

The Honorable Edward F. Shea

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIA DE LA O, et al.,
Plaintiffs,
v.
ROBIN ARNOLD-WILLIAMS, et
al.,
Defendants.

No. CV-04-0192-EFS

CLASS ACTION

MARIA FERNANDEZ, et al.
Plaintiffs,
v.
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, et al.,
Defendants.

[NO. CV-05-0280-EFS]

**NOTICE OF CLASS ACTION,
PROPOSED CLASS AGREEMENT,
INCLUDING ATTORNEYS FEES
AND COSTS, AND FAIRNESS
HEARING**

NOTICE OF CLASS ACTION

A **Proposed Class Settlement** Agreement (Class Agreement) has been reached in a federal court class action lawsuit, *Fernandez v. Department of Social and Health Services*, involving family home child care providers who sued the Department of Social and Health Services (DSHS) and the Division of Fraud Investigations (DFI) for alleged civil rights violations. The Plaintiffs' lawsuit involves two distinct parts: 1) a class action that sought a court order to protect all family home child care providers from alleged unconstitutional inspections and investigations; and, 2) compensation for the nine individual plaintiffs who alleged they suffered injuries because of DFI's 2002 investigation.

The class action part of the lawsuit alleges that DSHS has policies and practices allowing DFI investigators to illegally enter family home child care provider homes and seize original child care business records. Plaintiffs allege these policies and practices violate the Constitutional rights of family home child care providers throughout the state of Washington. The class action lawsuit seeks to: (1) prevent DSHS from inspecting areas of the family child care home not accessible to the children; (2) limit DSHS inspections to the family home child care providers' business hours, and (3) prevent DFI investigators from entering family home child care provider homes or taking original business records without consent, a court order or a search warrant approved by a judge.

The class action part of the lawsuit seeks to have DSHS change the DFI policies and practices as it relates to DFI investigations of family home child care providers, and to have the State Defendants change the regulations relating to family home child care inspections.

The second part of the case involves nine individual family home child care providers from Mattawa, Washington who seek individual monetary damages for an investigation that DFI launched in the Town of Mattawa in May 2002. The nine providers allege they were investigated by DFI on the basis of their race or national origin, and that their civil rights were violated.

If the class action settlement is approved, it would affect the rights of all family home child care providers licensed by the Department of Early Learning (DEL). **If you are a licensed family home child care provider in the State of Washington, you should read this NOTICE, have this NOTICE translated for you, or go to www.columbialegal.org where translations are available.**

This notice discusses your rights as a class member, provides a brief history of the lawsuit, and summarizes the terms of the Proposed Class Agreement. It describes the nine individual plaintiffs' claim for damages and class counsel's claim for attorney's fees. It also explains why class counsel recommends approval of the Proposed Class Agreement, how you can get more information about the Proposed Class Agreement, and tells you what you must do if you wish to support or object to the Proposed Class Agreement or testify at the Fairness Hearing. The notice sets forth a deadline of July 30, 2008, for filing written comments. It also provides information about the date, time, and location of the Fairness Hearing.

YOUR RIGHTS

The Court is being asked to approve the **Proposed Class Agreement**. If approved, the Class Agreement will require DEL to make changes to the regulations regarding inspections, change the way investigations are conducted by DFI, and would vacate existing Court rulings and dismiss class claims. **You have been identified as a class member. You have the right to support or object to the Proposed Class Agreement. The Proposed Class Agreement will not be approved if, after considering explanation by the parties and objections, the Court determines that the Proposed Class Agreement would be unfair to the Class.**

HISTORY OF THIS CLASS ACTION LAWSUIT

Fernandez v. DSHS, was filed in Thurston County Superior Court on April 8, 2005. It was subsequently removed to federal court and then transferred to the U.S. District Court - Eastern District of Washington. The *Fernandez*

lawsuit was consolidated with the *De la O v. Arnold-Williams* lawsuit (21 individual Mattawa family home child care providers also suing DSHS).

In December 2006, the Federal Court ruled that four state laws¹ were unconstitutional because they authorized inspections in private areas of the home not accessible to the children, and at times when children are not in care. The Department of Early Learning filed emergency regulations to fix the constitutional problems identified in the Court's ruling. The Court also ruled that DFI entries into family child care homes to conduct criminal investigations (not inspections) and to search and seize records, violated the Fourth Amendment to the U.S. Constitution, unless the provider gave permission to enter, or DFI investigators had a search warrant or a court order.

The *Fernandez* Plaintiffs **withdrew** three class claims in December 2006. The withdrawn claims asked the Court to order: (1) that DSHS be required to advise family home child care providers they could consult with an attorney before complying with a subpoena; (2) that DSHS be prevented from using non-DSHS law enforcement officers to enter child care homes during investigations; and, (3) that DSHS translate crucial legal documents (such as subpoenas) into the primary language of family home child care providers. The class representatives also asked (4) that DSHS be required to advise family home child care providers of the opportunity to quash (stop or limit) a subpoena in court when a subpoena is served. Claim (4) noted above could not be resolved because when DEL became responsible for family home child care licensing in July 2006, the laws governing DEL did not authorize DEL to issue

¹ RCW 74.15.030, RCW 74.15.080, WAC 388-296-0450, and WAC 388-296-0520(8).

administrative subpoenas outside the context of an administrative hearing process. Therefore at this time, DFI may not issue administrative subpoenas for family home child care provider records.

If the Proposed Class Agreement is approved, all Class claims, including the four class claims described above, will be dismissed. However, the Class Agreement does not affect your right to bring new claims against the State Defendants for alleged wrongful conduct occurring after the date the Court gives final approval of the Class Agreement.

SUMMARY OF PROPOSED SETTLEMENT

Class Claims

1. DSHS and DFI Investigations.

In the **Proposed Class Agreement**, DSHS has agreed that it will not allow DFI to: (1) demand immediate entry into family child care homes without a search warrant signed by a judge, court order or your permission; (2) search for or take child care records without a search warrant signed by a judge, court order or your consent; or (3) ask about immigration status or Social Security numbers, unless required to do so by law. Upon approval of the Class Agreement, DFI will revise its Investigator Manual and implement a procedure to notify providers prior to going to the home, unless they have a court order or search warrant, in advance of an investigative visit by mailing a “Home Entry Letter.”

The **Proposed Class Agreement** would also vacate prior court rulings and dismiss this litigation.

Investigator Manual. The proposed DFI Investigator Manual changes will state that (summarized):

1. DFI investigators shall not enter a family home child care provider's home absent consent, court order, or a warrant.
2. Unless there is an applicable court order or warrant, DFI investigators will mail a Home Entry Letter to the family home child care provider at least 5 days, and not more than 35 days, prior to going to the home. DSHS will translate the Home Entry Letter into Spanish.
3. DFI investigators shall only inspect and/or copy a family home child care provider's records in a reasonable location within the licensed space chosen by the provider, during the family home child care provider's business hours.
4. DFI investigators may obtain original records only by consent, warrant, or court order and shall return the original records within 60 days unless DFI is authorized pursuant to a warrant or court order to retain the originals, or consent to retain the originals is given by the family home child care provider. If consent to remove originals is required and given by the provider, the investigator shall have the provider sign the inventory log form affirming that consent was given and, if requested, DFI will provide the family home child care provider with a copy of any original records removed when consent was required, and will provide copies within 14 days after removal.
5. DFI investigators shall follow chain of custody procedures by creating an inventory log identifying the category and timeframe of original records being removed when removing original records from a family home child care provider. If the provider requests a copy of the inventory log, the investigator shall provide a copy within 5 business days.
6. DFI shall not issue administrative subpoenas to family home child care providers unless the law is changed, because DEL currently lacks legal authority to issue administrative subpoenas to Plaintiffs in their capacity as family home child care providers outside of the administrative hearing process under the Administrative Procedures Act - RCW 34.05. If legal authority to issue administrative subpoenas to family home child care providers is given to DEL by the legislature, DFI investigators shall receive additional subpoena training to prevent DFI investigators from using

subpoenas as if they were judicial warrants, unless authorized by law or court order.

DFI investigators will also be instructed verbally and in writing of the Investigator manual changes within 60 days of the final resolution of all other contingencies in the Class Agreement.

Home Entry Letter. The Home Entry Letter, written in English and Spanish, would read:

1. You **do not** have to talk to the DFI investigator.
2. You **do not** have to let a DFI investigator into your home unless you give the investigator permission, or the investigator has a court order or a warrant.
3. You **do not** have to give the DFI investigator permission to remove original business records, or other original documents, unless the investigator has a court order or a warrant.
4. Original records removed from your home will be returned to you within 60 days unless a warrant or a court order allows the investigator to keep the original records, or you give permission to keep the original records for more than 60 days. If the investigator does not have a warrant or court order to remove original records, but you give permission to remove original records, you can ask for a copy of the original records and a copy will be sent within 14 days.
5. If original records are removed, the DFI investigator will make a written log identifying which records are taken. You can ask for a copy of the log and it will be sent to you within 5 business days.
6. If the investigator does not have a court order or a warrant, the investigator **must** promptly leave whenever you ask them to leave.
7. If the investigator does not have a court order or a warrant, and you give the investigator permission to enter your home, you have the right to tell

them they can only go to the licensed space, and you have the right to change your mind and can ask them to leave.

8. If the investigator does not have a court order or a warrant, you may ask the investigator to come back at another time.

Immigration and Social Security Matters. The Investigator Manual will state that DFI investigators shall inquire about immigration or social security numbers only if required by state or federal law and only of the family home child care provider licensee and their employees. DFI investigators would not inquire into immigration or Social Security matters of spouses or children.

2. **Vacate Rulings.** The **Proposed Class Agreement** proposes that the Federal District Court vacate its ruling declaring certain state laws unconstitutional. The **Proposed Class Agreement** requires that DEL adopt the emergency regulations as final regulations which will limit inspections to areas of the home otherwise accessible to children and to times when licensed activities are conducted (open for business hours). DEL adopted the regulations required by the **Proposed Class Agreement** on December 29, 2007. These regulations can be amended in the future, but only in accordance with Washington law.

3. **Dismissal of the Lawsuit.** The **Proposed Class Agreement** would be adopted as the **Temporary Order** of the Federal District Court until DSHS revises the DFI Investigator Manual, implements the Home Entry Letter procedure in English and Spanish, and instructs DFI staff about the Manual revisions. The Temporary Order and the class claims resolved by the *Fernandez* lawsuit would then be dismissed. Family home child care provider class

members would still be able to bring their own lawsuits if they believe that future acts by DEL or DSHS violate their civil rights.

Individual Claims and Attorneys Fees

Monetary damages were not sought on behalf of class members because (1) class claims were raised to prevent repetition of the alleged unlawful conduct that occurred during DSHS' May 2002 Mattawa child care investigation; and, (2) the Class and the nine individual Plaintiffs did not share common civil rights and national origin discrimination claims. Pursuant to the Proposed Class Agreement, class representatives, MARIA FERNANDEZ, BERTHA MENDOZA, and MARIA CHAVEZ, will each receive the sum of \$45,000.00 as compensation for their individual damage claims for the alleged violations of their civil rights in 2002. These three individuals will not receive any money for their work as class representatives in the class action portion of this lawsuit.

Costs and Attorneys Fees

Columbia Legal Services as class counsel incurred, based on hourly attorney fee rates and advanced costs, approximately \$1,150,000 in attorneys' fees and costs in litigating this matter. Class counsel has agreed to accept \$350,000 as settlement for these expenses.

CLASS COUNSEL RECOMMENDS SETTLEMENT

Columbia Legal Services, as class counsel, recommends that the **Proposed Class Agreement** be approved. They believe the Investigator Manual revisions and Home Entry Letter, combined with this Notice of Class Action, will prevent the problems that occurred during the 2002 DSHS Mattawa family home child care provider investigation from recurring in the future. DFI

investigators and family home child care providers will know that DFI investigators cannot enter family home child care provider homes or remove original records, except with provider permission, by court order or warrant.

Family home child care providers will receive the Home Entry Letter in English and in Spanish. Family home child care providers who speak a language other than English or Spanish will have advance opportunity to obtain the assistance of a translator, an opportunity the Class alleges was not provided during the Mattawa child care investigation.

The agreement to inquire into immigration issues and Social Security numbers of providers and their employees only where required by law should prevent alleged future privacy invasions. If future inquiries are made, DSHS may be required to demonstrate which state or federal law required the inquiry. DFI investigators will not inquire about immigration or Social Security matters of spouses or children, as allegedly occurred in Mattawa in 2002.

The Federal District Court's prior orders that family home child care provider inspection statutes and regulations violate the constitution will be replaced by a final DEL regulation limiting inspections to areas of the home accessible to children and only during business hours. If DEL wishes to revise the final regulation in the future, the proposed revision may be subject to DEL's negotiated rule-making process with SEIU 925 and class members can comment at public hearings or in writing.

Extensive investigation and numerous court hearings have disclosed the law and relevant facts needed to resolve class claims. *Fernandez* Plaintiffs' attorneys have spent approximately 5,000 hours on this litigation. Plaintiffs' attorneys have

examined more than 70,000 pages of documents produced by the State Defendants. Fifty-four witnesses have been deposed, some for two or three days.

State Defendants have appealed two rulings in this case to the U.S. Court of Appeals, and trial, initially scheduled for October 2006, has been delayed until the appeals are finished. A Class settlement resolves this litigation now, and would avoid the uncertainty that gains thus far obtained in the Federal District Court may be lost in the Court of Appeals.

The parties in both lawsuits began mediation in August, 2007. They agreed to resolve class claims before negotiating the final monetary settlements for the individual plaintiffs. A Ninth Circuit mediator assisted in negotiations and the parties participated in all day mediation with another professional mediator. After four months, the *Fernandez* Plaintiffs and the State Defendants reached a **Proposed Class Agreement** of class claims subject to three conditions: (1) *Fernandez* Plaintiffs accept the State's final monetary settlement offer, (2) the Federal District Court agree to vacate prior rulings holding state law unconstitutional, and (3) the **Proposed Class Agreement** is approved by the Court at a Fairness Hearing. The *Fernandez* individually-named Plaintiffs accepted the State's \$405,000 offer to settle the monetary claims of nine individually-named Mattawa child care providers involved in this lawsuit.

FURTHER INFORMATION AVAILABLE

This is a summary of the **Proposed Class Agreement**. **As a class member, you may get more information about the Proposed Class Agreement or obtain**

a copy of the Proposed Class Agreement by contacting class counsel, Columbia Legal Services. You may call Columbia Legal Services toll free at **1-800-572-9615, ext. 26, 1-509-662-0911, ext. 26.** Columbia Legal Services may also be reached by mail at 300 Okanogan Avenue, Suite 2A, Wenatchee, WA 98801. Class counsel will also post further information about this lawsuit at its website which can be accessed at www.columbialegal.org. Information on the website will be in languages other than English and Spanish.

CLASS MEMBERS MAY FILE WRITTEN COMMENTS

Any class member who wants to comment on the Settlement, either for or against it, may do so by filing a written statement with the United States District Court, 825 Jadwin Avenue, Room 174, Richland, WA 99352, by 4:30 p.m. on **July 30, 2008.**

NOTICE OF FAIRNESS HEARING

The United States District Court in Richland will hold a hearing on **August 12, 2008,** at 10:00 a.m. This hearing will be held at the United States District Court, Eastern District of Washington at Richland located at 825 Jadwin Avenue, Richland, Washington. During this hearing, the Court will consider any written comments and objections filed by class members relating to the fairness, reasonableness and adequacy of the **Proposed Class Agreement.** Any person who wants to attend the fairness hearing may do so. If you wish to testify at this hearing, you must notify the Court Clerk in writing by **July 30, 2008.**

By Order of the United States District
Court - Eastern District of Washington –
At Richland