdale News/Sun Sentinel, Oct. 6, 1986, at 8 A; *Many Child Abusers Escape Detection*, Ft. Lauderdale News/Sun Sentinel, Oct. 7, 1986, at 1 A; *Grand Jury Report Rips HRS*, Ft. Lauderdale News/Sun Sentinel, Oct. 10, 1986, at 1 B.

14. *Troubled Teens Clog Foster Care Program*, Miami Herald, Aug. 24, 1986, at 11 BR.

15. *Give HRS Money, Too*, Miami Herald, Feb. 18, 1987, at 14 A; *Official 'Child Abuse'*, Miami Herald, Feb. 17, 1987, at 14 A.

16. See *supra* note 15.

17. See, e.g., *State Seeks to Avert Foster Parents' Strike*, Ft. Lauderdale News/Sun Sentinel, July 25, 1987, at 3 B; *Don't Ignore Foster Program Woes*, Ft. Lauderdale News/Sun Sentinel, July 25, 1987, at 14 A.

18. STATEWIDE HUMAN RIGHTS ADVOCACY COMMITTEE, ANNUAL REPORT 8 (1985) (hereinafter SHRAC).

19. District X, Human Rights Advocacy Committee, *Minutes* (1986). NAPA discovered the links intended by the legislature between the Department and community advisory and advocacy groups are illusory. NAPA, *supra* note 11, at 21. Community groups are not presented with a set of challenges that sustain their interest and curiosity, nor are their contributions regarded as an integral part of the experience of managing the Department. *Id.* Human Rights Advocacy Committees, codified in the

often the easiest route available. These have included vacated cottages at mental health institutions. Placement in an institution is inappropriate for most children in need of supervision.²⁰ The juvenile detention facility becomes a handy fall-back placement until public outcry causes the cycle to begin again.

Recognition of the seriousness of the problem has not been limited to children's advocates, committees and newspapers. In 1986, the Grand Jury of the Seventeenth Judicial Circuit criticized HRS officials for failing to aggressively seek solutions to crowded foster care and other shelter homes.²¹ Paradoxically, it also criticized HRS officials for their overaggressive attitudes toward returning abused children to their families.²² The Grand Jury report stated that "lack of funding has caused drastically underpaid caseworkers with little experience to make decisions concerning the health, safety, and lives of children."²³

When the foster care system is not working, other elements of the program to protect children from abuse and neglect fail as well. Florida's policy for reuniting families does not mandate returning abused children to their natural parents for further abuse.²⁴ It does require a plan that focuses upon temporary shelter for children while counseling and other supportive services are provided to family members with the ultimate goal of reunification.²⁵ For many parents and children, services to support the foster home program in Florida are either not

Reorganization Act, were charged with the responsibility to investigate abuse reports and monitor program development. FLA. STAT. § 20.19 (6) (1985). They have been prevented from thorough investigation of abuse reports. HRS cloaks itself with confidentiality provided in the statutes for protecting the privacy rights of parents and clients to cover up bureaucratic bungling of abuse investigations.

20. Seventeenth Judicial Circuit, 1986 *Grand Jury Report* (1986) [hereinafter *Grand Jury Report*].

21. *Id.*

22. *Id.*

23. *Id.*

24. See FLA. STAT. § 39.45 (1), (2) (1987), which states:

It is the further intent of the legislature that a child be reunited with the child's natural family whenever possible, and, when not possible, that the child be permanently placed for adoption, or when neither option is achievable that the child be prepared for alternative permanency goals or placements to include, but not be limited to, long-term foster care, independent living, custody to a relative on a permanent basis with or without legal guardianship, or custody to a foster parent on a permanent basis with or without legal guardianship.

Id. at (2).

25. *Id.*

available or are not provided.

This article analyzes the various causes of action which might be used to alleviate the serious harm being inflicted upon many of Florida's children by the failure of the social services delivery system to comply with state and federal law. Since questions of law are generally narrowly tailored and decided, this comment will limit its focus to injuries suffered by children in foster care due to inadequate foster care services.

II. Statutory and Statistical Background

In 1983, Florida ranked fiftieth among all states in total per capita spending for social services expenditures.²⁶ Although the nationwide average was \$226 per person, Florida provided a mere \$116 per person.²⁷ Recognizing a tremendous need for children's services and the impact of continued growth on an already inadequate social service delivery system, Florida's legislature responded by enacting legislation, suggested by legal, professional, and lay advocates for children. The goal of this legislation is to produce well adjusted adults.²⁸ Unfortunately, the legislature failed to appropriate the necessary funding to assure success of foster care placement agreements or plans. HRS, in turn, has failed to implement and monitor the required programs for children in need of the state's protection. This has placed the state and its children in grave peril.²⁹

26. NAPA, *supra* note 11, at 66. While the level of spending is only one indicator in assessing a system's successes and failures in the delivery of services, Florida's lack of a financial commitment when compared to other states, coupled with the record of abuse and neglect of its children, must raise serious questions among political and community leaders about the need for reform. This is not a new discovery, yet the children continue to suffer.

27. *Id.*

28. FLA. STAT. § 20.19 (1987). This legislation had been suggested by legal, professional, and lay advocates for children. During the decade of the seventies, the legislature's goal was to make statutory policy changes in hopes of effecting better services to children. As a result, it passed the HRS Reorganization Act in 1975. In doing so, the legislature intended to provide a better system for service delivery.

29. BLUEPRINT, *supra*, note 1, at 25. In 1985, Florida lost more foster homes (771) than the number of new homes recruited (740). However, the number of foster children increased by 400. Intensive crisis counseling, often a stabilizing service that keeps families together after facing a tragedy or otherwise frightening experience, serves only 10% of the families who could benefit. There are still approximately 20,000 eligible children (high risk and poor children) on the waiting list for subsidized day

A. The Statutes

In 1980, Congress passed the Adoption Assistance and Child Welfare Act (Public Law 96-272), "the most important piece of child welfare legislation enacted in the past twenty years. . . ."³⁰ It provides a "blueprint" for a concerted effort by the judicial, executive and legislative branches of government "to preserve families and, if necessary, to build new ones."³¹ It is intended to enhance in-home supportive and supplemental services; significantly in cases requiring placements, permanency of the placements has become an issue tied to federal funding. In addition, judicial and administrative reviews are mandated to expedite permanent placements.³²

Florida's statutes have been amended to conform with federal law, and now provide that the primary responsibility of the Foster Care Program in Florida is to insure that all children requiring substitute home care receive the most appropriate placement, planning, and services to reach their individual goals.³³ Florida statutes require HRS to provide for the temporary placement of children removed from their families

care services. The number of Florida's children in poverty increased by 7% during the decade 1969-1979. Twenty per cent of all children in Florida live in poverty, and among black children that figure increases to 43%. *Id.* at 28. Only 65% of families receiving Aid to Families with Dependent Children receive food stamps, although studies conclude that most are eligible. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES (DHRS), TOWARD A HEALTHIER FLORIDA, 1975-1985 at 6 (1986) [hereinafter DHRS].

"In 1975 Florida was the eighth largest state with 8.6 million people." NAPA, *supra* note 11, at 60. Since 1975, Florida's population has increased 33% to 11.4 million people in 1985, catapulting it to the status of sixth largest state. *Id.* Florida's youth, to 19 years of age, number 2.9 million and account for 26% of the state's population; they are the source of many of the state's problems. *Id.* at 61. Reported child abuse increased 132% from 1977 to 1984. In 1984, there were 125,725 child abuse cases to investigate compared to 54,229 cases in 1977. *Id.* The number of Florida's children in poverty is increasing in direct proportion to the increase in female headed households, the number of which increased 81% between 1970 and 1980. *Id.* at 62.

30. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD WELFARE LEAGUE OF AMERICA, YOUTH LAW CENTER, NATIONAL CENTER FOR YOUTH LAW, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 7 (1987).

31. *Id.*

32. OMNI SYSTEMS, INC., WORKLOAD ANALYSIS OF THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES FOSTER CARE AND ADOPTION SERVICES PROGRAMS, Table 3, 19 (1986) [hereinafter OSI].

33. FLA. STAT. § 39, Part V (1987).

due to abuse, neglect or exploitation by the parent or guardian, or due to the child's behavior.³⁴ Planning is directed toward achieving a situation in which a child can return home to his natural parents or relatives within eighteen months.³⁵

If reunification is not possible, permanency can be effected through several methods. The court has the power to terminate parental rights where the child could best be served by adoption. Other methods include the formulation of long-term foster care agreements, and preparation of the child for adulthood through an independent living program.³⁶

In Florida, an agreement is required for children in care for 30 days or more even though the natural parents do not participate in its drafting. If permanency is effected, a judicial review must occur every six months thereafter if the child is thirteen years old or younger and annually if the child is over thirteen.³⁷ The court must appoint a guardian ad litem to act as an advocate during any child abuse or neglect judicial proceeding.³⁸ A guardian ad litem acts as an independent third party and expressly represents the child's best interests during the court proceeding. The guardian ad litem may subsequently be assigned by the court to monitor a child's placement.³⁹

State law mandates the "negotiation" of performance agreements which must be comprehensive and specific.⁴⁰ They must be based on responsibilities negotiated with parents, foster parents, and the child.⁴¹ The purpose of such agreements is to ensure permanency by assuring the safe return of the child to his parents. If a return to the home is impossible, the primary goal is to gain the permanent commitment of the child to the department (or a child-placing agency) for the purpose of finding a "permanent adoptive home."⁴² When it is impossible to find an adoptive home, the placement agreement must record the actions taken for preparing the child for long term foster care or independent living.⁴³ The law requires performance agreements be limited to

34. *Id.*

35. *Id.*

36. FLA. STAT. § 39.45-.474 (1987).

37. FLA. STAT. § 39.453(3)(a) (1987).

38. FLA. STAT. § 415.508(1) (1987).

39. OSI, *supra* note 32, at 2.

40. FLA. STAT. § 39.451 (1987).

41. *Id.*

42. *Id.*

43. *Id.*

the shortest period necessary to accomplish their purpose.⁴⁴ Prior to 1983, an HRS counselor could develop a permanent placement plan independent of external oversight in cases involving uncooperative parents. Now, courts are required to review the appropriateness of such plans and the parents are given an opportunity to be heard.⁴⁵ In addition, state law now requires foster parent screening and training; this includes both initial and ongoing in-service training after licensing of the foster home.⁴⁶ Licensing and relicensing is mandated.⁴⁷

Following the requirements of the Adoption Assistance and Child Welfare Act, which is necessary for federal funding, the Florida legislature has addressed the need for service improvements to children who are in need of foster care. To a great extent, however, the language of the statutes is mere rhetoric and success at implementation is minuscule when compared to the expectancy created by the legislature's mandates.

44. *Id.* at (2). The agreements must include, but are not limited to:

- (a) The specific reasons for the placement in foster care . . . ;
- (b) A description of the type of out-of-home placement in which the child is to be placed, including a discussion of the appropriateness of the placement;
- (c) A plan for addressing the needs of the child while in foster care including a discussion of the services already provided;
- (d) The specific actions to be taken by the parent or parents of the child to eliminate or correct the identified problems or conditions and the period during which the actions are to be taken . . . ;
- (e) The financial responsibilities and obligations, if any of the parents . . . ;
- (f) The visitation rights and obligations of the parent or parents and the social service agency during the period the child is in foster care;
- (g) The social and other supportive services to be provided to the parent or parents of the child, the child, and the foster parents during the period the child is in foster care . . . ;
- (h) The date on which the child is expected to be returned to the home of the parent or parents;
- (i) The specific description and the nature of the effort to be made by the social service agency responsible for the placement to reunite the family; and
- (j) Notice to the parent or parents that placement of the child in foster care may result in termination of parental rights.

FLA. STAT. § 39.451(3) (1987).

45. FLA. STAT. § 39.452 (1987).

46. FLA. STAT. § 409.175(4)(a) (1987).

47. FLA. STAT. § 409.175 (1987). HRS is required to conduct a complete home study for the purposes of screening and licensing non-relative placements. *Id.*

B. *The HRS Foster Care Record*

Following enactment of the Department of Health and Rehabilitative Services Reorganization Act of 1975,⁴⁸ Florida embarked on a bold experiment in the organization and delivery of human services. The legislature mandated an entirely new structure.⁴⁹ The structure prom-

48. FLA. STAT. § 20.19 (1987).

49. NAPA, *supra* note 11, at 1. Reorganization provided for a Secretary appointed by the Governor, a deputy secretary appointed by the Secretary, and three Assistant Secretaries for Operations, Program Planning, and Administrative Services, also appointed by the Secretary. See FLA. STAT. §§ 20.19 (2), (3) (1985). These three separate units are responsible for the administration and ultimate delivery of services within the HRS Department. FLA. STAT. § 20.19(3) (1985). The NAPA report said that integration of the roles and duties of the Assistant Secretaries for Operations, Planning, and Administrative Services at the same level of administration taxes creativity and results in prolonged decision-making, a high degree of bureaucratization, duplication of functional services across units, and under-utilization of personnel. NAPA, *supra* note 11, at 5. The responsibilities and line authority of eleven district administrators, appointed by the Secretary, were defined by legislative mandate. Their goal is to administer human services in an integrated service delivery system with maximum decision-making at the local level. See FLA. STAT. § 20.19(4) (1985).

In 1987, the legislature amended the statute prescribing the HRS Department's administrative structure and required the Secretary to appoint two deputy secretaries and two assistant secretaries. The Assistant Secretary for Operations was elevated to Deputy Secretary for Operations, giving the District Administrators over whom the Deputy Secretary for Operations has line authority a position directly answerable to the Secretary. See Fla. Stat. §§ 20.19(2), (3), (4) (1987).

Foster care in Florida is administered by the Department of Health and Rehabilitative Services through field workers in each of the eleven service delivery districts. *Id.* at (e). Each district has a District Administrator who is responsible to the Assistant Secretary for Operations and has line authority over workers in each district providing the services and implementing the policies of the Children Youth and Family (CYF) Program and five others as statutorily mandated. *Id.* The CYF Program office in Tallahassee is primarily responsible for policy and program development for foster home placements and for service implementation and the monitoring of its effectiveness. The State Program Office Director works for the Assistant Secretary for Program Planning. Neither of these bureaucrats has line authority over the staff in the districts who provide the mandated services. See FLA. STAT. § 20.19(3), (9) (1985). However, in actual practice their roles are often confused and district staff respond to multiple authorities. NAPA, *supra* note 11, at 5.

After ten years under the HRS organizational structure mandated in 1975, partially due to the need to improve services to children in foster care, the National Academy of Public Administrators stated, "the Department has created a legacy of disappointed idealism and growing skepticism about increasing the efficiency of service delivery through service integration." NAPA, *supra* note 11, at 4. The Academy believes at issue is the Department's emphasis on process, not outcome. Discretion is lim-

ised the integration of services and adaptation to local conditions.⁵⁰ From a theoretical perspective, both are well thought out responses to problems in social services delivery.⁵¹ However, actual performance by HRS, as documented in a recent study commissioned by the legislature, has not provided the improvements in children's services which were anticipated when reorganization occurred. One reason for that poor performance is inadequate funding.⁵² As a result of the legislature's failure to provide adequate funding, in 1986 the staffing level for counselors and in-take workers was only 66% of the projected need in 1979.⁵³ An additional 608 counselors were recommended to meet minimally recognized standards.⁵⁴ In Pinellas County, District V, where Corey Greer died, over half the supervisors in the district had less than a year's experience.⁵⁵ Turnover among workers was extremely high; thirty percent of the field workers had less than six months experience and none had received any formal training.⁵⁶ When the governor's office researched the causes for Corey's death, it reported that salaries for protective service workers in Florida are at least \$2,500 lower than those in comparable states,⁵⁷ thus establishing one explanation for the high turnover rate.

In 1986, 5,683 of Florida's children were in foster care, and more than half of the foster care population was over 12 years of age.⁵⁸ In

ited by cumbersome rules that impede social workers' and counselors' abilities to respond to the needs of abused and neglected children that require unique solutions to problems. Frequently, the Department is unable to pursue its goals because it is too busy coping with crises created by its failure to implement operating policies. *Id.* at 5.

The reality of the Florida management system is that reorganization on a regional basis has not met expectations for improvement in a system charged with the legal responsibility to protect the children of Florida from abuse and neglect. Some of the problems are technical; some are the result of limited resources; others are related to leadership; and many are political. The children suffer.

50. FLORIDA'S CHILDREN: THE NEXT DECADE, EXECUTIVE SUMMARY 2 (1986) [hereinafter SUMMARY]. Florida's decentralized structure has two components, decentralization and matrix management. *Id.* at 8.

51. *Id.*

52. *Id.*

53. OSI, *supra* note 32, at 5, 20.

54. *Id.*

55. BLUEPRINT, *supra* note 1, at 22.

56. *Id.*

57. *Id.* at 50.

58. OSI, *supra* note 32, at 20. In an attempt to address permanent placement of hard-to-place foster children, Florida's political leaders enacted FLA. STAT. § 409.166 which provides a subsidized adoption program for "special needs children." Special

1982, a study sponsored by HRS's Children Youth and Family Program summarized findings on the length of time spent by Florida's children in foster care placement.⁵⁹ Only 38.8% of a total of 2,213 children were identified in foster care for less than one year in compliance with state and federal law. On the other hand, slightly more than half of the foster care population had been in care less than two years (55.7%).⁶⁰ Almost one-fourth of the population (22.8%) had been in care for five years or more in substantive violation of Florida's statutory policy.⁶¹ Years after the enactment of Florida's foster care statutes, approximately 61.2% of Florida's children in foster care remained longer than one year,⁶² although the statutes clearly state that it is the intent of the legislature that "no child remain in foster care longer than one year."⁶³

In 1986, four years later, a study noted, "[c]urrently the number of foster care placements and especially the length of many foster care placements is unacceptable."⁶⁴ One solution recommended wholesale transfer of 1,572 children from foster care status to adoptive status.⁶⁵ However, the report further recognized the insufficiency in the number of adoptive homes available.⁶⁶

needs children include those whose permanent custody has been awarded to the department or to a licensed child placement agency and:

1. Who has established significant emotional ties with his or her foster parents; or,
2. Is not likely to be adopted because he or she is:
 - a. Eight years of age or older;
 - b. Mentally retarded;
 - c. Physically or emotionally handicapped;
 - d. Of black or racially mixed parentage; or
 - e. A member of a sibling group of any age, provided two or more members of a sibling group remain together for purposes of adoption.

FLA. STAT. § 409.166(4)(a) (1987). Unfortunately, the program is not adequately funded, the subsidy paid can be no more than the monthly stipend paid for a child in a foster family home, and it terminates when the child is 18 years old. It has been successful in encouraging foster parents to adopt children they become attached to, but is limited in its effectiveness to provide an incentive for adoption.

59. DHRS, *supra* note 29, at 5.

60. *Id.*

61. *Id.*

62. *Id.*

63. FLA. STAT. § 39.45(2) (1987).

64. OSI, *supra* note 32, at D-1.

65. *Id.* at D-10.

66. *Id.*

Licensing, which has been mandated by the legislature to assure a reasonable standard of care in foster homes and day care facilities, is essentially an extension of the police power of the state.⁶⁷ Therefore, it is important that the setting and enforcement of standards be consistent, fair, and logical. "This is not true in Florida."⁶⁸ HRS placed Corey Greer and eleven other children in a home which was licensed for four. One supervisor involved in Corey's placement had no background in foster care and did not know she was required to report to licensing and request a waiver if more than four children were placed in the home.⁶⁹

If it is properly administered, a regulatory program that promotes enforceable and fair standards serves as an important preventive mechanism against neglect and abuse in foster care homes and day care centers. Florida is plagued with fractionated and inconsistent administration of programs, a non-professional status of licensing, and the need for different categories of licensed care.⁷⁰ In District V, where Corey Greer lived, the licensing office had stopped monitoring placements due to the shortage of staff.⁷¹

The preamble to Florida's Foster Care Statute states that it is the legislative intent of the policy to reunite families.⁷² The requirement is clear that a performance agreement or a plan will be prepared and submitted to the court if a child is going to be in foster care longer than 30 days.⁷³ The plan must include specific actions to be taken to eliminate or correct the conditions that led to foster home placement and the length of time it will take to implement.⁷⁴

Contrary to the mandate, a review of the 1982 report on foster care and subsequent statistical data shows substantial failure to identify and provide counseling, emergency intervention, and other services necessary to reunite the family or prevent removal of children from their homes.⁷⁵ Many of the program deficiencies identified in 1982, including the availability of outreach mental health programs, day care, day treatment, and before and after school care, were labeled as defi-

67. SUMMARY, *supra* note 50, at 23.

68. *Id.* at 24.

69. BLUEPRINT, *supra* note 1, at 21.

70. SUMMARY, *supra* note 50, at 24.

71. BLUEPRINT, *supra* note 1, at 21.

72. FLA. STAT. § 39.45(2) (1987).

73. FLA. STAT. § 39.451(4)(a) (1987).

74. FLA. STAT. §§ 39.451, 39.452 (1987).

75. DHRS, *supra* note 29, at 64.

cient in subsequent reports.⁷⁶ The conclusion is clear. Programs required to reunite families and prevent the permanent removal of children from their homes are non-existent and, where they do exist, they are insufficient to meet either the need or the mandate.

State law proscribes abuse and neglect of children and establishes criminal penalties for culpable and willful neglect.⁷⁷ The foster care and adoption program mandated by the statutes requires the state to provide Florida's abused and neglected children temporary shelter and appropriate care when reunification with their natural family is possible and permanent placement when necessary for their protection. Failure to fund and properly implement that program may result in liability for the state.⁷⁸

76. OSI, *supra* note 32, at D-6. The governor and legislature have the authority to remedy many of the deficiencies that plague the service delivery system for children in Florida's foster care program and those in need of other special services. The legislature established the legal authority and budgets under which HRS must operate. DHRS, *supra* note 29, at 23. The statutes described in this paper mandate programs supported by national and state experts on foster care. FLA. STAT. § 415 clearly proscribes abusive treatment and § 827 provides criminal penalties for people who abuse children. However, the facts provided in this paper, many gathered from reports commissioned by the Florida Legislature, lead one to believe the legislature has failed to grasp the magnitude of the problems facing children in need of the state's protection and its services.

The failure to provide adequate services was documented in the OSI report in 1982. Subsequent reports support the conclusion that abuse of children in foster care and in their own homes due to failure of the state to take appropriate intervention and prevention actions has increased. As documented, budget increases have not kept pace with population growth and legislative mandates. If the legislature made children in need of special services, its top priority for a couple of legislative sessions, many of the problems could be resolved without resort to legal remedies through the courts. Certainly the philosophy, intended as law, expressed in FLA. STAT. § 39, § 409, § 415, § 827, § 393, § 394, § 20.19 and other sections, supports this theory.

77. See FLA. STAT. § 415 (1987); FLA. STAT. § 827 (1987). Chapter 415 requires: an investigation by HRS; reporting of abuse and neglect; HRS to immediately report to the state's attorney or a police agency all injuries that are discovered; and provides for: protective services teams; the appointment of guardian ad-litem when abuse has occurred; and confidentiality of reports and records. FLA. STAT. § 415 (1987). Chapter 827 proscribes abuse and neglect and makes willful and culpable neglect punishable under the criminal statutes.

78. See *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981); *Shull v. Zumwalt*, 564 F. Supp. 1030 (D. Mo. 1983); *Wolfe v. New Mexico Dep't of Human Services*, 575 F. Supp. 346 (D. N.M. 1983); *Lynch v. King*, 550 F. Supp. 325 (D. Mass. 1982), *aff'd sub nom.*, *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983); *Elton v. Orange County*, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (Cal. Ct. App.

Florida's foster care and adoption statutes conform with the federal Aid to Families with Dependent Children-Foster Care (AFDC-FC) program, established in 1980 by Congress as part of the Adoption Assistance and Child Welfare Act.⁷⁹ This comprehensive program for dependent children requires a written plan, adherence to the plan, and periodic reviews of foster home placements.⁸⁰ The plan must include short term and long term goals with the primary goal of reunification with the natural family.⁸¹ In effect, Congress has imposed on the state agency an obligation to fulfill the requirements of a plan and to perform periodic review before federal funds will be made available.⁸² Because Florida accepts funds allocated by Congress under the AFDC-FC program, HRS must comply with its requirements or lose those funds.⁸³

III. Judicial Remedies

Individual foster children have brought two basic types of cases to establish a government agency's liability for abuse and neglect. They are tort claims which require proof of duty⁸⁴ and proximate cause,⁸⁵ and 42 U.S.C. Section 1983 civil rights claims arising from the deprivation of a child's constitutional right to be free from harm.⁸⁶ In addition to deciding whether a placement agency has been negligent, the courts must decide the question of governmental immunity.⁸⁷ The basis for immunity has been a claim by the government that the duty owed

1970); *Yamuni v. State of Florida*, Dep't of HRS, 498 So. 2d 441 (Fla. 3d Dist. Ct. App. 1986); *Florida State Nat'l Bank of Jacksonville v. City of Jacksonville*, 339 So. 2d 632 (Fla. 1976); *Vonner v. State Dep't of Public Welfare*, 273 So. 2d 252 (La. 1973); *Koepf v. County of York*, 251 N.W. 2d 866 (Neb. 1977); *Bartels v. County of Westchester*, 76 A.D.2d 517, 429 N.Y.S.2d 906, (App. Div. 1980).

79. 42 U.S.C.S. § 671(a) (1984).

80. *Id.*

81. 42 U.S.C.S. § 675(5) (1984).

82. *Id.*; 42 U.S.C.S. § 670 (1984).

83. 42 U.S.C.S. § 671(b) (1984).

84. *Vonner v. State Dep't of Public Welfare*, 273 So. 2d 252 (La. 1973).

85. *Elton v. Orange County*, 3 Cal. App. 3d 1053, 1057, 84 Cal. Rptr. 27, 31 (Ct. App. 1970).

86. *Doe v. New York City Dep't of Social Services*, 649 F. 2d 134 (2d Cir. 1981).

87. Comment, *Child Abuse in Foster Homes: A Rationale for Pursuing Causes of Actions Against the Placement Agency*, 28 St. Louis U.L.J. 975, 980 (1984).

the child in protective custody is a "discretionary function."⁸⁸

Finally and significantly, children in foster care have successfully claimed and litigated fourteenth amendment due process violations, based upon denial of benefits created by state/federal laws and regulations.⁸⁹ These cases are generally class action suits brought for injunctive relief and a declaratory judgment.

A. Tort Actions

In recent years, successful tort actions brought against placement agencies by individual children required proof of duty and proximate cause. Two arguments have been used by foster children to prove the duty element. In *Vonner v. State Department of Public Welfare*,⁹⁰ the court advanced a direct argument theory.⁹¹ The court said that by taking custody of the children, the agency assumed responsibility for their care and well-being, and therefore had the duty to protect them from abuse.⁹² In *Vonner*, two children from a foster home had been placed in a detention center for running away on three separate occasions after allegedly having been beaten. Three months later, one of the two children left in the home was beaten to death by the foster mother.⁹³ The Louisiana Supreme Court found that the placement agency was vicariously liable for the acts of the foster mother since the agency assumed the responsibility for the care and well being of the children when it took them into custody.⁹⁴ Furthermore, the court said the agency could not escape its responsibility by entering into a contract with the foster parents.⁹⁵ The court observed that the agency retained custody of the foster child and was liable for breach of its duty when the child's "well-being" was not protected by the foster parents.⁹⁶

88. *Elton*, 3 Cal. App. 3d at 1055, 84 Cal. Rptr. at 29.

89. *Lynch v. King*, 550 F. Supp. 325 (D. Mass. 1982), *aff'd sub nom.*, *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983).

90. 273 So. 2d 252 (La. 1973).

91. *Id.* at 255.

92. *Id.* The court said that the placement agency could not contract away its direct responsibility for children in its custody. Therefore, under this theory, placement agencies are vicariously liable for the acts of foster parents when the duty of the agency for the well-being of the foster child is breached through acts by the contracted party. *Id.*

93. *Id.* at 254-55.

94. *Id.*

95. *Id.* at 255-56.

96. *Id.* at 255. In *Vonner*, the court's decision was based upon the theory that an

Foster children plaintiffs also argue that the placement agency breaches a legal duty when it fails to follow its own regulations or those regulations promulgated by the state. In *Elton v. Orange County*,⁹⁷ allegations of a failure to perform the inspection, supervision and control functions mandated by the state of California were held sufficient to state a cause of action.⁹⁸ In *Bartels v. County of Westchester*,⁹⁹ a New York court said that if the agency knew of the foster parents' incompetence or of their indifference to the discharge of their duties, it might be held liable for an ensuing injury.¹⁰⁰ Proximate cause is not raised as frequently as the issue of duty, but the question of whether the foster parents' actions are an intervening cause of the child's injury is. If the foster parents' actions are independent of circumstances created by the placement agency's negligence, then the agency cannot be held liable.¹⁰¹ However, as *Elton* held, if the abuse by the foster parents is created by or allowed to continue due to the negligence of the placement agency, the agency can be held liable for any damages which result.¹⁰²

Generally, federal, state, and local governments are not susceptible to actions in tort unless the government has consented to be sued. For example, the federal government has waived its immunity in certain cases and may be held liable to the same extent and in the same manner as a private individual under like circumstances.¹⁰³ Most states have also waived immunity from tort actions to various limits. Even

agency is liable for actions taken by foster parents that breach the agency's duty. It acknowledged that the basis of the decision could have been a narrower ground; that the agency disregarded its own regulations concerning supervision; "a continuous course of beating over an extended period . . . should have been discovered" in the conscientious performance of its duties. *Id.*

97. 3 Cal. App. 3d 1053, 1057, 84 Cal. Rptr. 27, 31 (Ct. App. 1970).

98. *Id.*

99. 76 A.D.2d 517, 518, 429 N.Y.S. 2d 906, 910 (App. Div. 1980). The court found that the placement agency had breached a statutorily mandated affirmative duty to the child.

100. *Id.*

101. *Elton*, 3 Cal. App. 3d at 1053, 84 Cal. Rptr. at 27. The argument in *Elton* was if the placement agency had removed the child from the foster home, the foster parents would not have had the opportunity to abuse the child. *Id.*

102. *Id.*; See RESTATEMENT (SECOND) OF TORTS § 422A (1965). The Restatement states, "where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause." *Id.*

103. 28 U.S.C.A. §§ 1346(b), 2674 (1980).

when statutory limits for damages have been set, courts still must decide whether immunity protects the sovereign from liability.

In determining the immunity issue in cases brought by foster children, most state courts will decide whether a duty owed to the child is discretionary or operational. In this regard, a California appellate court overturned a trial court's decision in *Elton v. Orange County*,¹⁰⁴ and said that if every act which involved an exercise of discretion was considered discretionary, all official activity would be immune from prosecution.¹⁰⁵ In *Koepf v. County of York*,¹⁰⁶ the Supreme Court of Nebraska stated:

The placement in foster homes of defenseless children, and the supervision of their health and care, once committed to the custody of the welfare department must be accomplished with the reasonable care commensurate with the circumstances. We hold that a political subdivision of this state can be held liable for a breach of that duty.¹⁰⁷

Florida recognizes governmental tort liability for negligent conduct when there is failure to exercise either a common law duty of reasonable care¹⁰⁸ or a statutory duty of care.¹⁰⁹ However, "for certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care."¹¹⁰ The governmental immunity statutes place a cap of \$100,000 on individual claims unless the legislature successfully files and enacts a claims bill providing additional compensation following a judgment in favor of a plaintiff against any state agency or its subdivisions.¹¹¹ In addition, a foster child plaintiff in a

104. *Elton*, 3 Cal. App. 3d at 1055, 84 Cal. Rptr. at 29.

105. *Id.*; 84 Cal. Rptr. at 30-31.

106. 251 N.W.2d 866, 870 (Neb. 1977).

107. *Id.* at 871. Though the immunity issue was resolved in favor of the plaintiff in *Koepf*, the court decided in favor of the county, based upon an argument that the county was not clearly wrong. *Koepf* demonstrates the necessity to develop a clear and convincing argument on the issues of duty and proximate cause when a case is brought in state court for damages based upon negligence. *Id.*

108. *Trianon Park Condominium v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985).

109. *Id.*

110. *Id.* FLA. STAT. § 768.28(5) (1987) provides that governmental agencies "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. . . ."

111. *Id.*

tort action may be required to overcome a special provision in the Florida Statutes pertaining to foster care that sets a standard requiring a showing of "willfulness" for liability to be assessed to HRS.¹¹²

Florida's current judicial policy for the separation of powers in tort claims was set out in *Commercial Carrier Corp. v. Indian River County*.¹¹³ The supreme court said the judicial branch must not interfere with the discretionary functions of the legislative or executive branches absent a violation of constitutional or statutory rights.¹¹⁴ In *Commercial Carrier*, the court recognized that certain discretionary functions of government are inherent in the act of governing and are immune from suit.¹¹⁵ The court adopted the principle endorsed by the U.S. Supreme Court in *United States v. Varig Airlines*,¹¹⁶ that "the nature of the conduct, rather than the status of the actor," determines whether the function is the type which is, by its nature, immune from tort liability.¹¹⁷

Recently, the question of governmental liability - and more specifically, the question of HRS liability - was addressed in *State of Florida, Department of Health and Rehabilitative Services v. Yamuni*.¹¹⁸ The case involved alleged negligence by HRS in investigating the reported abuse of a child and in its failure to seek a protective custody petition.¹¹⁹ HRS appealed the trial court's decision in favor of plaintiff.¹²⁰ A jury awarded the plaintiff \$3,100,000 which was subsequently remitted to \$50,000.¹²¹ The plaintiff claimed that HRS's negligence led to a broken arm that ultimately required amputation.¹²² The Third District Court of Appeal affirmed the trial court's decision that HRS's caseworkers were negligent.¹²³ The court acknowledged that "competent evidence" supported the facts as alleged.¹²⁴

The court addressed HRS's claim of sovereign immunity after de-

112. FLA. STAT. § 39.455 (1987).

113. 371 So. 2d 1010 (Fla. 1979).

114. FLA. CONST. Art. II, § 3.

115. *Commercial Carrier*, 371 So. 2d at 1010.

116. 467 U.S. 797 (1983).

117. *Id.* at 798.

118. 498 So. 2d 441 (Fla. 3d Dist. Ct. App. 1986).

119. *Id.* at 442.

120. *Id.* at 441.

121. *Id.* at 442.

122. *Id.*

123. *Id.*

124. *Id.*

ciding that HRS owed a statutory duty to the child. Just one year earlier, in *Trianon Park Condominium Association v. City of Hialeah*,¹²⁵ the Florida Supreme Court had held that a statute enacted for the protection of the general public did not give rise to a duty to individual citizens.¹²⁶ In *Yamuni*,¹²⁷ however, the court interpreted the statute as one enacted to protect individuals or a class of individuals, distinguishing it from *Trianon*.¹²⁸ The court held that, "where, as here the express intention of the legislature is to protect a class of individuals from a particularized harm, the governmental entity entrusted with the protection had a duty to individuals within the class. . . ."¹²⁹ Since the child in *Yamuni* was a member of the class the legislature intended to protect,¹³⁰ the court held HRS owed a statutory duty to protect him from abuse and neglect.¹³¹

In *Trianon* and *Commercial Carrier*, the court adopted a four-part test to determine whether an agency's conduct is discretionary or operational.¹³² The test was first adopted by the Washington Supreme Court in *Evangelical United Brethren of Aona v. State*.¹³³ *Yamuni* applied the same test. If all four parts can be answered unequivocally in the affirmative, the conduct is considered discretionary.¹³⁴ However, if one or more can be answered negatively, the agency may be subject to liability.¹³⁵

125. 468 So. 2d 912 (Fla. 1985).

126. *Id.*

127. *Yamuni*, 498 So. 2d at 443.

128. *Id.*

129. *Id.* at 442.

130. FLA. STAT. §§ 827.01-.04 (1987). This chapter of the Florida Statutes proscribes child abuse and provides penalties for "whoever, willfully or by culpable negligence . . . abuses 'a' child."

131. *Yamuni*, 498 So. 2d at 442-43. See also FLA. STAT. §§ 327.01-.04.

132. *Trianon Park*, 468 So. 2d at 918; 371 So. 2d at 10, 12.

133. 67 Wash. 2d 246, 407 P.2d 440, 445 (1965).

134. *Id.*

135. *Id.* The questions are:

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
2. Is the questioned act, omission, or decision essential to the resolution or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objective?
3. Does the act, omission or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved?

Applying the test in *Yamuni*, the third district concluded that the acts, omissions, and decisions of the caseworkers involved basic governmental policy. It was clear that HRS has the authority and the duty to carry out the objectives of the program through the power delegated to it by the legislature.¹³⁶ Applying the four-part test, the court decided two questions affirmatively,¹³⁷ two negatively, and characterized the alleged negligent conduct as operational.¹³⁸ The court held that the reasons for the negative answers included the ministerial aspect of abuse investigations and a lack of necessary policy expertise in determining if a child abuse report is unfounded.¹³⁹ Having found "HRS's duty to investigate involved operational acts," the court stated, "it was incumbent upon HRS to investigate in a competent manner or face the consequences for its negligence."¹⁴⁰ The question of whether HRS waived sovereign immunity has been certified to the Florida Supreme Court.¹⁴¹

In *George W. Zink IV v. Department of Health and Rehabilitative Services*,¹⁴² a child in the custody of HRS was placed in a foster home. The natural child of the foster parent shot the foster child with a shotgun.¹⁴³ Appellant alleged HRS breached its duty of care by failure to inspect the home and monitor the care and treatment of the child while in foster care.¹⁴⁴ As a result, the child alleged he had been placed in a dangerous setting and that HRS was responsible.¹⁴⁵ HRS claimed it lacked knowledge that the home was dangerous and had done nothing to contribute to the child's injury.¹⁴⁶ Based upon a factual dispute,

4. Does the governmental agency involved possess the requisite constitutional, statutory, and lawful authority and duty to do or make the challenged act, omission or decision?

136. FLA. STAT. § 20.19 (1987).

137. *Yamuni*, 498 So. 2d at 443.

138. *Id.* at 444.

139. *Id.*; See *Emig v. State Dep't of Health and Rehabilitative Services*, 456 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1984). Similarly, the court decided failure to notify appropriate authorities of a juvenile's escape from a detention center did not involve basic policy, judgment or expertise, and therefore, the judicial branch was not sitting in judgment of the executive branch when it established liability. *Id.*

140. *Yamuni*, 498 So. 2d at 444. The trial court's decision was affirmed. *Id.*

141. *Id.*

142. 496 So. 2d 996 (Fla. 5th Dist. Ct. App. 1986).

143. *Id.* at 997.

144. *Id.*

145. *Id.*

146. *Id.*

the court remanded the case for further proceedings.¹⁴⁷

Also worth noting is a case brought against the City of Jacksonville by a bank in its capacity as guardian of two children. In *City of Jacksonville v. Florida State National Bank of Jacksonville*,¹⁴⁸ the children were seriously abused by their father after repeated reports to the city police department of the father's prior abusive action.¹⁴⁹ Plaintiffs alleged that the police failed to exercise "reasonable care in the special duty undertaken in the children's behalf. . . ."¹⁵⁰ The First District Court of Appeal decided the city could be held liable for tortious conduct; the supreme court decided the first district had acted within its authority although the decision was allegedly in conflict with other appellate decisions.¹⁵¹ The supreme court held that the writ was improvidently issued and was without jurisdiction. It decided the facts of the case were so different from prior decisions favoring municipal immunity that the rules did not apply.¹⁵² Further, the supreme court found that the first district had done a "thorough and thoughtful job of analyzing Florida case law in order to apply it to the facts of the particular controversy before it."¹⁵³

Although the question of sovereign immunity has been decided in favor of abused children in states across the country, HRS apparently believes that the question of its own liability has not yet been decided. If the Florida Supreme Court affirms the appellate court's answers to questions two and three of its adopted test in *Yamuni*, acts or omissions by caseworkers may be considered operational or ministerial and not discretionary.¹⁵⁴ If the court follows its previous decisions and its heart, it can create an important standard for evaluating HRS's responsibility to the state's children; a standard logically founded upon its statutory duty to protect children from abuse.

147. *Id.*

148. 339 So. 2d 632 (Fla. 1976).

149. *Id.* at 633.

150. *Id.* at 632-33.

151. *Id.* at 633.

152. *Id.*

153. *Id.* The dissent opined, "the majority demonstrates compassion but fails to follow Florida law." *Id.* at 636 (Boyd, J., dissenting). The prior decisions of the Florida Supreme Court followed the pronouncement in *Wong v. City of Miami*, 237 So. 2d 132 (Fla. 1970), which stated, "The sovereign authorities ought to be free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence." *Florida State Nat'l Bank*, 339 So. 2d at 635.

154. *Yamuni*, 498 So. 2d at 443.

B. Section 1983 Damage Actions

A 1981 New York case, *Doe v. New York City Department of Social Services*,¹⁵⁵ may have triggered the trend toward section 1983¹⁵⁶ civil rights challenges in foster care cases.¹⁵⁷ In *Doe*, a foster child claimed deprivation of her constitutional right to be free from harm because of the placement agency's failure to adequately supervise her placement. The child had been sexually molested and continually mistreated by her foster father and the agency had failed to report the abuse or take affirmative action to correct the situation.¹⁵⁸ She claimed that the agency's failure to periodically monitor her placement as required by New York law resulted in its failure to discover the abuse to which she was subjected for over six years.¹⁵⁹

The court first dealt with the immunity issue and declared that "Government officials may be held liable under section 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful."¹⁶⁰ Previously, in *Monell v. Department of Social Services of New York City*,¹⁶¹ the U. S. Supreme Court had reversed its earlier position and held that local governments were not immune under section 1983.¹⁶² The *Monell* court said "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."¹⁶³

The court also held that in a charge of failure to exercise an af-

155. 649 F.2d 134 (2d Cir. 1981) (Based upon the court's misleading jury instructions and erroneous evidentiary rulings, the court reversed the jury verdict in favor of the Bureau and remanded the case for a new trial).

156. Title 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

157. *Doe*, 649 F.2d at 141.

158. *Id.* at 136-37.

159. *Id.*

160. *Id.* at 141.

161. 436 U.S. 658 (1978).

162. *Id.* at 660.

163. *Id.* at 690.

firmative duty, two fundamental requisites are necessary for section 1983 liability to be imposed:

The first is that the omissions must have been a substantial factor leading to the denial of a constitutionally protected liberty or property interest.¹⁶⁴ The second is that the officials in charge of the agency being sued must have displayed a mental state of "deliberate indifference" in order to "meaningfully be termed culpable" under Section 1983.¹⁶⁵

The court explained that an interpretation of the term "deliberate indifference" in the foster care situation is more difficult to determine than in other settings.¹⁶⁶ The goal of the state's foster care program was the creation of a family-type environment and a high degree of intrusiveness or direct supervision by the agency was discouraged.¹⁶⁷ However, on appeal the Second Circuit Court of Appeals found evidence that the agency had been "deliberately indifferent" and could be held liable under section 1983.¹⁶⁸ The court held that indifference must be based upon knowledge of an affirmative duty.¹⁶⁹ Further, "actual knowledge of a specific harm is not the only type of knowledge that will suffice."¹⁷⁰ The defendants in *Monell* had been charged with knowledge of unconstitutional conditions. This knowledge was evidenced by persistent violations of their statutory duty to inquire about conditions of alleged abuse, to be responsible for those conditions, and for their failure to take corrective action.¹⁷¹ After remand to the district court and subsequent appeal of its decision to enter a judgment notwithstanding the verdict in favor of the agency, the circuit court restated its decision that in this case "there was sufficient evidence of liability under section

164. *Doe*, 649 F.2d at 141.

165. *Id.*; *West Haven v. Turpin*, 439 U.S. 974 (1978).

166. *Estelle v. Gamble*, 429 U.S. 97 (1976). (The Court in *Estelle* said, "Government officials may be held liable under § 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful." This case was brought by a prisoner alleging negligence on the part of the warden of a prison and the Texas Department of Corrections. He claimed he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of a back injury sustained while doing prison work.).

167. *Doe*, 649 F.2d at 142.

168. *Id.*

169. *Id.* at 145.

170. *Id.*

171. *Id.*

1983."¹⁷² The court ordered reinstatement of a jury award of \$225,000 against the placement agency.¹⁷³

In *Estate of Bailey v. County of York*,¹⁷⁴ the Third Circuit Court of Appeals declared that protecting a child is not limited to situations where the child has been entrusted to a state agency for custody or care.¹⁷⁵ When a special relationship exists between the agency and the child such that the agency is aware that the child faces abuse or neglect, an affirmative obligation is created to protect the child.¹⁷⁶ If the agency fails to satisfy its duty, a claim may arise under section 1983 due to failure to protect.¹⁷⁷

In *Bailey*, the agency had taken temporary custody of a little girl in response to allegations by a relative that the mother's boyfriend had abused the child. A physician confirmed physical abuse and the agency attempted to deny the boyfriend access to the child before it returned her to her mother. After being returned to her mother, the child died from injuries allegedly inflicted by the mother and her boyfriend.¹⁷⁸ On appeal, the federal court imposed liability on the agency for failing to institute protective custody proceedings; the court remanded the case for further proceedings.¹⁷⁹ In commenting on the burden of proof facing plaintiffs seeking to impose liability under section 1983, the *Bailey* court stressed that agency conduct far below the accepted minimum and prevailing standards would have to be shown to permit an inference of deliberate or reckless disregard for the child's safety.¹⁸⁰

In *Taylor v. Ledbetter*,¹⁸¹ the Eleventh Circuit Court of Appeals affirmed a decision to dismiss a complaint brought under section 1983.¹⁸² In this case, filed against Georgia officials for their failure to properly investigate a foster home setting prior to placement and subsequently monitor the placement, a foster child suffered severe physical

172. *Doe v. New York City Dep't of Social Services*, 709 F.2d 782, 792 (2d Cir. 1983).

173. *Id.*

174. 768 F.2d 503 (3d Cir. 1985).

175. *Id.*

176. *Id.* at 510.

177. *Id.* at 512.

178. *Id.*

179. *Id.*

180. *Id.*

181. 791 F.2d 881 (11th Cir. 1986).

182. *Id.* at 882.

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injuries at the hands of her foster mother.¹⁸³ "As a result of [the] injuries or adverse reaction . . . to unnecessary medication, the [child] lapsed into a coma, in which she remain[ed]" at the time of the appeal.¹⁸⁴ The plaintiff brought action against state officials based upon alleged violations of Georgia statutes which established a program of foster care and allegedly created a claim of entitlement by foster children to certain benefits.¹⁸⁵ The court held that the "deliberate indifference" standard of *Doe*,¹⁸⁶ which requires both an allegation of knowledge and some evidence of the agency's failure to act on that knowledge, had not been met.¹⁸⁷

There is some indication that the federal court felt that *Taylor* should have been filed in state court.¹⁸⁸ The court acknowledged that the injuries were serious and that the defendant might have violated state statutes and regulations, or violated common law duties owed to the plaintiff, but, according to the eleventh circuit, those allegations were insufficient to establish a constitutional violation under section 1983.¹⁸⁹

Successful section 1983 actions for damages in federal court will require proof of deliberate or reckless disregard for a child's safety and evidence that an agency's actions are below minimum and prevailing standards. The pleadings will require specific allegations that the agency knew, or should have known that it complied with its duty to protect children from abuse and neglect or of the conditions that caused the child's injury. And, a court may apply a test for "deliberate indifference" if a plaintiff alleges that the agency failed to follow established guidelines or regulations.¹⁹⁰

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 883.

187. *Id.*

188. *Id.* at 884.

189. *Id.* In the dissenting opinion, an argument was made that Georgia's statutes provide more than just "procedural guidelines to be followed in arriving at a decision," and, therefore, a right and a duty to protect children had been created. *Id.* at 884, 885 (Hatchett, J., dissenting). The dissenting opinion offers a view more closely aligned with *Doe*.

190. *Doe*, 709 F.2d at 782. Other cases claiming negligence by placement agencies have been filed on behalf of parents. Courts, however, have thus far refused to recognize a parent's right to treatment, including counseling and job training. See, e.g., *Dixie v. Jewish Child Care Association*, 522 F. Supp. 913, 915 (S.D. N.Y. 1981). A New York federal court in *Dixie* declined to approve plaintiff's claim of a constitu-

C. Actions for Injunctive Relief and Declaratory Judgment

During the last decade, class actions for injunctive relief and declaratory judgment have been successfully filed in several states across the country on behalf of foster and dependent children, and foster parents and natural parents for failure to provide benefits prescribed in statutes, in regulations, or by agreement between the parties.¹⁹¹ Although these cases have generally been filed in federal courts, based upon fourteenth amendment claims, they may be filed in either state or federal courts.

Natural parents, foster parents, and children subject to protective intervention were included as parties in a class action suit brought in a federal district court in Massachusetts which has resulted in an opinion with far-reaching consequences. In *Lynch v. Dukakis*,¹⁹² a group of natural parents and foster parents alleged that the Massachusetts system for providing foster care and child welfare services violated the due process clause of the Fourteenth Amendment, the Social Security Act, and regulations promulgated by the Secretary of Health and Human Services.¹⁹³ In February, 1980, the court certified a class defined as "all

tional right to treatment. *Id.* at 916. The court said parents "do not have a constitutional right to rely on an agency to strengthen and reunite their families even if that agency has a statutory duty to do so." *Id.* However, agency policy that would meet the *Doe* deliberate indifference standard had not been alleged. *Id.* Some children will never be returned to their natural home and should not be because their parents cannot provide for them properly or will not provide adequately and do not want them. Another line of cases brought by children in foster care claim failure to arrange for adoption as required by law is a constitutional violation of their rights. *See Wolfe v. New Mexico Dep't of Human Services*, 575 F. Supp. 346 (D. N.M. 1983). A case brought in state court in Oregon was settled before trial for \$90,000. *Bradford v. Davis*, 290 Or. 855, 626 P.2d 1376 (1981). This suggests that liability may arise if there is negligence as defined by state law. In *Bradford*, a 17-year-old brought suit claiming the agency had failed to take "reasonable actions" to find him an adoptive home. He had been in foster care for 13 years. *Id.* at 857, 626 P.2d at 1378. Courts in other jurisdictions have taken the opposite position on this question, however, and appear to be less inclined to find actionable neglect. *Smith v. Alameda County Social Services Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (Cal. Dist. Ct. App. 1979).

191. *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983); *Shull v. Zumwalt*, 564 F. Supp. 1030 (D. Mo. 1983); *Wolfe v. New Mexico Dep't of Human Services*, 575 F. Supp. 346 (D. N.M. 1983).

192. 719 F.2d 504 (1st Cir. 1983).

193. *Lynch v. King*, 550 F. Supp. 325, 328 (D. Mass. 1982) (order granting preliminary injunction), *aff'd sub nom.*, *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983).

children subject to protective intervention by agencies of the Commonwealth of Massachusetts, under the foster family home care system in operation, pursuant to 42 U.S.C. Sections 608, 625 . . . and all members of the natural and foster families of such children."¹⁹⁴ The court analyzed the necessary four criteria prior to issuing a preliminary injunction on a motion by plaintiffs.¹⁹⁵

The court first determined whether the plaintiff exhibited likelihood of success on the merits, carefully analyzing the facts presented by parents, friends, and employees of the state. The court also looked at the requirements of the federal statutes pertaining to foster care and adoption prior to 1980 as well as the 1980 Adoption Assistance and Child Welfare Act, parts of which had become effective during the year it had taken to hear evidence on the motion.¹⁹⁶ Even before Congress passed the 1980 Act, the state had been required to develop and review service plans to assure proper care and to prevent foster care placement whenever possible through programs established to improve conditions in a child's natural home.¹⁹⁷ The court found that the 1980 Act established specific requirements which mandated written service plans for children placed in foster care and periodic review of those plans every six months.¹⁹⁸ The facts revealed a failure to substantially comply with the requirements of either section 608 or section 671 which required the agency to develop plans, provide services and make periodic reviews.¹⁹⁹ Therefore, based on a preponderance of the evidence, the court concluded that plaintiffs had established a likelihood of succeeding on the merits of their claim.²⁰⁰

The court then had to decide whether the plaintiffs would suffer irreparable injury if preliminary relief was not awarded.²⁰¹ The court concluded that without case plans and periodic reviews, children in foster care in the Commonwealth would continue to face a grave threat of serious harm.²⁰²

Next, the court considered whether the "irreversible bodily and emotional injury" threatened outweighed the hardship placed on the

194. *Id.* at 327.

195. *Id.* at 330.

196. *Id.* at 332-37.

197. *Id.* at 335.

198. *Id.* at 339.

199. *Id.* at 337.

200. *Id.*

201. *Id.* at 338.

202. *Id.* at 339.

state in granting relief.²⁰³ The judge acknowledged concern about the prospect of issuing relief which unduly hampered the day-to-day administration of a state agency and as to the ultimate effect of granting an order that a state cease spending badly needed federal funds.²⁰⁴ The court acknowledged that the effects of finding the state in noncompliance with the federal law could mean a reduction in funds to serve the very children represented since the remedy for non-compliance meant a loss of federal funding to the state. Nevertheless, the court stated that "the need for judicial sensitivity to these concerns does not justify abdication of judicial responsibility."²⁰⁵ The judge concluded that the threat of irreparable injury outweighed any burden imposed on the state as a result of the granting of injunctive relief.²⁰⁶

Finally, the court considered whether the public interest would be adversely affected by the granting of plaintiff's motion for preliminary injunction.²⁰⁷ Based upon the belief that no one would dispute society's interest in ensuring proper care for its children, the court decided the public interest would be furthered by awarding "a remedy calculated to ensure that Massachusetts' foster care system conforms to the dictates of the Social Security Act."²⁰⁸

The court issued a preliminary injunction which required the state to comply with the requirements of the 1980 Adoption Assistance and Child Welfare Act in order to receive federal funds under Title IV-E of the Social Security Act.²⁰⁹ As previously discussed, these detailed requirements include written service plans and periodic reviews of foster home placements in respect to those plans. The plans must be developed with the ultimate goal of reuniting children with their natural families or relatives when possible. If reunification is not possible, then readiness for adoption or legal guardianship must be included in the plans.²¹⁰ The court further ordered the state to provide adequate caseworkers to develop and review the mandated plans.²¹¹

In *Shull v. Zumwalt*,²¹² the chief judge of the United States Dis-

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 340.

207. *Id.*

208. *Id.*

209. *Id.* at 355.

210. U.S.C.S. § 671(a) (1984).

211. *Lynch*, 550 F. Supp. at 355.

212. 564 F. Supp. 1030 (D. Mo. 1983). (*Shull* was a class action brought by

strict Court for Missouri approved a consent order between the plaintiff and several individuals and agencies in charge of foster care services that expressly and specifically required improvements in services. The order was published to assist other courts in considering similar questions.²¹³

In *Wolfe v. New Mexico Department of Human Services*,²¹⁴ a dependent child and others alleged failure by the State of New Mexico to move children in state custody toward adoption as mandated by state and federal statutes.²¹⁵ Following denial of a summary judgment motion by the defendant, the New Mexico Department of Human Services, the district court approved a consent decree. In denying the agency's summary judgment motion, the court addressed the question of abstention based upon comity and federalism with regard to the fed-

next friend to an infant, and others similarly situated, to challenge the provision of foster care in the metropolitan area of Jackson County, Missouri.).

213. *Id.* The order expressly and specifically required: (1) licensing of foster homes based upon the existence of qualifications of foster parents to provide "nurturing and safe homes," and mandatory training of foster parents; (2) proper matching of foster children with foster parents based upon the housing restrictions for the home and the foster parents' expressed preferences; (3) a pre-placement process and supervision of the foster home including actual and psychological preparation of the child for placement and preparation of the foster family for placement of the child and a monthly review of the child's placement to ascertain proper supervision and to "assist in identifying and rectifying any problems"; (4) prohibition on the use of improper punishment of foster children including a ban on corporal punishment, and assistance in the development of appropriate alternative forms of discipline; (5) investigation of and response to suspected incidents of abuse and neglect or unsuitable care; (6) elimination of overcrowding in foster homes and the provision of day care services when necessary; (7) the rate of reimbursement based upon the rate determined by the U.S. Department of Agriculture as necessary to provide adequate care for children in urban areas of the region of the country; (8) a maximum caseload size of twenty to twenty-five children assigned per social worker; (9) social service worker training; (10) medical care including dental and mental health services; (11) essential services necessary to adequately treat psychological, emotional and intellectual problems a foster child may suffer; (12) permanency planning with written service agreements with natural parents when possible, including a requirement that the agency must provide services to the natural parent agreed to by the parties when the goal is a return to the home and when a return is not appropriate, a plan for permanent placement in six months that may include adoption, the steps for which the decree clearly provides; and finally, (13) the reporting and monitoring element requires the agency to submit compliance reports to plaintiff's counsel semi-annually for five years and specifically outlines factors to be reported following the prescription of the order. *Id.* at 1031-43.

214. 575 F. Supp. 345 (D. N.M. 1983).

215. *Id.* at 348.

eral court's "involvement in the operations of state government" and stated simply that the state had failed to make a prima facie showing of facts necessary to apply the doctrine of abstention.²¹⁶ The court then critically analyzed the defendant's claim that the plaintiff had failed to show a liberty or property interest sufficient to establish a violation of due process.²¹⁷ Noting that the defendants failed to even argue the issue, the court embraced the plaintiff's arguments and stated:

'[P]roperty interests are not created by the Constitution, but rather are defined by existing rules or understandings that stem from an independent source such as state-law rules or understandings that secure certain benefits and that support certain claims of entitlement to those benefits.'²¹⁸ Construing the allegations of the complaint liberally, the Court cannot say . . . that the plaintiffs cannot prove any set of facts which would entitle them to relief'.²¹⁹

The court rejected, however, the plaintiff's claim that a liberty interest arises "not from any specific federal or state law, but rather is implicit in the constitutional guarantee of 'liberty'."²²⁰ The plaintiff had attempted to persuade the court that the asserted liberty interest was part of the protection courts have "traditionally provided in matters of family," but the court rejected that argument.²²¹ On the liberty issue, the court concluded:

[I]t cannot be seriously disputed that if the plaintiffs are entitled to certain benefits under state and/or federal law, and if these benefits have been denied by the defendants, the Due Process Clause is implicated . . . [T]he defendants have utterly failed to demonstrate they are entitled to judgment as a matter of law.²²²

Finally, the defendants apparently attempted to defend on grounds of immunity, claiming that the statutes and regulations allegedly violated vested them with "broad discretion." The court stated, "[t]his argument is patently frivolous."²²³ The court emphatically denied the

216. *Id.* at 350.

217. *Id.* at 350.

218. *Id.* at 351 (citing *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972)).

219. *Id.*

220. *Id.*

221. *Id.* at 352.

222. *Id.* at 354.

223. *Id.*

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defendant's motion for summary judgment, finding it "poorly conceived and unfounded." Subsequently, a consent decree was approved by the court.²²⁴

Lynch set an important precedent for maintaining a class action suit for declaratory judgment and injunctive relief when a placement agency has substantially failed in its responsibility to comply with the AFDC-FC program under the Social Security Act.²²⁵ *Shull* and *Wolfe* both contained similar due process arguments, each with a different angle, and each was successful.²²⁶ The goal of injunctive relief actions like *Lynch*, *Shull*, and *Wolfe* is to improve governmental inadequacies and failures that have created systemic harm.

IV. Conclusion: Implications for Florida

Abused and neglected children are pursuing negligence cases in state court. The successful tort actions nationwide, and those currently in process in Florida's courts, show that HRS owes a duty of care to the children entrusted to its care. They also indicate how abuse can be directly related to the negligence of the agency and how the agency's negligence can constitute a proximate cause of the child's injuries. Perhaps most importantly, plaintiffs have successfully established that the agency's actions were operational and not discretionary, thereby defeat-

224. *Id.* The New Mexico Consent Decree was entered in settlement of plaintiff's injunctive and declaratory claims and included expressly specific requirements for: (1) adoptive family recruitment; (2) training all foster parents and workers involved with foster care in New Mexico; (3) caseload maximums of no more than twenty families with thirty-five children in foster care; (4) planning and review including a permanency plan for returning home (including placement with relatives), transition/adoption, emancipation or independent living with an eighteen month limit on return to the parental home as a viable plan; (5) criteria for adoption including the process to terminate parental rights; (6) adoption matching procedures; (7) legal services necessary to carry out the provision of the decree and state law; (8) information and records system; (9) staff ratios and qualifications guidelines; and to monitor implementation of the decree, (10) a citizen review board was established and (11) payment by the state of all costs of monitoring was ordered. The court proclaimed the judgment to remain in force and effect with continuing jurisdiction retained by the court for enforcement for five years from the date of entry or until the department was in substantial compliance for one year after semi-annual reporting had commenced. The court retained the authority to extend its oversight beyond the five year period and to require quarterly reporting by the department at its expense if it failed to take aggressive steps to comply with the order. *Id.* at 354-65.

225. *Lynch*, 719 F.2d at 504.

226. *Shull*, 554 F. Supp. at 1030; *Wolfe*, 575 F. Supp. at 345.

ing any claim of governmental immunity.

Florida's courts would be overwhelmed if even a small percentage of those children and their families who appear to have viable claims file suit. When deciding *Yamuni*, the Supreme Court of Florida will be asked to determine if, in fact, HRS has a cloak of immunity greater than other agencies in Florida in cases of proven negligence.

In light of *Doe* and other cases, abused and neglected children in foster care in Florida could bring section 1983 claims against HRS in federal court based upon a child's constitutional right to be free from harm.²²⁷ A higher degree of culpability must be proven in federal court, and the agency's performance must be below a minimally required level,²²⁸ but the question of governmental immunity is apparently not a problem in federal courts.²²⁹ Based upon the decision in *Monell*, local governments are not immune from liability if a successful section 1983 claim is brought.²³⁰

A class action suit brought for injunctive relief and a declaratory judgment is the appropriate remedy to the government's failure to adequately fund, implement, and monitor federal and state mandates. The Federal Adoption Assistance and Child Welfare Act and Florida's foster care statutes clearly mandate a program to protect children from abuse and neglect. That program should promote family preservation when possible, through a system of temporary shelter in foster care, with children and family members receiving counseling and other supportive services. When reunification is impossible, adoptive or other permanent placement for children must be sought. Florida's acceptance of federal funds under the federal law requires compliance with the federal act.

As documented by advocacy groups, state consultants, HRS and the media, foster homes are dangerously overcrowded, and mandated services have been inadequate to meet the requirements of negotiated agreements for foster children.²³¹ HRS staffing is inferior in relation to recognized professional standards necessary to provide minimally acceptable job performances.

It is clear that the *Lynch* tests for injunctive relief and a declara-

227. *Doe*, 709 F.2d at 782.

228. *Id.*

229. *Monell*, 436 U.S. at 658.

230. *Id.*

231. BLUEPRINT, *supra* note 1; NAPA, *supra* note 11; SHRAC, *supra* note 18; Grand Jury Report, *supra* note 20; OSI, *supra* note 32.

tory judgment can be met in Florida. A class made up of foster children, foster parents and natural parents should easily be able to exhibit the likelihood of success on the merits, the first step necessary to establish in an action for injunctive relief.²³² In *Lynch*, the plaintiffs were able to show failure by the state of Massachusetts to substantially comply with the requirements of federal law to develop plans, provide necessary service, and make periodic reviews of placements with the necessary goals of reunification or permanency. Research shows Florida's record to be equally dismal, and plaintiffs should be able to successfully plead similar circumstances.

The second requirement for injunctive relief, the showing of irreparable injury to the plaintiff,²³³ is a fact of daily life for many foster children in Florida. When the court considers whether the harm which threatens our children outweighs the hardships which might be placed on the state in granting injunctive relief, the decision should be easy.²³⁴ This will only require the plaintiffs to prove that the long-term effects of program improvements in the foster care system, when balanced against the short-term effects of a possible loss of federal funding, outweighs any hardship which would be placed on the state by granting relief. Many of the cases successfully brought in other states applied the *Lynch* court standard. That standard is reflected in its statement that "the need for judicial sensitivity to these concerns (the state's loss of funds) does not justify abdication of judicial responsibility."²³⁵ If that standard is applied by a court reviewing the facts in Florida it would produce the same results.

Finally, a plaintiff must show that the public interest will not be adversely affected by the court's decision to provide injunctive relief.²³⁶ In Florida, it is clear that many children in foster care are not receiving the care required by law and public policy. Florida's citizens have an interest and a responsibility to ensure corrective action and thereby provide the tools for proper care of its children. The public interest can only be enhanced.

Often, duties owed to children and other members of society can only be enforced by our courts. The public policy embodied in laws enacted to prevent and ameliorate the effects of abuse and neglect of

232. *Lynch*, 550 F. Supp. at 332-37.

233. *Id.* at 338-39.

234. *Id.* at 339-40.

235. *Id.* at 339.

236. *Id.* at 340.

children must be taken seriously. A class action suit to compel compliance with federal and state laws may very well be in Florida's future.

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