IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-40023

M. D., by next friend Sarah R. Stukenberg; D. I., by next friend Nancy G. Pofahl; Z. H., by next friend Carla B. Morrison; S. A., by next friend Javier Solis; A. M., by next friend Jennifer Talley; J. S., by next friend Anna J. Ricker; K. E., by next friend John W. Cliff, Jr.; D. P., by next friend Karen J. Langsley; T. C., by next friend Paul Swacina,

Plaintiffs - Appellees

v.

GREG ABBOTT, in his official capacity as Governor of the State of Texas; CHRIS TRAYLOR, in his official capacity as Executive Commissioner of the Health and Human Services Commission of the State of Texas; JOHN J. SPECIA, JR., in his official capacity as Commissioner of the Department of Family and Protective Services of the State of Texas,

Defendants - Appellants

Appeal from the United States District Court for the
Southern District of Texas, Corpus Christi

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

The only matter before us at this time is whether to grant a stay of the district court's order. This case is a class action filed under 42 U.S.C. § 1983 on behalf of foster children in the Texas foster care system (the "class

members") against various Texas state officials (the "State"). The district court concluded the State violated the class members' constitutional rights, and ordered injunctive relief. The State appealed. The district court denied the State's motion to stay pending appeal. The State then filed a motion with this court that also sought a stay. We construe narrowly the immediate injunctive relief ordered and DENY a stay.

FACTS AND PROCEDURAL BACKGROUND

Among the allegations in the class members'[1] complaint is that the State violated their substantive due process rights by failing to keep them "reasonably safe from harm while in government custody" and denying them "the right to receive the most appropriate care, treatment, and services." Following a bench trial, the district court concluded that the State had violated the class members' constitutional rights. *M.D. v. Abbott*, No. 2:11-CV-84, 2015 WL 9244873 (S.D. Tex. Dec. 17, 2015). The district court said an overhaul of the foster care system's policies and procedures was required, and it identified goals that needed to be met. *Id.* at *106–12. A special master, appointed by the district court with input from the parties, is to make recommendations as to how to reach those goals. *Id.* at *107–08. Additionally, the district court mandated an immediate end to the "unsafe placement[]" of children, including ceasing assigning children to "foster group homes that lack 24-hour awake-night supervision." *Id.* at *107.

The State now seeks a stay from this court under Federal Rule of

[1] The district court initially certified a class that included all children who were or would in the future be in Texas's foster care system. On appeal, we vacated the certification. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 841–49 (5th Cir. 2012). On remand, the district court recertified a general class (all children within the system) and two subclasses (children in foster care and children in foster group homes).

Appellate Procedure 8(a)(2). Additionally, the class members filed an unopposed motion to seal records in Volume II of the Appendix, which would be consistent with the documents' sealed status in district court proceedings.

DISCUSSION

We consider four factors when ruling on a motion to stay an injunction pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 410 (5th Cir. 2013). "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Id.* (quotation marks omitted). The applicant "bears the burden of showing that the circumstances justify an exercise of" our discretionary power to stay a case. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009).

Here, the class members argue that the breadth of the district court's injunction has not yet, except in one particular, been determined. A special master will be appointed to develop recommendations for implementing the goals outlined in the district court opinion. The district court then must accept those recommendations before any substantive changes to the foster care system are implemented. Based on the need for these future rulings by the district court, class members argue that the only injunctive relief ordered by the district court that is immediately appealable under 28 U.S.C. § 1292(a)(1) is the mandate to end "unsafe placements." An injunction must provide "explicit notice of the precise conduct that is outlawed." *See Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 385, 387–88 (5th Cir. 1980); FED. R. CIV. P. 65(d)(1)(C). Otherwise, it may be deemed impermissibly vague. *Harris*, 617

F.2d at 387–88. Thus, we construe the district court's mandate narrowly, as the class members argue it should be construed, as only precluding placements in foster group homes that lack 24-hour supervision.

Because the prohibition on unsafe placements is the only portion of the order currently appealable, it is the only portion of the district court's order that we could stay. *See Sierra Club v. Clifford*, 257 F.3d 444, 446 (5th Cir. 2001) (reviewing an order of reference after the district court had accepted the special master's recommendations)[2]; *see also* 9C ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2615 (3d ed.) (orders of reference to a special master, and procedural direction given to a special master during the course of a reference, are not immediately appealable).[3]

Having construed the injunction, we now consider whether it should be stayed. The record is vast, but we find evidence supporting the grave problems arising from the lack of 24-hour supervision in foster group homes. As to that claim only, we find that the State has not made a showing of a likelihood of success in overturning the injunction. *See Griffith v. Johnston*, 899 F.2d 1427, 1439–40 (5th Cir. 1990) (recognizing the "special relationship" between the state and children under its care can trigger substantive due process concerns);

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[2] In *Sierra*, we provided "that an aggrieved party may seek [immediate] review of an order of reference" with the district court's permission under 28 U.S.C. § 1292(b) or by petitioning for writ of mandamus, "but the party is not required to do so because such order . . . may be reviewed on appeal." 257 F.3d at 448. Here, the district court did not certify the reference as appealable under Section 1292(b) and the State did not petition this court for writ of mandamus.

[3] Several other circuits have held the same. *See, e.g., Bogard v. Wright*, 159 F.3d 1060, 1063 (7th Cir. 1998) ("The appointment of a special master . . . is deemed a procedural order . . . [that has] the form of an injunction [but is] . . . not classified as [an] injunction[] for purposes of section 1292(a)(1)."); *Jackson by Jackson v. Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 988 (10th Cir. 1992) (recognizing that the preparation and submission of remedial plans are not appealable under Section 1292(a)(1), but the portion of the order that clearly contains injunctive relief is appealable); *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096 n.6 (3d Cir. 1987) (noting that an appeal of a special master's appointment "may . . . ripen[] with the entry of the district court's final order, thereby providing [the court] with jurisdiction"); *Thompson v. Enomoto*, 815 F.2d 1323, 1326–27 (9th Cir. 1987) (appointment of a master pursuant to an original consent decree does not have the practical effect of granting or denying an injunction).

Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 880–81 (5th Cir. 2004) (discussing the government's obligation to provide its juvenile wards "personal security and reasonably safe living conditions"). We in no way bind a subsequent merits panel with respect to this conclusion.

As to the balance of harms, the State rests its argument primarily on supposed irreparable harm resulting from being ordered to pay for the special master's work. The State argues that if the district court's appointment of a master is later set aside, it will not be able to recoup those costs. Financial harm, though, is outweighed by the harm to the class members and public interest if we stay the case. A stay would allow the State to continue to make apparently dangerous placements in foster group homes that lack 24-hour supervision. We agree with other circuits that "where the value of the constitutional rights to be protected far outweigh[] administrative costs that might be incurred in formulating a remedy, the lower court proceedings . . . should continue." *See Reed v. Rhodes*, 549 F.2d 1050, 1052 (6th Cir. 1976) (considering a stay in school desegregation case).

The State also argues that the injunction impairs its ability to carry out its policies, including placing siblings in the same foster group home. The class members correctly note that the State can still place children in the same group home provided that home has 24-hour supervision.

The public interest also supports allowing the special master to proceed. Because the safety and rights of vulnerable children are at stake, and the immediate injunctive relief ordered is concentrated on a single, narrow mandate, the *Planned Parenthood* factors weigh in favor of denying a stay.

IT IS ORDERED that the State's motion to stay pending appeal is DENIED. IT IS FURTHER ORDERED that the class members' unopposed motion to place Volume II of the Appendix under seal is GRANTED.