

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

M.D., by her next friend, Sarah R.
Stukenberg, *et al.*,

Plaintiffs,

vs.

GREG ABBOTT, in his official capacity
as Governor of the State of Texas, et al.,

Defendants.

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CIVIL ACTION NO. 2:11-CV-00084

**DEFENDANTS’ OBJECTIONS TO SPECIAL MASTERS’
RECOMMENDATIONS**

Defendants make the following objections to the Special Master Recommendations to the Court (“Recommendations”) filed November 4, 2016 (Doc. 471).

1. Defendants object to the Recommendations in their entirety on the bases that:
 - a. Any injunctive remedy is improper because the Court’s underlying findings of class-wide constitutional violations are unsupported by reliable expert testimony or other competent, admissible evidence.
 - b. The findings of constitutional violations in the Court’s December 17, 2015, Memorandum Opinion (Doc. 368) are too vague to permit the remedies proposed in the Recommendations to be precisely tailored to cure those purported constitutional violations.
 - c. The Recommendations as a whole and each recommendation therein that refers to “risk of harm” derive from an incorrect articulation of the substantive due process right and duty owed to children in foster care and they thus are not tailored to cure a cognizable violation of foster children’s rights under the Constitution. Instead, the

Recommendations should be tailored to meet the appropriate standards that the Court articulated in its Memorandum Opinion. As the Court's opinion recognized, foster children have a substantive-due-process right to "personal security and reasonably safe living conditions"; and, to obtain relief under section 1983 on a substantive-due-process claim, a plaintiff must prove "that the state official acted or failed to act despite his knowledge of a substantial risk of serious harm." Mem. Op. pp. 15, 20 (quoting *Hernandez, ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880-81 (5th Cir. 2004)). Those are the standards that govern this case, and that the Special Masters should have tailored their recommendations to meet.

- d. The proposed remedies in the Recommendations are overbroad insofar as they are not narrowly tailored to redress violations of the constitutional duty owed to a child in foster care, but instead seek to implement what the Special Masters deem best practices, for which there is no constitutional duty.
- e. The Special Masters failed to demonstrate that their proposed remedies are the least intrusive into the administration of foster care by the Department of Family and Protective Services (DFPS).
- f. There is no evidence that the proposed remedies will, in fact, cure the alleged class-wide constitutional violations.
- g. The Appointment Order for the Special Masters (Doc. 379) violates Fed. R. Civ. P. 53 for the reasons stated in the objections Defendants made in their Opposed Motion to Stay (Doc. 370) and their Opposed Motion to Revoke Reference to Special Masters (Doc. 389). The Recommendations are invalid because they are the product of that improper appointment.

- h. The Recommendations fail to meet the requirement that every injunction must “describe in reasonable detail . . . the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(C).
 - i. The Recommendations do not satisfy the Fed. R. Civ. P. 23(b)(2) requirement that final injunctive relief is appropriate respecting the class as a whole.
 - j. Insofar as the Recommendations are made to apply on a class-wide basis, they are invalid because Plaintiffs failed to demonstrate compliance with the requirements of Fed. R. Civ. P. 23(a)(2) (commonality), 23(a)(3) (typicality), and 23(b)(2) (existence of appropriate class-wide remedy), both before and after trial.
 - k. Throughout the Recommendations the Special Masters provide their own descriptions or characterizations of testimony and documents in the evidentiary record and of the Court’s Memorandum Opinion. These descriptions and characterizations are outside the scope of the Appointment Order, are hearsay, and are not the best evidence of what is in the record. Fed. R. Evid. 801-02.
 - l. Defendants object that the Recommendations, if adopted by the Court, are open-ended as to time, fail to meet the requirements of Rule 65, and are tantamount to a de facto receivership for which no lawful showing has been made.
2. Defendants make the following additional objections that apply to specific clusters of provisions in the Recommendations:
 - a. In many instances the Recommendations refer to actions already being undertaken by DFPS and to policies DFPS already has in place. Defendants object to these Recommendations on the basis that injunctive relief, whether affirmative or prohibitory, must be remedial in nature and must address a violation as yet un-

- remedied. Affirmatively ordering actions that are already underway and policies that are already in place is not remedial. Further, references to existing policies/actions create ambiguity as to whether those existing policies or actions are adequate to address the goal or whether additional policies or actions are required. This objection applies to each of the following paragraphs in the Recommendations: 1.1, 1.2, 3.1, 4.1, 4.2, 4.3, 4.4, 12.1, 19.1, and 19.2.
- b. In many instances the Recommendations call upon DFPS to submit a plan instead of the Special Masters submitting their own proposed remedies as contemplated in the Court's Memorandum Opinion and Appointment Order. Defendants object to these recommendations on the basis that they improperly shift the burden of proof on remedy from the Plaintiffs to the Defendants. The entire progress of this case to date reflects a failure on the part of the Plaintiffs, their counsel, their experts, the Court (to date), and now the Special Masters directed to do so, to craft and demonstrate the effectiveness of a remedy. It is not Defendants' burden to prove Plaintiffs' remedy. Defendants also object on the basis that phrasing a remedy with reference to plans to be submitted by Defendants does not meet the specificity requirement of Fed. R. Civ. P. 65(d)(1)(B). These objections apply to each of the following paragraphs in the Recommendations: 2.1, 4.4, 5.1, 5.3, 7.1, 7.2, 11.2, 12.1, 13.1, 13.2, 13.3, 18.2, 19.1, 19.7, 20.1, 23.1, 24.1, 24.4, and 27.1.
- c. Vague terminology renders the Recommendations unenforceable under Fed. R. Civ. P. 65(d). This objection applies to the specified terms and phrases in the following paragraphs in the Recommendations:

1.1—"quality time"

1.2—“adequate training”

1.3—“as required”

2.1—“all the case information they need to serve children”

3.3—“adequate training”

4.3—“anonymously and privately”

4.4—“where warranted”

5.1—“working with . . . to facilitate,” “committing that PMC youth have safe, stable housing upon emancipation”

7.2—“address . . . traumatic events such as, for example”

11.1—“caseload standard”; specifically, given the Special Masters’ statement that “we do not recommend a fixed caseload cap,”: it is unclear whether DFPS would be in violation of an order adopting this “caseload standard” language if one or more caseworkers exceeded the proposed top-end range of 17 PMC cases per caseworker. To the extent that the number 17 is intended to represent the upper limit of a caseload range above which PMC caseworkers may not go, it constitutes a caseload cap, and DFPS objects to the imposition of a caseload cap on the basis that the Court has not drawn any line or made any finding that sets a constitutional limit beyond which caseloads may not go. What is more, no constitutional line drawing can be performed in this case because there is no evidence to show where the constitutional minimum standard or line on caseworker caseloads lies. In addition, objection is made to the use of the crude rubric of “caseworker caseloads” as opposed to the more suitable, multifactor, and nuanced rubric of “caseworker workloads” used by DFPS, which in the judgment of department professionals

more accurately and effectively reflects the appropriate metric for measuring the burden and level of work that caseworkers may efficiently handle to achieve positive outcomes for PMC children. The per capita approach that caseworker caseloads envisions is an overly simplistic and ineffective method for measuring accurately the real amount of work that PMC caseworkers perform on behalf of PMC children to achieve positive outcomes in the realms of health, safety, and well-being. And there is no proof or finding that that measuring by caseloads instead of workloads achieves results more in line with constitutional standards. Also, the recommendation that “DFPS complete Workload Studies for CVS workers every 5 years, using a methodology approved by the Court” is unclear because the methodology is not specified.

11.2—It is unclear whether the recommendation that “CVS staff who serve children in the PMC class have caseloads between 14 and 17” means the same thing as the recommended “caseload standard in the range of 14 to 17 PMC cases for CVS caseworkers” discussed above with respect to 11.1. To the extent the two phrases are intended to mean the same thing, the same objection discussed above in 11.1 applies; and to the extent they are intended to mean different things, it is unclear what those distinct meanings are. Also, “using a methodology approved by the Court” is unclear for the same reason as stated with respect to 11.1: the methodology is unspecified.

12.1—“to complete implementation,” “to address inadequate compensation”

13.1—“decrease,” “to substantially improve the percentage of”

13.2—“Work Study,” “at what point their PMC caseloads are manageable,”
“caseload standard”

16.1—“Workload Study,” “at what point RCCL Investigators’ and Inspectors’
caseloads are manageable”

16.2—“discrete cohort of staff,” “remote, rural, or substantially less populated
areas,” “impractical”

17.1—“conduct case readings . . . using a tool developed in consultation with the
Special Masters”

18.2—“expand the array of enforcement actions available to DFPS”

19.3—“investigate all reported incidents of sexual abuse by a child against a
child”; specifically, the terms “investigate” and “sexual abuse”

20.1—“strengthens,” “for example,” “fortify”

22.2—“family-like setting,” “for example”

22.3—“family-like setting,” “young”

22.4—“unrelated”

24.1—“for example”

24.2—“performance targets,” “expand”

28.1—“report . . . on . . . placement moves”

- d. Plaintiffs have sued the Commissioner of DFPS, the Executive Commissioner of HHSC and the Governor. They have not sued the Texas Legislature or the State of Texas. The actual defendants do not have the power or authority to enact legislation or appropriate funds. To the extent the Recommendations, if and as ordered, call for action requiring the passage of legislation, the appropriation of funds, or other measures

outside of Defendants' control, they are improper and cannot be enforced against the Defendants. This objection applies to each of the following paragraphs: 2.1, 4.4, 4.5, 5.1, 5.3, 11.1, 11.2, 12.1, 13.2, 16.1, 19, 21, 22, 23 and 31.1.

- e. In a number of instances the Recommendations include proposals the Special Masters say were generated in response to the Court's instruction to recommend provisions beyond the Court's Goals that are deemed necessary to cure the State's constitutional violations. In the Memorandum Opinion the Court instructed the Special Masters to be "mindful that Texas does not need to provide a perfect foster care system; just one that no longer violates the Constitution" (D.E. 368, p. 246), and to make recommendations beyond the Court's Goals "that are deemed necessary to cure the State's constitutional violations outlined in this Opinion" (*id.* at p. 250), and to protect foster children from "an unreasonable risk of harm." (*Id.* at p. 251, 252, and 254). The Special Masters, however, have expressly disclaimed application of any legal standard. ("This report does not address any legal issues; legal issues are reserved for the Court." Recommendations p. 1). Thus, the resulting recommendations are without reference to any applicable legal standard and are irrelevant. Further, the recommendations are not based on evidence properly before the Court, both as to underlying liability (both individual and class-wide) and as to effectiveness of remedy. These objections apply to each of the following recommendations: 2.1, 7.1-.2, 20.1 and 28.1.

3. Defendants make the following additional objections to the following specific Recommendations:

- Defendants object to recommendation 1.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that existing DFPS

policies or practices regarding caseworker visitation pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. The testimony of a few former foster children that they did not see their caseworkers privately and regularly does not establish that all PMC members will likely be harmed by a failure to see their caseworkers privately and regularly. Moreover, as the Special Masters acknowledge, CPS Handbook Policy 6311.2 already requires caseworkers' visits to be "conducted with the child alone and in privacy away from the caregiver, such as away from the home or in a separate room." Defendants further object to the implementation timeframe. Three months is insufficient time for DFPS to finalize a new policy and train thousands of caseworkers. Defendants further object because DFPS already conducts case reads to ensure the occurrence of quality face-to-face visits between CVS caseworkers and PMC children as part of its compliance with the federal Child and Safety Family Reviews.

- Defendants object to recommendation 1.2 as not being tailored to remediate a constitutional violation because no reliable evidence shows that existing DFPS policies or practices regarding caseworker training on child visitation pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. DFPS already trains all new caseworkers on all applicable

policies, including CPS Policy Manual 6311.2, as part of a robust classroom and field-based learning program. Defendants further object because three months is not enough time to develop policy, implement it, and train thousands of caseworkers. Additionally, the Special Masters recommended on several points that DFPS report its compliance to the Court on a semi-annual basis. The manpower it would take to submit these reports semi-annually would hamper DFPS in its efforts to fulfill its mission of protecting children. Each FTE devoted to compiling compliance reports is one less FTE serving clients. Defendants further object because DFPS already conducts case reads to ensure the occurrence of quality face-to-face visits between CVS caseworkers and PMC children as part of its compliance with the federal Child and Safety Family Reviews.

- Defendants object to recommendation 1.3 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the existing incidence of face-to-face visits between CVS caseworkers and PMC children poses a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object because DFPS already conducts case reads to ensure the occurrence of quality face-to-face visits between CVS caseworkers and PMC children as part of its compliance with the federal Child and Safety Family Reviews.
- Defendants object to recommendation 2.1 as not being tailored to remediate a constitutional violation because there is no reliable evidence that DFPS's

existing systems for maintaining and accessing PMC children's case records pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. The Named Plaintiffs' experiences are not typical of PMC children generally, and the Named Plaintiffs' case files are not typical of PMC children's case files generally. Defendants further object because of the logistical challenges of implementing the full recommendation. CASA staff already has access to the key portions of a child's record in IMPACT. It is not practical or fair to require third parties such as CPAs, who operate much smaller businesses without the same level of IT capabilities, to completely change their software to match that of DFPS. DFPS depends on the highest level quality CPAs and does not wish to impose unnecessary disincentives on these often small, faith-based, and/or non-profit organizations. Furthermore, granting full access to third parties, such as CASA staff, CASA volunteers, and SSCC staff, might violate confidentiality laws DFPS is charged to uphold to protect the privacy and safety of the children it serves. DFPS records contain many different types of records which are only permitted to be shared with varying individuals, depending on the type of record. Having to grant full case record access to third parties would disable DFPS from ensuring that only appropriate persons access the information permitted under the various confidentiality laws binding the agency. This recommendation discounts the complexity of the many types of records maintained by CPS and

RCCL. This recommendation could potentially violate at least attorney-client privilege, confidentiality of FBI criminal background check results, and state law protecting the identity of a reporter of abuse or neglect. This could also lead to comingling of records that would be prohibited by federal law, such as substance abuse treatment record protections. DFPS also has no ability to force former employees to maintain their contact information. Further, any integration of IMPACT and CLASS would be even more difficult and inefficient as CLASS will be housed at HHSC following the consolidation, subject to different legislative funding requests and different methods of IT systems. Ultimately, this recommendation does not address a problem experienced by caseworkers. Caseworkers in the field do not review printed copies of case records, instead they view the records digitally, as the system was designed for. DFPS objects to the timeframes and monitoring methodology recommended by the Special Masters. All parties who are entitled to case information on PMC children already have access to it. DFPS further objects to the recommended timeline to submit a plan due to timing constraints associated with legislative funding requests.

- Defendants object to recommendation 3.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policy or practices pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. As the Special Masters

acknowledge, section 6316 of the CPS Policy Manual already requires that a child be photographed upon entering substitute care. Defendants further object to the recommendation of a policy review and a case record review by the Special Masters because DFPS already conducts case-record reviews that specifically cover this measure. An additional case-record review is an unneeded and ill-advised expense. A case record review of all existing PMC cases is an unneeded and ill-advised expense, as it would require considerable FTE manpower to conduct a manual review of individual case files.

- Defendants object to recommendation 3.2 as not being tailored to remediate a constitutional violation because there is no reliable evidence that the absence of a policy requiring semi-annual photos taken of children under age 3 poses a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. DFPS objects to the recommendation that the Special Masters develop methodology as taking a photo on the DFPS-issued smart phone and uploading it to IMPACT is such a basic task as to not require any methodology.
- DFPS objects to a review of training materials as recommended by the Special Masters because it is an unnecessary diversion of funds from the provision of foster care. Defendants object to recommendation 3.3 because DFPS already trains its caseworkers to take pictures with their smart phones. DFPS believes

that taking a photo on the DFPS-issued smart phone and uploading it to IMPACT is such a basic task as to not require any special review of its training.

- Defendants object to recommendation 4.1 because DFPS already operates a 24-hour abuse and neglect hotline, Statewide Intake, no reliable evidence shows that DFPS's existing policy or practices regarding reporting abuse or neglect pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object to the proposed review of hotline operations by the Special Masters as being unnecessary and an unnecessary diversion of funds from the provision of foster care. The Texas Sunset Advisory Commission conducted a thorough agency wide review and had no suggestions to improve Statewide Intake in its final 2015 report.
- Defendants object to recommendation 4.2 as not being tailored to remediate a constitutional violation because the right of foster children to anonymously report abuse, neglect, exploitation, or violation of personal rights is already enumerated in Minimum Standards (as the Special Masters noted) at 40 Texas Administrative Code 748.1101(b)(29) and at 40 TAC 749.1003(b)(30), no reliable evidence shows that DFPS's existing policy or practices regarding reporting abuse or neglect pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object

that having the Special Masters conduct a review of Minimum Standards and other related material Masters as being unnecessary and a waste of agency resources.

- Defendants object to recommendation 4.3 as not being narrowly tailored to remediate a constitutional violation because the right of foster children to anonymously report abuse, neglect, exploitation, or violation of personal rights is already enumerated in Minimum Standards (as the Special Masters noted), no reliable evidence shows that DFPS's existing policy or practices regarding reporting abuse or neglect pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants' further object that having the Special Masters conduct a review of Minimum Standards and other related material will result in an unnecessary drain on funds intended to provide foster care.
- Defendants object to recommendation 4.4 as not being tailored to remediate a constitutional violation because DFPS already uses monthly reports to track initiations, extensions and timely closures of abuse and neglect cases in the data warehouse of all operations, which include PMC children; and no reliable evidence shows that DFPS's existing policy or practices regarding reporting abuse or neglect pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions. Each call to Statewide Intake is screened and investigated. Defendants further object to the

requirement to report to the court semi-annually. As mentioned above, the resources it would take to submit these reports semi-annually would hamper DFPS in its efforts to fulfill its mission of protecting children. Each FTE devoted to compiling compliance reports is one less FTE serving clients. Furthermore, a qualitative case record review by the Special Masters and a review of hotline screening would waste tremendous taxpayer resources and yield, at best, only marginal improvements to a time-tested system. Thus, the proposed remedy is unlikely to cure any purported constitutional deficiencies as this information alone could not be used to prevent future maltreatment. DFPS objects to a data plan to the extent it requires new technology or IT capabilities that the agency is not currently funded to address.

- Defendants object that the recommendation 4.5 to require landline phones in all facilities where PMC children are housed is not tailored to remediate a constitutional violation. No reliable evidence shows that the absence of a policy requiring landline phones poses a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Moreover, DFPS already has policies and abuse reporting structures in place that address this concern. DFPS is also concerned about imposing additional costs on individual foster homes. Adding costs will discourage people from becoming foster parents and reduce the available placement array.

- Defendants object to recommendation 4.6 as not being tailored to remediate a constitutional violation because no reliable evidence shows DFPS's existing policies and practices regarding reporting suspected abuse and neglect cause PMC children to face a substantial, class-wide risk of being deprived of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. DFPS already trains all staff to report maltreatment and requires CPAs, SSCCs, and GRO and RTC providers to train caregivers to do the same. DFPS covers the reporting requirement in its CPS Professional Development (CPD) training (at the time of trial called Basic Skills Development (BSD)) for new caseworkers. DFPS further requires all facilities and Child-Placing Agencies that it contracts with to follow all applicable minimum standards which also require reporting of abuse or neglect. State law already requires all adults, even outside of the child welfare field, to report suspected or actual abuse or neglect of a child. See Texas Family Code 261.101. The Special Masters' recitation of "multiple occasions" of abuse allegations not being relayed and investigated does not demonstrate a class-wide constitutional violation or merit class-wide relief.
- Defendants object to the group of recommendations 5.1 as not being tailored to remediate a constitutional violation in the form of serious harm occurring or threatening to occur *within* foster care. Even putting aside the point that this recommendation addresses purported risks of harms occurring outside of foster care, no reliable evidence shows that DFPS's existing policies and practices

cause PMC children to face a substantial, class-wide risk of being deprived of personal security and reasonably safe living conditions. The relevant policies and practices corresponding to specific recommendations are discussed below.

- Defendants object to recommendation A through C because transition Planning already begins at age 14 for youth in DFPS conservatorship. CPS Handbook Section 6274 outlines the requirements for beginning transition planning with youth at their permanency conference and at each child's plan review. The transition plan covers topics related to permanency, connections, education, medical and therapeutic needs, future housing plans, and employment in order to begin education and preparing the youth for a successful transition to adulthood in the event that positive permanency is not achieved.
- Defendants object to recommendation D because no reliable evidence shows that mandating driver's education classes is necessary to provide PMC children with personal security and reasonably safe living conditions, or that PMC children face a substantial, class-wide risk in the absence of such a policy. Defendants further object because there are many instances where driver's education is not appropriate for a particular child. Finally, the proposed policy is unnecessary because when a PMC child meets the necessary qualifications and opts to take driver's education, DFPS already covers the costs of instruction.
- Defendants object to recommendation E as not being tailored to remediate a constitutional violation because no reliable evidence shows that existing DFPS policies or practices pose regarding expunction or sealing of criminal records

pose a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions in foster care, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. DFPS objects to this recommendation because it is unnecessary. To the extent that the child has an attorney ad litem for the purpose of expunction and that the child wants to pursue an expunction, DFPS already cooperates with the attorney ad litem to facilitate that process.

- Defendants object to recommendation F as not being tailored to remediate a constitutional violation. There is no reliable evidence showing that PMC children who lack a birth certificate face a substantial, class-wide risk of being deprived of personal security and reasonably safe living conditions. Moreover, ensuring that children exit foster care with a birth certificate does not address a constitutional harm occurring in foster care.
- Defendants object to recommendation G as not being tailored to remediate a constitutional violation. First, there is no reliable evidence showing that DFPS's existing policies or practices regarding disability or SSI benefits poses a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Moreover, DFPS already employs SSI Coordinators to assess youth for SSI eligibility and ensure that all paperwork is compiled for

their SSI applications. Finally, assessing children for disability or SSI benefits does not address a constitutional harm occurring in foster care.

- Defendants object to recommendation H as not being tailored to remediate a constitutional violation. Requiring Defendants to "commit" that PMC youth have safe, stable housing upon emancipation does not address a constitutional harm occurring in foster care. Once a child exits foster care, and chooses not to participate in supervised independent living or extended foster care, DFPS has no legal means to compel youth to reside in such living arrangements or funding to commit for housing needs outside of what is currently funded after foster care. Defendants further object to the vagueness of the term "committing," i.e., whether this recommendation, if adopted, would require DFPS to provide housing for former foster youth.
- Defendants object to recommendation 5.2 as not being tailored to remediate a constitutional violation because no reliable evidence shows that children who lack a birth certificate upon entering the PMC are at risk of being deprived of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Texas Family Code 264.121 requires that DFPS ensure each youth receive a copy of his or her birth certificate at age 16. Federal law also requires each youth being discharged from foster care receive a copy of his or her birth certificate unless the child has been in foster care for less than six months. See 42 U.S.C.A § 675(5)(I). Outside of the statutory provisions, there are various scenarios where a caseworker can

request a birth certificate for a child in care. Otherwise, DFPS has a screenshot of the child's birth certificate for all children in care.

- Defendants object to recommendation 5.3 on several bases. First, it is not tailored to remediate a constitutional violation because no reliable evidence shows that children who lack a DFPS-created email account are at risk of being deprived of personal security and reasonably safe living conditions. Second, this recommendation does not address a risk of harm that purportedly occurs in foster care. Third, it is not clear which personal documents and records the recommendation covers.
- Defendants object to the conclusion 6 that “All PMC children shall be entitled to an attorney ad litem and a CASA volunteer” because no reliable evidence shows that the absence of a policy requiring an attorney ad litem and a CASA volunteer creates a substantial, class-wide risk of being deprived of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters’ recommendation will eliminate that purported constitutional harm. Moreover, DFPS has no statutory authority over ad litem appointments, and this interferes with judicial discretion regarding appointments. Further, DFPS would face a conflict of interest if it were to become involved in these appointments as in Texas, attorneys ad litem are appointed to represent the legal interests of the child. Counties are responsible for appointing and paying attorneys ad litem. Finally, DFPS has no authority over CASA, a non-profit organization that does not operate in all Texas counties and may not have the resources to represent all PMC children.

- Defendants object to recommendation 7.1, the proposed HealthCare Plan, because it is not narrowly tailored to remedy a constitutional violation because no reliable evidence shows that DFPS's existing policies and practices regarding healthcare provision cause PMC children to face a substantial, class-wide risk of being deprived of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. No reliable evidence at trial showed that existing policy fails to protect PMC children. DFPS further objects to the proposed plan because it is unnecessary, duplicates existing efforts and statute in Chapter 266 of the Texas Family Code, and potentially interferes with the statutory obligations and activities of a different agency, HHSC, and contractual obligations between HHSC and a third party health provider, STAR Health.
- Defendants object to recommendation 7.2 as not being tailored to remedy a constitutional violation. No reliable evidence shows that DFPS's existing policies and practices regarding traumatic events cause PMC children to face a substantial, class-wide risk of being deprived of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.
- Defendants object to recommendation 11.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a "caseload standard" of 14 to 17 children poses a substantial, class-wide risk of

depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Further, to the extent that the number 17 is intended to represent the upper limit of a caseload range above which PMC caseworkers may not go, it constitutes a caseload cap, and Defendants object to the imposition of a caseload cap on the basis that the Court has not drawn any line or made any finding that sets a constitutional limit beyond which caseloads may not go. Nor can such constitutional line drawing can be performed on this issue because there is no evidence to show where the constitutional minimum standard or line on caseworker caseloads lies, below which PMC children are deprived of personal security and reasonably safe living conditions. In addition, DFPS objects to the use of the rubric of "caseworker caseloads" as opposed to the more nuanced rubric of "caseworker workloads" used by DFPS, which in the judgment of department professionals more accurately and effectively reflects the appropriate metric for measuring the burden and level of work that caseworkers may efficiently handle to achieve positive outcomes for PMC children. The per capita approach that caseworker caseloads envisions is an overly simplistic and ineffective method for measuring accurately the real amount of work that PMC caseworkers perform on behalf of PMC children to achieve positive outcomes in the realms of health, safety, and well-being. And there is no proof that measuring by caseloads versus workloads achieves results more in line with constitutional standards. Defendants further object to this recommendation

because DFPS does not have sufficient funding to hire the number of CVS caseworkers and corresponding support staff that would be required for this recommendation, and only the Legislature can appropriate those funds.

- Defendants object to the graduated caseload ranges and implementation ranges of Recommendation 11.2. The caseload ranges are not based on any constitutional standard, are not meaningful as a workload measure, and place a severe financial and resource burden on other stages of service.
- Defendants object to recommendation 12.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that CVS caseworker turnover poses a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object to the recommendation because it is impossible to determine appropriate caseload ranges for new workers due to the individual needs of new workers and the varying levels of complexity within each case itself. DFPS does not have enough funds to hire enough CVS caseworkers to meet the recommended ratio, cannot require the Legislature to appropriate additional funds, and cannot divert existing funds from elsewhere in the agency without inhibiting DFPS's ability to protect and serve PMC children.
- Defendants object to recommendation 13.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policies and practices regarding proximity of placements poses a substantial, class-

wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.

- Defendants object to recommendation 13.2, the interim caseload range for ISY workers, because it is not based on safety for children and is not tailored to remediate a constitutional violation. There is no reliable evidence supporting that the proposed interim standard of 22-25 children per ISY worker is the constitutional minimum needed to prevent a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions. Moreover, all ISY workers are currently carrying cases, and there is only one vacancy, so as of November 18, 2016, an additional 125 FTEs would be needed to achieve a caseload of 22 children. DFPS would need to hire 97 more caseworkers for a caseload of 25 children. DFPS does not have the funds to hire the number of additional ISY workers needed to achieve the recommendation and does not have the authority to require the Legislature to appropriate funding. Attempting to achieve the caseload recommendations without additional funding will substantially reduce resources needed for other stages of service, inhibiting DFPS's ability to protect and serve PMC children.
- Defendants object to recommendation 13.3 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policies and practices regarding ISY workers and their interaction with PMC children poses a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable

evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.

- Defendants object to recommendation 13.4 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policies and practices regarding caseworker visitation present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Moreover, it is a great expense of cost and time to work on other cases for the primary caseworker to travel long distances to visit the child in person quarterly, and foster homes or facilities may not readily have the technological resources available to facilitate virtual visit via Skype, Facetime, or videoconferencing.
- Defendants object to recommendation 16.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the caseloads of RCCL investigators and inspectors present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. As with CVS caseworker caseloads, the inability of both the Court and the Special Masters to identify a constitutional maximum for caseloads means that any remedial relief cannot be narrowly tailored to bring caseloads within that purported constitutional limit. Defendants' further object as a RCCL workload

study is not necessary because caseloads are already manageable and turnover is very low. Defendants object to retaining an expert as this drains resources unnecessarily because existing FTEs who could perform the study.

- Defendants object to recommendation 16.2 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the caseloads of RCCL investigators and inspectors present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants object to this recommendation as it interferes with the agency's ability to deploy human resources as staffing, policy, and geographical needs at the time dictate.
- Defendants object to recommendation 17.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS policies and practices regarding RCCL investigations present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. DFPS further objects as this recommendation does not indicate a benchmark or other measure of finality to determine when the recommendation has been satisfied.
- Defendants object to recommendation 18.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS policies and practices regarding RCCL corrective actions present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe

living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. There is no call for the additional expenditure on IT changes for information that is readily available to the conservators of PMC children and those making placement decisions via our existing automation system.

- Defendants object to recommendation 18.2 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS policies and practices regarding enforcement actions present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.
- Defendants object to recommendation 19.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy generally requiring single-child placements for children who have been sexually abused presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object to this recommendation as impractical because there may not be enough single-home placements available to accommodate every PMC child that has been sexually abused. Finally, Defendants object because the district court orders the child's placement, not DFPS.

- Defendants object to recommendation 19.2 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policies or practices present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.
- Defendants object to recommendation 19.3 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policies or practices present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants object that "negligent placement" is not a valid finding of neglect as defined in rules.
- Defendants object to recommendation 19.4 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy requiring children who have exhibited "sexually aggressive behavior" to be labelled as such presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.
- Defendants object to recommendation 19.5 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy requiring children who have been sexually abused to be labelled as

such presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.

- Defendants object to recommendation 19.6 for the reasons stated in 19.4 and 19.5 above.
- Defendants object to recommendation 19.7 as not being tailored to remediate a constitutional violation because no reliable evidence shows that PMC children face a substantial, class-wide risk of maltreatment, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.
- Defendants object to recommendation 19.8 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy requiring a documented safety assessment before children who have exhibited "sexually aggressive behavior" can be placed with other children presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.
- Defendants object to recommendation 19.9 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy requiring an individualized needs assessment for every PMC child who has been sexually abused presents a substantial, class-wide risk of depriving

PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object because an "individualized needs assessment" is unclear, and because a district court orders the child's placement, not DFPS.

- Defendants object to recommendation 19.10 as not being tailored to remediate a constitutional violation because no reliable evidence shows that monthly, PMC-specific maltreatment reports are necessary to prevent a substantial, class-wide risk of maltreatment among PMC children. Moreover, the manpower it would take to submit monthly reports would hamper DFPS in its efforts to fulfill its mission of protecting children. DFPS does not currently collect maltreatment data separately within the PMC. Instead, RCCL reports annually in the public DFPS Data Book all substantiated cases of abuse or neglect, regardless of TMC or PMC stage, or whether in conservatorship at all. The Each FTE devoted to compiling compliance reports is one less FTE serving clients. Ultimately, reporting this information is unlikely to increase child safety or reduce maltreatment.
- Defendants object to recommendation 20.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's policies and practices regarding placement of children with different service levels present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm.

- Defendants object to recommendation 22.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's policies and practices regarding monitoring and oversight of placements present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. DFPS objects as this recommendation is broader than the Court's order. Further, DFPS objects as this prevents children of varying service levels to learn from and model good behavior from other children.
- Defendants object to recommendation 22.2 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's policies and practices regarding family-like placements present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object to the proposed timelines due to difficulties in increasing capacity, which is a voluntary effort from the foster family. Also, as noted above, a court with jurisdiction over the child welfare lawsuit orders the child's placement, not DFPS. This recommendation conflicts with pending federal legislation, H.R. 5456. DFPS further objects in that the recommendation's exceptions are too narrow and could disrupt or harm placements for children such as sibling groups with under four siblings.

- Defendants object to recommendation 22.4 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy generally prohibiting same-room placements of unrelated children more than three years apart in age presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object that this recommendation will disrupt existing, stable placements; and because the court with jurisdiction over the child welfare lawsuit orders the child's placement, not DFPS.
- Defendants object to recommendation 23.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy generally requiring sexually abused children to be placed in single-child placements presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Defendants further object to this recommendation as impractical because there may not be enough single-home placements available to accommodate every PMC child that has been sexually abused. Finally, Defendants object because the district court orders the child's placement, not DFPS.
- Defendants object to recommendations 24.1, 24.2, 24.4, as not being tailored to remediate a constitutional violation because no reliable evidence shows that

DFPS's existing policies and practices regarding the agency's placement array present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendations will eliminate that purported constitutional harm.

- Defendants object to recommendation 24.3 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's occasional use of overnight office placements presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendation will eliminate that purported constitutional harm. Moreover, adopting this recommendation would present needless operational obstacles for DFPS. It may be appropriate to use a non-regulated location placement on a temporary basis, for example, when a child is removed in the middle of the night in a rural town or will then be transported to a different state in the morning.
- Defendants object to recommendation 25.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that tracking and publishing data on the number of biological and adopted children in each placement facility is necessary to provide PMC children with personal security and reasonably safe living conditions.
- Defendants object to recommendation 27.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows judicial oversight of

Foster Care Redesign is necessary to provide PMC children with personal security and reasonably safe living conditions.

- Defendants object to recommendation 28.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that DFPS's existing policies and practices regarding placement moves and array present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendations will eliminate that purported constitutional harm.
- Defendants object to recommendation 30.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that housing more than 8 children in a foster group home presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable evidence shows that adopting the Special Masters' recommendations will eliminate that purported constitutional harm. Defendants further object because this recommendation lacks an exception for any current remaining foster group homes, and adopting it will disrupt those current placements.
- Defendants object to recommendation 30.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that foster group homes present a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions, and no reliable

evidence shows that adopting the Special Masters' recommendations will eliminate that purported constitutional harm.

- Defendants object to recommendation 31.1 as not being tailored to remediate a constitutional violation because no reliable evidence shows that the absence of a policy requiring 24-hour awake-night supervision in foster group homes presents a substantial, class-wide risk of depriving PMC children of personal security and reasonably safe living conditions.

Defendants request that these objections be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, a true and correct copy of the foregoing document has been filed in accordance with the Electronic Document Filing System of the Southern District of Texas, thus providing service to all participants.

/s/ Thomas A. Albright
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