

No. 78426-4

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SUPREME COURT OF THE STATE OF WASHINGTON

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In re Dependency of A.K.

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AMICI CURIAE BRIEF OF  
NATIONAL COUNCIL FOR COMMUNITY  
BEHAVIORAL HEALTHCARE,  
FEDERATION OF FAMILIES FOR  
CHILDREN'S MENTAL HEALTH,  
MENTAL HEALTH AMERICA,  
NATIONAL ALLIANCE ON  
MENTAL ILLNESS, AND  
BAZELON CENTER FOR MENTAL HEALTH LAW

IN SUPPORT OF PETITIONERS

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## **I. INTRODUCTION**

The imposition of prolonged periods of detention on runaway foster children undermines the purported goals of such detention and may have devastating effects on these children. The Legislature imposed a seven-day limit on detention for good reason: it encourages prompt consideration of the runaway foster child's mental health needs and prescribed treatment alternatives. This Court should reject the use of any inherent contempt power to impose any longer period of incarceration. Mental health professionals, families of children with mental health needs, and advocates for these children seek reversal of the decision in *In re Dependency of A.K., et al.*, 130 Wn. App. 862, 125 P.3d 220 (2005) ("*In re A.K.*").

## **II. IDENTITY AND INTEREST OF AMICI**

The identity and interest of *Amici* in this case is set forth in *Amici's* Motion to File *Amici Curiae* Brief, filed herewith.

## **III. STATEMENT OF THE CASE**

*Amici* adopt the Statement of the Case set forth in the Petitioners' Petition for Review and Supplemental Brief of Petitioners.

## **IV. ARGUMENT**

### **A. Washington's Juvenile Courts Should Not Use Inherent Contempt Authority to Address the Runaway Behavior of Foster Care Children.**

The Court of Appeals affirmed the juvenile court's use of inherent contempt authority to sentence two foster children to detention for as long

as 60 days to address the children's chronic runaway behavior. *In re A.K.*, 130 Wn. App. at 872, 874. Washington statutes governing dependency, at-risk youth, children in need of care, and truancy, however, limit the juvenile courts' statutory contempt authority to detain children to no more than seven days. See, e.g., RCW 13.34.165 (dependency).

The court of appeals addressed the conflict between the courts' general inherent contempt authority and the statutory limits imposed specifically for juvenile detentions in *In re Interest of M.B.* The court concluded that juvenile courts may use their inherent contempt authority to impose detention sanctions longer than the statutory seven-day period upon finding that less restrictive alternatives are inadequate:

On the rare occasion when a juvenile court decides it must disregard the statutory seven-day limit and resort to its inherent contempt powers, the court must enter a finding as to why the statutory remedy is inadequate and articulate a reasonable basis for believing why some other specific period of detention will achieve what seven days will not.

101 Wn. App. 425, 453, 3 P.3d 780 (2000) ("*In re M.B.*"). In the wake of this decision, inherent contempt authority has been used to impose prolonged detention sentences on children who run away from foster care placements, typically without any consideration of the mental health needs leading to the runaway behavior. This Court must determine for the first time whether juvenile courts may use inherent contempt authority to impose punitive periods of detention on runaway foster children that far exceed the Legislature's statutory limits.

*Amici* agree with Petitioners that the Due Process Clause of the Fourteenth Amendment and the Separation of Powers doctrine bar juvenile courts from using inherent contempt power to impose punitive and lengthy periods of detention for violations of foster care placement orders. Rather than repeat those arguments, *Amici* submit this brief to explain, based on our professional expertise and experience, how addressing the runaway behavior of foster children through extended periods of detention is simplistic and ineffective.<sup>1</sup> This approach fails to recognize the overwhelming prevalence of mental health needs among foster care children and the importance of addressing these underlying needs, which frequently explain why foster children run away. Imposing extended periods of detention is not only ineffective in preventing runaway behavior, but often exacerbates that behavior and aggravates these children's mental health issues.

The last section of this brief outlines a solution that *Amici* believe will protect the substantive due process rights of foster children to be free of the harm that runaways may encounter during runaway episodes.<sup>2</sup> Rather than responding to runaway episodes with measures intended to

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<sup>1</sup> See *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (“[C]ourt[s] can take notice of scholarly works, scientific studies, and social facts.”).

<sup>2</sup> Adolescent runaways from foster care are at risk of a number of short- and long-term negative consequences regarding their physical and emotional wellbeing. While absent from care, runaways often develop substance abuse problems and become victims of sexual assault. Such developments also increase their likelihood of missing school, engaging in criminal activity, and becoming homeless. Nina Biehal & Jim Wade, *Going Missing from Residential and Foster Care: Linking Biographies and Contexts*, 30 British Journal of Social Work 211 (2000).

either coerce or punish foster child contemnors, this Court should require the Department of Social and Health Services ("DSHS") and the juvenile courts to respond aggressively to runaway episodes with individualized response plans that include mental health assessments and therapeutic options.

**B. Foster Children Are at High Risk for Mental Health Challenges.**

In order to ensure an effective means of addressing chronic runaway behavior, the courts should appreciate the special problems facing foster children. Up to 80% of children in child welfare systems have significant emotional, behavioral, and developmental problems that require mental health services.<sup>3</sup> The most commonly reported diagnoses for this population were attention deficit/hyperactivity disorder, conduct disorder, oppositional defiant disorder, and major depressive disorder. One study found that more than 60% of children under the age of six entering foster care were classified as "suspect" on screenings for developmental problems.<sup>4</sup> Children in non-relative care appear to be at greatest risk for developmental problems.<sup>5</sup> Many have been exposed to such adverse biological and psychosocial risk factors as premature birth,

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<sup>3</sup> American Academy of Child and Adolescent Psychiatry Policy Statement, *Psychiatric Care of Children in the Foster Care System* (2001) (hereafter "AACAP Policy Statement") (available at <http://www.aacap.org/page.www?section=Policy+Statements&name=Psychiatric+Care+of+Children+in+the+Foster+Care+System>).

<sup>4</sup> Laurel K. Leslie, et al., *Developmental Delay in Young Children in Child Welfare by Initial Placement Type*, 23(5) *Infant Mental Health Journal* 496, 508 (2002).

<sup>5</sup> *Id.* at 505, 509.



prenatal drug and alcohol exposure, parents with substance abuse disorders, high levels of violence in their homes and/or communities, and child maltreatment.<sup>6</sup> The majority of foster children have been seriously abused and/or neglected by their biological parents.<sup>7</sup> Their histories of abuse, neglect and rejection make it more likely that youth in foster care will become runaways.<sup>8</sup>

A recent study<sup>9</sup> highlights in stark terms the mental health and developmental issues faced by children placed in foster care. Researchers at the University of Minnesota studied three groups of at-risk children in Minnesota: (1) children placed in foster care; (2) maltreated children that remained with their families of origin; and (3) at-risk children who were not maltreated and remained in their homes.<sup>10</sup> The study provides a comparison of children placed in foster care to maltreated children left in their own homes with little or no help. The study concluded that the children placed in foster care still fared worse on a variety of behavioral and developmental measures than the maltreated children that remained in

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<sup>6</sup> AACAP Policy Statement, *supra* note 3.

<sup>7</sup> *Id.* *Amici* note that some children are placed in foster care for reasons other than maltreatment. For example, too many children are placed in foster care because their parents have no other option than relinquishing custody in order to obtain desperately needed mental health services for their children. Bazelon Center for Mental Health Law, *Avoiding Cruel Choices* (Nov. 2002), at 1 (available at <http://www.bazelon.org/issues/children/publications/TEFRA/avoidingcruelchoices.pdf>).

<sup>8</sup> Samuel J. Fasulo, et al., *Adolescent Runaway Behavior in Specialized Foster Care*, 24 *Children & Youth Services Rev.* 623, 625-26 (2002).

<sup>9</sup> Catherine R. Lawrence, et al., *The impact of foster care on development*, 18 *Development & Psychopathology* 57-76 (2006).

<sup>10</sup> *Id.* at 60-61.

their homes of origin.<sup>11</sup> The study demonstrates that placing a child in foster care presents an additional set of challenges beyond the maltreatment that led to the initial dependency determination.<sup>12</sup> The study concluded that the results may be explained by a lack of “comprehensive psychological services” for children placed in foster care<sup>13</sup> and recommended increasing mental health services as a means to overcome the problems identified by the study.<sup>14</sup>

**C. The Mental Health Challenges Facing Foster Children Lead to Runaway Behavior.**

Many children entering the foster care system have preexisting attachment disorders due to neglect, rejection, and abuse during infancy. The foster care system enhances these disorders by institutionalizing caregiver-child separations:

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<sup>11</sup> The report summarized this finding:

Analysis of children placed into care after kindergarten permitted the examination of pre- and postplacement change in behavior problems assessed with the same measure []. In these analyses, the foster and maltreated groups did not differ prior to placement. However, immediately following placement, children in foster care exhibited an increase in behavior problems. The increase in problematic behavior following departure from foster care significantly exceeded change in behavior problems among those reared by maltreating parental figures, suggesting an exacerbation of problem behavior in the context of out of home care.

*Id.* at 71.

<sup>12</sup> “[E]ntry into foster care itself lies outside of the range of typical childhood experience, further challenging already vulnerable children. Thus, while out of home care is intended to ameliorate adverse caregiving conditions, the accumulation of experiences necessitating placement often render children even more vulnerable to emotional and behavioral difficulties.” *Id.* at 58.

<sup>13</sup> *Id.* at 72.

<sup>14</sup> *Id.* at 74.

[F]oster care, by design, challenges caregiving relationships through extended caregiver-child separations during infancy and toddlerhood. For some children, separations may be experienced as significant rejection or loss, compounding a history of parental unavailability and potentially distorting the child's adjustment to surrogate caregivers and the foster home environment.

Lawrence, *supra* note 9, at 58 (internal citations omitted).<sup>15</sup> It is not surprising that the traumatic experience of removal and foster care placement can trigger a range of behaviors, such as running away.<sup>16</sup>

Despite their disproportionate mental health needs and the behavioral impact of being placed in the state's care, most youth in foster care do not receive mental health care (if at all) until their situation reaches a crisis point.<sup>17</sup> The failure of many child welfare programs to provide "counseling, and other rehabilitative services . . . to runaways and

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<sup>15</sup> See also Mark Courtney, et al., *Youth Who Run Away from Substitute Care*, Chapin Hall Center for Children at the University of Chicago (2005), at 31 (hereafter "Chapin Hall Working Paper") (listing those behavioral, developmental, and psychological disorders that may increase or decrease runaway tendencies based on a review of over 14,000 foster care files for children who ran away from a placement between 1993 and 2003) (available at [http://www.chapinhall.org/article\\_abstract.aspx?ar=1382](http://www.chapinhall.org/article_abstract.aspx?ar=1382)).

<sup>16</sup> See Marni Finkelstein, et al., *Youth Who Chronically AWOL From Foster Care: Why They Run, Where They Go, and What Can Be Done*, Vera Institute of Justice (August 2004), at 3 ("Researchers have found that foster youth who go AWOL have experienced emotional or psychological problems that began before they entered foster care. Placement into foster care itself is a traumatic experience that can trigger a range of behaviors.") (available at [http://www.vera.org/publication\\_pdf/244\\_460.pdf](http://www.vera.org/publication_pdf/244_460.pdf)); see also Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 Cath. U. L. Rev. 271, 279 (1993) ("Most [children in foster care] show signs of chronic illness when they enter foster care, chiefly emotional disorders that go untreated because mental health services are scarce. As a result of this phenomenon, a higher incidence of inpatient mental health admissions exists among foster children than among the non-foster care population." (footnotes omitted)).

<sup>17</sup> AACAP Policy Statement, *supra* note 3.

potential runaways results in a higher rate of running behavior among foster youth than among other children.”<sup>18</sup>

The likelihood that a child in foster care will run away is often compounded by the traumatic events many youth face while in foster care. According to a recent University of Chicago study, “Youth Who Run Away from Substitute Care,” youth reported the following traumatic events while in foster care:<sup>19</sup>

- 45% reported abuse or neglect in foster care placement
- 45% were physically assaulted
- 29% experienced the death of a parent or close relative
- 21% were raped or sexually assaulted
- 17% had been incarcerated
- 14% had one or more pregnancies
- 12% witnessed violence
- 17% were ill (including emotional disorders)

Running away is a strategy these youth employ regularly to escape the difficulty of trauma and victimization.<sup>20</sup>

Youth with the highest placement instability are at the greatest risk for running away. A youth who has been placed in five different foster care settings is nearly three times as likely to run as a child in a first placement.<sup>21</sup> Multiple placements lead to inherent difficulties of

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<sup>18</sup> Ryan, *supra* note 16, at 279-80.

<sup>19</sup> Chapin Hall Working Paper, *supra* note 15, at 43.

<sup>20</sup> Caren Kaplan, *Children Missing From Care: An Issue Brief*, Child Welfare League of America (2004), at 27 (available at <http://www.cwla.org/programs/fostercare/childmiss.htm>).

<sup>21</sup> Chapin Hall Working Paper, *supra* note 15, at 39.

establishing relationships with multiple strangers. Youth who lack strong emotional ties to their new caretakers find it easier to leave.<sup>22</sup> Running away may also be an attempt to provoke a reaction, to prove that their foster parents want them and care about them.<sup>23</sup>

**D. Addressing Runaway Behavior With Detention—Instead of Prompt and Consistent Mental Health Assessments and Care—Frequently Exacerbates Runaway Behavior.**

*Amici* agree with the courts in *In re A.K.* that the runaway behavior of foster children must be addressed. However, prior detention sentences were not effective in the cases at issue. These results are consistent with what current research demonstrates.<sup>24</sup> Alternative measures, such as addressing underlying mental health, substance abuse, and trauma issues, are far more likely to stop runaway behavior.

In addition to not correcting the behavior, incarceration is likely to encourage runaway behavior. Studies of foster care runaways demonstrate that subjecting chronic runaways to long-term detention in institutional settings likely will increase the chance of future flight. First, DSHS and

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<sup>22</sup> Fasulo, *supra* note 8, at 625-26; Chapin Hall Working Paper, *supra* note 15, at 10.

<sup>23</sup> Kelly Dedel, *Juvenile Runaways*, Office of Community Oriented Policing Services, U.S. Dep't of Justice (Feb. 2006), at 7 (available at <http://www.popcenter.org/Problems/PDFs/JuvenileRunaways.pdf>).

<sup>24</sup> See, e.g., Finkelstein, *supra* note 16, at ii ("Facility staff practiced different strategies to prevent and respond to AWOLs. After an AWOL, many staff recommended counseling sessions to collect information on why the youths ran and where they went. Some facilities extended curfews and allowed more home passes, while others took a more punitive approach by confining youth returned from an AWOL to their rooms and taking away privileges. Some youths reported that punitive measures increased their desire to run away because they saw no legitimate means to visit their friends and family."); *id.* at 28.

the state courts should recognize the overwhelming evidence that children who run away from their foster care placements often run to family members and friends in an attempt to connect with people who know them and to feel as though they belong.<sup>25</sup> “[A] scenario unique to foster care runners is running away to home—that is from care to family or friends from the neighborhood of origin.”<sup>26</sup> Detention is the antithesis of the family-like atmosphere runaways seek, presenting the runaways with an entirely new set of peers and authority figures in an institutional setting. Detention deprives these children of the parental figures, siblings, and

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<sup>25</sup> The record for *In re Dependency of Y.H.* demonstrates that a prominent feature of Y.H.’s running behavior was a desire to reunite with her mother. See Record for *In re Dependency of Y.H.*, Appendix A at 8-15 (transcript of contempt proceeding for Y.H.’s mother, who allowed Y.H. to stay with her during a run episode). Similarly, M.H.-O. ran to her father in Omaha, Nebraska, during one of her runaway episodes. See Record for *In re Dependency of M.H.-O.*, Appendix B at 25 (excerpt of June 4, 2004 DSHS Individual Service and Safety Plan (“ISSP”)). See also Finkelstein, *supra* note 16, at 13; *id.* at 33 (“Often [the AWOL youth interviewed] said they had desired a bit of freedom from life in the congregate care setting, and many expressed a desire to be with their families or in their old neighborhoods.”).

<sup>26</sup> Chapin Hall Working Paper, *supra* note 15, at 3-4. The Chapin Hall Working Paper described a series of recent studies that demonstrate this phenomenon:

There is some evidence that youth who run most often return to friends and family. Courtney and Barth’s (1996) study of 2,653 California foster care youth found that runaways were most likely to have returned to the family of origin, and it suggested that many multiple exits from care were lengthy running episodes and of these, most were actually unsuccessful attempts at family reunification. Similarly, Fasulo, et al. (2002) found that 44 percent of runaways returned to family, 39 percent ran to a friend, and 17 percent reported running to be with family or friends in the community of origin. Finally, Biehal and Wade (2000), who studied over 272 runaways from 32 British care settings, discovered such a large number of youth who ran to be with family or friends (54%) that they grouped these youth separately from others in their analyses.

*Id.* at 6. The Chapin Hall Working Paper also included results from in-depth interviews with 40 chronic foster care runaways, many of which highlighted the efforts of these children to find family or some other environment that mirrored home. *Id.* at 47, 49.

friends they seek with their runaway behavior. Responding to foster child runaways with detention will only increase the desire of many of these children to seek family and friends upon release.

Second, DSHS and the state courts should recognize the dangers of subjecting a foster child to a long period of institutionalized care, which occurs with a punitive contempt sanction. A recent study by the Vera Institute of Justice in New York found that nearly three-quarters of all foster care runaways were reported from congregate settings.<sup>27</sup> A study by the University of Chicago, which involved the review of over 14,000 case files for foster care runaways, demonstrates that children in institutional foster care settings are almost twice as likely to run as those children placed in foster homes or relative settings.<sup>28</sup> Moving a child from a family-based foster care setting to an institutional setting may actually encourage future runs rather than curb runaway behavior.

Third, multiple placements lead to increased runaway behavior in some children.<sup>29</sup> As a result, punishing a runaway with an extended period of detention, followed by yet another foster care placement, is likely to increase the chance of repeat runaway behavior.

Rather than responding to runaway episodes with punishment, which is likely to exacerbate the problem,<sup>30</sup> the State (and the courts)

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<sup>27</sup> Finkelstein, *supra* note 16, at 2.

<sup>28</sup> Chapin Hall Working Paper, *supra* note 15, at 19, 32-33.

<sup>29</sup> *Id.* at 32.

<sup>30</sup> Dedel, *supra* note 23, at 38 ("Responding to a runaway episode with harsh restrictions and punishment is likely to exacerbate the problem, particularly among those who run

should focus efforts on providing appropriate services to address the underlying needs that contribute to runaway behavior. Certain types of mental health services, such as wraparound services<sup>31</sup> and therapeutic foster care,<sup>32</sup> have proven remarkably effective in reducing rates of incarceration, delinquency, and runaway behavior among children with serious mental health needs. One study found that children receiving wraparound services “were significantly less likely to change placements,” had lower rates of delinquency, and displayed fewer externalizing behaviors.<sup>33</sup> After receiving wraparound, children with histories of

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away from substitute care placements. Instead, foster care parents and group home staff should negotiate new boundaries and privileges (e.g., additional weekend home passes) that address the issues underlying the runaway episode (e.g., desire to maintain ties with biological parents).”).

<sup>31</sup> Providers of wraparound services: (a) engage in a unique assessment and treatment planning process that is characterized by the formation of a child, family, and multi-agency team, (b) marshal community and natural supports through intensive case management, and (c) make available an array of therapeutic interventions, which may include behavioral support services, crisis planning and intervention, parent coaching and education, mobile therapy, and medication monitoring. *Katie A. v. Bonta*, 433 F. Supp. 2d 1065, 1071-72 (C.D. Cal. 2006).

<sup>32</sup> Therapeutic foster care is “an intensive, individualized health service provided to a child in a family setting, utilizing specially trained and intensively supervised foster parents.” Therapeutic foster care programs: (a) place a child singly, or at most in pairs, with a foster parent who is carefully selected, trained, and supervised and matched with the child’s needs; (b) create, through a team approach, an individualized treatment plan that builds on the child’s strengths; (c) empower the therapeutic foster parent to act as a central agent in implementing the child’s treatment plan; (d) provide intensive oversight of the child’s treatment, often through daily contact with the foster parent; (e) make available an array of therapeutic interventions to the child, the child’s family, and the foster family (interventions may include behavioral support services for the child, crisis planning and intervention, coaching and education for the foster parent and the child’s family, and medication monitoring); and (f) enable the child to successfully transition from therapeutic foster care to placement with the child’s family or alternative family placement by continuing to provide therapeutic interventions. *Katie A.*, 433 F. Supp. 2d at 1072.

<sup>33</sup> California Institute for Mental Health, *Evidence-Based Practices in Mental Health Services for Foster Youth* (March 2002) (available at



incarceration and running away displayed significant declines in these self-destructive behaviors when compared to their peers.<sup>34</sup> A study comparing children in therapeutic foster care ("TFC") to children in standard care over a two-year period found that the TFC children were less likely to run away or be incarcerated, and generally showed greater emotional and behavioral adjustment.<sup>35</sup> Another study, conducted by the National Institute of Mental Health, found that children in TFC "showed significantly fewer criminal referrals, returned to live with relatives more often, ran away less often, and were confined to detention or training schools less often."<sup>36</sup>

Individualized responses are necessary to address runaway behavior—not detention. Social workers and case managers must be employed to develop individualized, therapeutic responses to runaway behavior at the time of the first runaway episode.<sup>37</sup>

**E. Substantive Due Process Requires DSHS and the Juvenile Courts to Develop Individual Runaway Response Plans that Address the Mental Health Needs of Foster Children.**

Addressing chronic runaway behavior with punitive and extended periods of detention should be viewed as a violation of the substantive due

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<http://www.cimh.org/downloads/Fostercaremanual.pdf>).

<sup>34</sup> *Id.*

<sup>35</sup> U.S. Dep't of Health & Human Servs., *Mental Health: A Report of the Surgeon General* (1999) (available at <http://www.surgeongeneral.gov/library/mentalhealth/home.html>).

<sup>36</sup> *Id.*

<sup>37</sup> Ryan, *supra* note 16, at 285-86.

process rights of foster children. In *Braam v. State*, this Court recognized that foster children have substantive due process rights to adequate services that meet the children's basic needs:

[F]oster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, 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.

*Braam v. State*, 150 Wn.2d 689, 699-700, 81 P.3d 851 (2003). The Washington courts and Legislature have recognized repeatedly that addressing the mental health needs of youth in the juvenile system is a component of the State's responsibility to provide for the basic needs of the child. See, e.g., *In re Welfare of Sumey*, 94 Wn.2d 757, 764, 621 P.2d 108 (1980) (noting the "State's constitutionally protected *parens patriae* interest in protecting the physical and mental health of the child"); *In re Dependency of H.W.*, 70 Wn. App. 552, 555, 854 P.2d 1100 (1993) ("the State has an equally compelling interest in protecting the physical, mental and emotional health of the children").<sup>38</sup>

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<sup>38</sup> See also RCW 13.34.315 (empowering the agency charged with the care of a child ordered removed from his or her home pursuant to this chapter to "authorize an evaluation and treatment for the child's routine and necessary medical, dental, or mental health care, and all necessary emergency care" (emphasis added)); RCW 74.13.031 ("The department shall have the duty to provide child welfare services and shall: . . . (6) Have authority . . . to provide for the routine and necessary medical, dental, and mental health care, . . .").

The Court's decision in *Braam* led to a 2004 settlement, which addresses five aspects of Washington's foster care system: placement stability, mental health services, foster parent training, sibling separation, and services to adolescents. See <http://www.wsipp.wa.gov/braampanel/SettlementAgreement.pdf> (emphasis added). The

A foster child's substantive due process rights to basic services and to be free from harm while in the State's care require the State to provide therapeutic and preventative responses to runaway behavior—not detention.<sup>39</sup> The connection between a foster child's substantive due process rights and a preventative program to deal with chronic runaway behavior is well-recognized:

Foster care is an exercise of state control over the private lives of helpless children whose families cannot or will not take care of them. Foster care is the type of state custody, like civil confinement, that activates constitutional rights and duties under the Due Process Clause of the Fourteenth Amendment. By virtue of this right to safe custody, all foster children, regardless of parental consent to placement, are similarly entitled to runaway prevention services. The poor health, lack of shelter, violence and desperation that pervade street life make running away a harmful experience. It is incumbent upon the state to attempt to prevent that harm by enrolling foster children in . . . mental health . . .

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settlement listed the following among its mental health "goals": "Children in the custody of DCFS shall receive timely, accessible, individualized and appropriate mental health assessments and treatment by qualified mental health professionals consistent with the child's best interest." See *Braam* Settlement at 8.

<sup>39</sup> Ryan, *supra* note 16, at 309-10 ("Guaranteeing a foster child the right of safe custody involves counseling services that deter running behavior. Runaways . . . are typically placed under the jurisdiction of the juvenile justice system once their need for rehabilitation is identified. Since foster children are constitutionally entitled to 'minimally adequate or reasonable training to ensure safety and freedom from restraint,' a punitive response from the juvenile justice system seems wholly inconsistent with the notion of 'freedom from restraint.' This is especially true if an earlier, proactive response from foster care could have prevented the behavior altogether." (citing *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982)).

services designed to dissuade running behavior and rehabilitate troubled youth.

Ryan, *supra* note 16, at 310-311 (emphasis added) (footnotes omitted).

The State has a constitutional responsibility to provide basic mental health care services to runaway foster children in the State's custody.<sup>40</sup>

*Amici* recognize that juvenile courts sometimes see detention as a tool to help runaway foster children obtain the health and social services they need. For example, the court of appeals below noted that "[t]he juvenile court ordered A.K. and M.H.-O. to participate in school and in mental health and treatment services while they served 60 days of detention. In M.H.-O.'s case, the [juvenile] court indicated in the order that it would 'seek to use this unique opportunity to give [M.H.-O.] the help she presently needs.'" *In re A.K.*, 130 Wn. App. at 886. *Amici* do not question the good, if misdirected, intentions of the juvenile courts in this case and DSHS (which petitioned for the juvenile court's use of its inherent contempt authority in each of the consolidated cases). However, research and experience demonstrate that using confinement to address the runaway behavior of foster children frequently backfires, encouraging more runaway behavior in the future. Allowing the expedient

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<sup>40</sup> Ryan, *supra* note 16, at 286 (1993) (noting that foster children are entitled to, and in need of, identification of their needs and counseling services designed to prevent runaway behavior; "This right is rooted in a theory of constitutional entitlement which arises out of the state's custodial relationship to children living in foster care. . . . The main hope for these children now rests with the courts, and specifically, judicial recognition of a foster child's right to mental health screening and runaway prevention services as constitutionally guaranteed by virtue of the child's due process right to safety.").

incarceration, in lieu of early and effective evaluation and treatment, simply invites a recurrence of the aberrant behavior.

This Court has the opportunity to provide an alternative solution that protects the substantive due process rights of foster children. This Court should require the State to consider and address the mental health needs of foster children at the outset of their dependency proceedings—a practice that will substantially reduce later runaway behavior. This Court should order DSHS to take appropriate steps to address runaway behavior, including: (1) promptly identifying mental health and substance abuse needs of children who are removed from their primary caregivers through the child welfare system,<sup>41</sup> and ensuring that their identified service needs are met; (2) identifying and addressing any mental health and substance abuse needs that a child may have the first time that a child runs from a foster care placement; and (3) training foster care parents and providers to recognize the signs of future runaway behavior.

Indeed, a number of courts have recognized that the Medicaid program requires participating states (such as Washington) to provide wraparound or “home-based” services and therapeutic foster care—services which provide significant benefits in preventing runaway behavior—to Medicaid-eligible children who need them, including

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<sup>41</sup> AACAP/CWLA Policy Statement, *Mental Health and Use of Alcohol and Other Drugs, Screening and Assessment for Children in Foster Care* (2003) (available at <http://www.aacap.org/page.www?section=Policy+Statements&name=AACAP%2FCWLA+Policy+Statement+on+Mental+Health+and+Use+of+Alcohol+and+Other+Drugs%2C+Screening+and+Assessment+of+Children+in+Foster+Care>).

children in foster care. *See Katie A. v. Bonta*, 433 F. Supp. 2d 1065 (C.D. Cal. 2006) (appeal pending) (granting preliminary injunction ordering state Medicaid agency to provide wraparound services and therapeutic foster care to all children in California's foster care system for whom they are medically necessary); *Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006) (ordering state Medicaid agency to provide similar "home-based services" to all Medicaid-eligible children for whom they are medically necessary).

The record in this case, however, shows that the repeated contempt proceedings afforded little opportunity to address the mental health needs underlying the Petitioners' runaway behavior. Instead, when the juvenile courts imposed statutory detention sanctions, their orders focused solely on the runaway foster child's opportunity to purge the contempt by (1) promising not to disobey placement orders in the future and (2) writing essays to that effect.<sup>42</sup> The juvenile courts did not look to the State to

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<sup>42</sup> See Record for *In re Dependency of Y.H.*, App. A at 1 (May 29, 2003 statutory contempt order); 2-3 (Aug. 27, 2003 statutory contempt order); 4-5 (Oct. 8, 2003 statutory contempt order); 20 (Jan. 7, 2004 statutory contempt order); 25-34 (transcript of Jan. 7, 2004 contempt hearing); 35 (Jan. 21, 2004 purge order); 36-40 (Mar. 2, 2004 inherent contempt order); see Record for *In re Dependency of M.H.-O.*, App. B at 1 (Aug. 19, 2002 detention order); 2 (July 3, 2003 statutory contempt order); 3 (July 23, 2003 statutory contempt order); 4 (Aug. 26, 2003 statutory contempt order); 5 (Sep. 3, 2003 statutory contempt order); 6 (Dec. 17, 2003 statutory contempt order); 7 (Jan. 28, 2004 purge order); 8-9 (Feb. 18, 2004 statutory contempt order); 10-12 (Mar. 1, 2004 inherent contempt order for 30-day detention sentence (includes summary of responses to prior runs)); 13-17 (Apr. 15, 2004 inherent contempt order for 60-day detention sentence (includes summary of responses to prior runs)); 21-27 (June 4, 2004 ISSP excerpt describes M.H.-O.'s runaway episodes and State responses); 28-32 (July 14, 2004 Assistant AG's Response to M.H.-O.'s Motion for Revision, which includes description of State and court responses to runaway episodes). Based on the record available to *Amici*, it appears that the courts and the State only focused on the mental health needs and substance abuse needs of Y.H. and M.H.-O. after repeated runaway episodes and

uphold its responsibility to provide services and protection to these children and develop an individualized response to the runaway behavior. By treating the statutory contempt process as a one-way street, it is not surprising that in both cases the juvenile courts encountered continued runaway behavior even after repeatedly resorting to the statutory seven-day detention remedy. Both cases escalated into the use of inherent contempt authority to impose lengthy periods of detention.

Rather than condone this simplistic, traditional method of protecting the courts' authority, this Court should employ a solution that is consistent with both the Legislature's mandate and social science. This Court should require the juvenile courts and DSHS to develop a multi-lateral response to runaway behavior: (1) using the seven-day statutory detention period, if permissible and necessary, to protect the child and emphasize the court's authority to stop running behavior,<sup>43</sup> and (2) requiring the State, when detention is sought, to develop an individual runaway response plan with appropriate services that will provide the

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only after the State sought inherent contempt sanctions. *See* Record for *In re Dependency of Y.H.*, App. A at 41-42 (Mar. 5, 2004 psychiatric and substance abuse assessment); 52-53, 69-73 (transcript of May 18, 2004 contempt hearing at which parties discuss Y.H.'s placement in substance abuse treatment after inherent contempt order in March 2004); *see* Record for *In re Dependency of M.H.-O.*, App. B at 17 (Apr. 15, 2004 inherent contempt order requires counseling evaluation and services for M.H.-O. while in detention); 18-20 (May 5, 2004 review order on inherent contempt notes psychiatric and substance abuse evaluations conducted during detention and orders more evaluations and treatment). The juvenile court should have demanded more from the State when the runaway behavior began and prior to the State seeking inherent contempt sanctions.

<sup>43</sup> *Amici* do not suggest that any remedial detention is permissible or required to respond to foster child runaways. *See* Petition for Review at 6-8; *see* Supplemental Brief of Petitioners at 5-10.

child the tools to stop running. If the State is meeting the children's substantive due process rights to basic services, including mental health services, the courts will not find it necessary to resort to their inherent contempt authority to punish foster children with long periods of detention that will likely lead to more running in the future.

#### V. CONCLUSION

*Amici* urge the Court to reverse the decision in *In re A.K.*, 130 Wn. App. 862, 125 P.3d 220 (2005), and insist upon therapeutic responses to runaway behavior that recognize the mental health needs of runaway foster children.

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Respectfully submitted,

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