

BRAAM UPDATE

BRAAM V. STATE OF WASHINGTON HELD THAT FOSTER CHILDREN HAVE A CONSTITUTIONAL RIGHT TO SAFETY

In December 2003, the Washington Supreme Court held, “that foster children have a constitutional substantive due process right to be free from unreasonable risk of harm and a right to reasonable safety. To be reasonably safe, the State, as custodian and caretaker of foster children, must provide conditions free of unreasonable risk of danger, harm or pain, and must include adequate services to meet the basic needs of the child.”¹⁶⁹ The court held that the standard to be applied in determining whether substantive due process rights have been violated is that applied by the U.S. Supreme Court in *Youngberg v. Romeo* - did the state’s conduct fall substantially short of the exercise of professional judgment, standards, or practices.¹⁷⁰

Goals of 2004 Settlement Agreement in *Braam v. State of Washington*

On July 31, 2004 the plaintiffs¹⁷¹ and the state of Washington¹⁷² in *Braam v. State of Washington*¹⁷³ reached a settlement agreement (the “Settlement Agreement”) consenting to the following specific, measurable and enforceable goals for children in the custody of DCFS:

- Providing each child with a safe and stable placement;
- Providing better mental health assessment & treatment;
- Improving foster parent training and information;
- Providing safe and appropriate placements;
- Placing siblings together unless a compelling reason not to; and
- Improving the quality & accessibility of services to adolescents.¹⁷⁵

The Settlement Agreement established an oversight panel, known as the Braam Panel (the “Panel”¹⁷⁶), to monitor progress toward these goals.

Panel found Lack of Compliance by State

¹⁶⁹ *Braam v. State of Washington*, 150 Wn.2d 689, 700, 81 P.3d 851 (2003) (class action suit brought by current and former foster children who sought damages for harm suffered as a result of multiple placements while in the custody of DCFS).

¹⁷⁰ *Braam v. State of Washington*, 150 Wn.2d 689, 703-04, 81 P.3d 851 (2003), relying on *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452 (1982).

¹⁷¹ Plaintiffs have developed a website that describes the history of the *Braam* case and current progress and developments. It may be accessed at <http://www.braamkids.org/501.html>

¹⁷² The State of Washington, Children’s Administration describes the Braam settlement and CA’s efforts at compliance at http://www.dsbs.wa.gov/ca/about/imp_settlement.asp

¹⁷³ *Braam v. State of Washington*, 150 Wn.2d 689, 712, 81 P.3d 851 (2003) (class action suit brought by current and former foster children who sought damages for harm suffered as a result of multiple placements while in the custody of DCFS).

¹⁷⁵ *Braam v. State of Washington* Final Settlement, July 31, 2004, available at: <http://www.braampanel.org/SettlementAgreement.pdf>

¹⁷⁶ See <http://www.braampanel.org/>

The Panel exercised its authority to issue an Implementation Plan, which defined specific and enforceable measures of performance for DSHS. Performance is gauged by the agency's compliance with action steps, benchmarks, and outcomes developed by the Panel.¹⁷⁷ The Settlement Agreement requires the Panel to issue Monitoring (progress) Reports regarding the settlement every six months.¹⁷⁸ In March 2006, the Panel released its first monitoring report. It concluded that the agency had not completed 32 out of 45¹⁷⁹ "action steps" that were to be completed by the end of 2005.¹⁸⁰

The Panel, as called for in the Settlement Agreement, developed professional standards in March 2007 by which the practice of social workers and administrators would be measured in carrying out their work. These were to be used in enforcement proceedings and were based on Council on Accreditation (COA) standards.¹⁸¹

On January 22, 2007, the Department released comprehensive statistics showing the agency's level of compliance with annual benchmarks set by the Panel in the Braam Implementation Plan.¹⁸² The data showed that the Department failed to reach all measurable statistical benchmarks that it was required to meet by June 30, 2006, in the following areas:

- **Foster homes** - Increasing the number of beds available to children in care;
- **Placement stability** - Decreasing the number of youth experiencing less than three placements in their first few years in care;
- **Kinship care** - Increasing the number of kinship care providers;
- **Sibling separation** - Increasing the number of siblings placed together;
- **Health care** - Increasing the timeliness of health screening, assessment and services;
- **Runaways** - Reducing runaway events and time as a runaway; and
- **Foster parent training** - Increasing the in-service training to foster caregivers.

In April 2007, the Braam panel released its Monitoring Report which for the first time released benchmark data. The benchmark data revealed that DSHS had failed to reach required benchmarks in all six areas¹⁸³ of the Settlement Agreement.¹⁸⁴ Furthermore, the agency acknowledged to the Panel that it had "not yet provided the Panel with sufficient information to enable the Panel to accurately track compliance with the benchmark as required under the settlement agreement..."¹⁸⁵ The Panel treated absent data as not meeting benchmarks in those areas. As of December 2007, the Panel had rejected three consecutive compliance plans from the agency on caseloads, 30 day visits, and emergency respite care.

¹⁷⁷On July 3, 2008, the Panel issued a Revised Braam Settlement Implementation Plan.
<http://www.braampanel.org/ImpPlanREVJuly08.pdf>

¹⁷⁸ Monitoring reports were issued by the Panel on March 2006; September 20, 2006; April 17, 2007; October 4, 2007; and October 2008. "The Implementation Plan is released simultaneously to the parties and the public. In the case of Monitoring Reports, the parties have agreed that CA and the plaintiffs will receive preliminary reports and be given time to comment before the documents are released to the public. Panel reports released for public distribution will be posted on the website; individuals and organizations can sign up to receive email alerts when new material is posted." These documents may be accessed at <http://www.braampanel.org/reports.asp>

¹⁷⁹ This constitutes a rate of incompleteness over 70%.

¹⁸⁰ <http://www.braampanel.org/MonRptMar28.doc>

¹⁸¹ Braam professional standards may be accessed at <http://www.braampanel.org/ProfStandards0307.doc>. Part of the Panel's rationale in selecting COA standards was based on the fact the CA was then pursuing COA accreditation. As OFCO discussed earlier in this report, that is no longer the case.

¹⁸² You may access the Department's most recent Braam Performance Report: FY 05 –FY07 with May 08 Update at http://ca.dshs.wa.gov/intranet/uploadedFiles/StateReportFY07_v2.doc

¹⁸³ Placement stability, mental health, foster parent training, unsafe/inappropriate placements; sibling separation, and adolescents.

¹⁸⁴ <http://www.braampanel.org/MonRptApr07.doc>

¹⁸⁵ <http://www.braampanel.org/MonRptApr07.doc> at p. 44.

Over the past year, OFCO continued to attend the quarterly meetings of the Panel, review the progress reports of the Panel, and monitor Children's Administrations' duty to deliver family and children's services to ensure children's health and safety and preserve families.

Plaintiffs Returned to Court in 2008 to Seek Enforcement of Settlement

In our prior Annual Report issued in December 2007, the Ombudsman reported on the intent of plaintiffs to return to court in the months ahead to seek enforcement of the *Braam* Settlement Agreement. As anticipated, on January 18, 2008, the plaintiffs filed a Motion to Enforce the Settlement Agreement reached in July 2004 with regard to four key areas: safety,¹⁸⁶ caseload sizes,¹⁸⁷ sibling contact,¹⁸⁸ and child health and education screenings (falls under mental health area).¹⁸⁹ The plaintiff's motion was based on findings made by the Panel that the Department was not in compliance with the Settlement Agreement.¹⁹⁰

Judge Agreed with Plaintiffs that Department had not Complied with Settlement Agreement

On June 30, 2008, Whatcom County Superior Court Judge Charles R. Snyder found that DSHS had violated the Settlement Agreement and on September 24, 2008, the court entered its written order.¹⁹¹ The Judge ruled that DSHS was out of compliance with the Settlement Agreement by not meeting the standards, the benchmarks, or actions plans in the four key areas that were the subject of plaintiff's motion: monthly contact between case workers and foster children, sibling visits, appropriate case load ratios, and Child Health and Education Tracking (CHET) screens. The court found that DSHS "has fallen well short of its obligation to provide sufficient information to accurately track their compliance with outcomes, benchmarks, and actions steps"¹⁹²

The court also found that before the enforcement motion was filed, DSHS had acknowledged its noncompliance in these areas. The agency attributed this partly to a lack of funding or resources. Since that time, the Legislature has provided additional funding in the 2008 supplement budget for the hiring of additional caseworkers, contracts for sibling visits, and the hiring of 12 additional CHET screeners.

The Judge granted the agency until July 30, 2008, to draft detailed compliance plans in the areas of monthly visits, lowering social worker caseloads, and CHET screens.¹⁹³ CA sent proposed compliance plans for the

¹⁸⁶ Plaintiffs asserted that more than 60 percent of foster children were not receiving monthly visits from caseworkers and that the agency failed to keep detailed data on caseworker visits.

<http://braamkids.org/PlaintiffsReleaseReturntoCourt.pdf>

¹⁸⁷ Plaintiffs asserted that the statewide average for foster care caseworkers is 25 cases and noted that professional standards call for 18 cases per worker. <http://braamkids.org/PlaintiffsReleaseReturntoCourt.pdf>

¹⁸⁸ Plaintiffs asserted that although the Settlement Agreement required twice monthly visits between siblings, less than half of siblings were receiving them and that the number of children placed with siblings was actually declining.

<http://braamkids.org/PlaintiffsReleaseReturntoCourt.pdf>

¹⁸⁹ Plaintiffs asserted that more than two-thirds of foster children were not receiving required Child Health and Education Track (CHET) screens within the required 30-day time period.

<http://braamkids.org/PlaintiffsReleaseReturntoCourt.pdf>

¹⁹⁰ The Settlement Agreement creates a rebuttable presumption that findings by the Panel are correct. *Braam v. State of Washington* Final Settlement may be accessed at <http://www.braampanel.org/SettlementAgreement.pdf>

¹⁹¹ September 24, 2008 Order on Children's Revised Motion to Enforce Settlement Agreement.

¹⁹² The Court's June 30, 2008 Oral Ruling on Motion to Enforce Settlement, pp 17-18. OFCO has found that the insufficiency of date presented by CA to the Panel and to plaintiffs has been a recurring concern raised by the Panel, plaintiffs, and other stakeholders during the course of the Braam meetings. This has added to the complexity of tracking progress and holding CA accountable for certain performance measures the agency agreed to in the Settlement Agreement.

¹⁹³ The court ruled that if the Panel did not accept the proposed compliance plan in a particular area, CA had an additional 60 days to submit a revised compliance plan that is acceptable to the Panel. Within 90 days of the acceptance

other three benchmarks to the Panel on July 30, 2008.¹⁹⁴ These have undergone revision with input from the Panel and plaintiffs. In the area of sibling visits, the agency had already submitted an approved sibling visit compliance plan prior to the enforcement motion. However, the court required the agency with 90 days from June 30, 2008 “to demonstrate substantial improvement towards compliance”¹⁹⁵ with the sibling visitation plan.

Current Status on Compliance

Monthly visits

The Panel approved CA’s compliance plan and visit policy submitted on August 29, 2008 and noted in its most recent Monitoring Report (October 2008) that CA implemented on September 1, 2008 the policy requiring monthly visits and visits in the first week of placement.¹⁹⁶ OFCO is conducting random checks of cases brought to our attention through our complaint process to determine whether the agency is complying with this mandate. In those cases where we find that CA is not meeting its duty to check on children every month, we are bringing this to the attention of supervisors and requesting that corrective action be taken.

Sibling visits

As already stated, this issue was not one of the benchmark areas in which the Judge required a compliance plan. However, it was raised in plaintiff’s Motion to Enforce the Settlement so we address it here. The Panel found that policies and protocols to develop a framework for visitations between parents, children, and sibling were completed as of September 1, 2008. The Panel replaced the requirement for quarterly reporting with monitoring of related outcomes.¹⁹⁷

Mental Health

The Panel found that data provided by the Department to assess progress as to whether children in out-of-home care 30 days or longer have completed and documented Child Health and Education Track (CHET) screens within 30 days of entering care is inadequate or inappropriate and that therefore the benchmark has not been reached. The Department reports that it is developing a data management tool to allow tracking based on the Panel’s requirements and that this will be reported on in the next monitoring report. Thus, the compliance plan, as ordered by Judge Snyder’s court order, is still in process and has not been approved.¹⁹⁸ As to the required outcome that children in out-of-home care be screened for mental health and substance abuse every 12 months, the Panel found that DSHS failed to meet the FY 07 benchmark and that a compliance plan is still required.¹⁹⁹

Caseload

The Panel approved CA’s October 1, 2008 version of its compliance plan which calls for the submission of a comprehensive, fully-detailed caseload reduction plan by December 31, 2008.²⁰⁰

of a compliance plan, CA must then show substantial progress in that area. Within 9 months of the acceptance of a plan, the Department is required to meet related benchmarks.

¹⁹⁴ <http://www1.dshs.wa.gov/pdf/ca/Panelltr073008.pdf>

¹⁹⁵ September 4, 2008 Order on Children’s Revised Motion to Enforce Settlement Agreement at 8.

¹⁹⁶ Note that the Panel and parties agreed to modification of the language of the original action step requiring visits “once every 30 days” to “every calendar month, with no visit being more than 40 days after the previous visit” to reflect policy changes approved by the Panel <http://www.braampanel.org/MonRptOct08.doc> at p. 14. See also http://www.dshs.wa.gov/ca/about/imp_settlement.asp

¹⁹⁷ <http://www.braampanel.org/MonRptOct08.doc> at p 15.

¹⁹⁸ <http://www.braampanel.org/MonRptOct08.doc> at p 23.

¹⁹⁹ The Panel required that the statewide benchmark of 75% must be met and that no region’s performance may be more than 10 percentage points lower than the statewide benchmark. <http://www.braampanel.org/MonRptOct08.doc> at p 23.

²⁰⁰ <http://www.braampanel.org/MonRptOct08.doc> at p 10.

Conclusion

In the Panel's October 2008 monitoring of the status of CA's compliance with outcomes by area of the Settlement Agreement, the Panel concluded that CA:

- reached the annual benchmark for 6 outcomes (1 for placement stability, 3 for mental health, and 2 for unsafe/inappropriate placements);
- failed to reach the annual benchmark and a compliance plan is required for 14 outcomes (1 in the area of placement stability, 1 in mental health, 3 in foster parent training, 4 with regard to unsafe/inappropriate placements, 3 for sibling separation, and 2 related to adolescents);
- failed to reach the annual benchmark and a compliance plan was approved for 1 outcome in the area of unsafe/inappropriate placements; and
- failed to reach the annual benchmark and compliance planning is in process in 1 outcome for mental health.²⁰¹

2008 Supplemental Budget Responds to Critical Foster Care Issues

The 2008 Supplemental Budget adopted by the legislature and approved by the Governor provided significant additional funding to expedite hiring new social workers to provide monthly visits to all children in CA care.²⁰² CA has begun hiring and training to carry out this mandate. The budget also responded to other issues raised by the Ombudsman and by plaintiffs in enforcement proceedings: money has been appropriated to facilitate twice-monthly visits between siblings who are placed out of the home and live apart from each other, and additional funding was set aside to hire more CHET screeners. Plaintiffs have expressed ongoing concerns that the fourth area of their Motion to Enforce the Settlement Agreement—case load size—has not been addressed with additional funding or other adequate measures. OFCO shares these concerns and as addressed by our recommendations in this report, continues to favor re-engagement of the COA accreditation which would set a clear standard for caseload size.

Meeting Status

The last Panel Meeting was held on December 8 and 9, 2008.²⁰³ At the Panel's request, OFCO delivered a presentation regarding how complaints are processed and investigated, as well as the Ombudsman's role in monitoring and reforming the child welfare system.

²⁰¹ October 1, 2008 Braam Settlement Monitoring Report #5 available at:

<http://www.braampanel.org/MonRptOct08.doc>

²⁰² The Braam Implementation Plan required that by June 30, 2006, 70% of children in foster care were to have monthly visits by case workers. In the 2007 survey of caregivers commissioned by the Braam panel, caregivers reported that only 37.9% of children in care received a private and individual face-to-face visit from the caseworker for each full placement month. Over 60% of all survey respondents reported that the child in their care did not receive a monthly visit from a caseworker and about 17% of survey respondents reported that their foster child did not receive a single visit in all of 2006. See: http://www.braampanel.org/ParentSurvey07_DataApp.pdf at p. 49. The Ombudsman believes that irregular and/or inadequate health and safety checks create missed opportunities for the agency to intervene with children before devastating things happen. Health and safety checks provide a chance for the case worker to observe first hand the environment in which the foster child is living and the interaction between the child and the care provider, and to develop a relationship of trust with the child so that if neglect or abuse is occurring, the child feels comfortable to disclose this to the worker.

²⁰³ Minutes from the Braam meetings are available at <http://www.braampanel.org/minutes.asp>