COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Supreme Judicial Court No. SJC-13666

JAKLIN SUZETH GOTAY & OTHERS,
Plaintiffs-Appellees,

v.

JULIANN CREEN, ROXANNA JOHNSON-CRUZ, BREANNE PETERSON AND CATHERINE VARIAN,
Defendants-Appellants.

On Interlocutory Appeal from an Order of the Worcester Superior Court

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BRIEF OF THE PLAINTIFFS-APPELLEES

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STATEMENT OF THE ISSUES

1. Whether a reasonable jury could find that the conduct of four current or former social workers for the Department of Children and Families in refusing to address known dangerous conditions in a foster care placement or remove them from that placement, resulting in grievous injuries to those children, violated clearly established constitutional or statutory rights of which a reasonable person would have known.
2. Whether a reasonable jury could find that the conduct of the four social workers amounted to an absence of professional judgment or deliberate indifference to Plaintiffs' rights.

INTRODUCTION

Defendants-Appellants seek to avoid facing a jury for their utter failure to address risks of danger to two foster children in their care by twisting the evidence and the law to support qualified immunity. The opening brief casts this as a case where Defendants were merely negligent (and therefore not constitutionally responsible) because the risks of harm to Plaintiffs were unknown to them until tragedy struck. But in this interlocutory appeal from the Superior Court's denial of summary judgment, this Court must draw all reasonable inferences in Plaintiffs'

favor, and a jury could find that Defendants knew of these risks, or at least knew enough that further action was required. Months before their foster mother's boyfriend (who had a violent criminal history) left them in blazing heat that caused lifelong disabilities to one Plaintiff, substantial trauma to the other, and killed a third child, Defendants knew of allegations that the boyfriend was in the home, had a criminal record, and had abused a child in the home. Another foster child was removed from the home at that time, and an investigation revealed that the boyfriend was in the home more than the foster mother had reported. One Defendant warned the foster mother to take "incriminating" posts off social media. Defendants concluded that home visits should be stepped up to ensure that the boyfriend was not in the home, but they never did that, nor did they make any unannounced visits that might have revealed that the foster mother was actively hiding the boyfriend. They did nothing at all. This is not a case of failure to perceive unknown risks; it is a case of total dereliction of professional duties in response to known information, which a jury could find conscience-shocking. A jury could find that Defendants violated Plaintiffs' clearly established constitutional rights. Therefore, the Superior Court's decision should be affirmed and this matter should be remanded for trial.

STATEMENT OF THE CASE

Plaintiffs-Appellees are satisfied with the Statement of the Case in the Blue Brief.

STATEMENT OF FACTS

In 2013, Defendant Kimberly Malpass ("Malpass") applied for approval as a foster parent by the Department of Children and Families ("DCF"). (RA.I/270.) Malpass had previous history with DCF, including an investigation that confirmed she was putting utility bills in the names of her minor children and an uninvestigated complaint that Malpass had neglected her sons and that Malpass's then-boyfriend was abusing her daughter. (RA.I/271-73; RA.II/121-34.) Defendants-Appellants Juliann Creen ("Creen") and Roxanna Johnson-Cruz ("Johnson-Cruz") recommended that DCF overlook this history, although Creen did not disclose all of the previous complaints against Malpass in making this request. (RA.I/279; RA.II/29-34, 144.) Creen was not a licensed social worker, although she should have had a license under longstanding DCF policy. (RA.I/273-74; RA.III/12-14.) The DCF Director of Areas approved the waiver of Malpass's DCF history on conditions that DCF verify Malpass's prescribed medications and that all utilities were in an adult name; Creen did not do either of these things but

nonetheless recommended Malpass's approval. (RA.I/279-80; RA.II/27, 31, 34.) Malpass was approved for a six-month probationary period as a foster parent in March 2014, during which period Creen, who was the family resource worker for Malpass, failed to make monthly home visits as called for under DCF policy and went months without contacting Malpass. (RA.I/282-83; RA.II/14, 15, 27.) Malpass's foster care license was renewed in 2015. (RA.I/286, 287; RA.II/173.) DCF later concluded that "[t]he licensing process utilized in Ms. Malpass' case was deficient and demonstrates an absence of supervisory oversight of critical steps required under DCF policy." (RA.III/214.) Because Creen and Johnson-Cruz failed to assess the physical and safety standards of Malpass's home, Malpass was approved even though "[t]here was not enough physical space to accommodate the children who were placed there." (RA.III/215.)

Samara Gotay ("Samara") and Alessa Sepulveda ("Alessa")[1] were in DCF custody, and were placed with Malpass, as infants in June 2014 and February 2015 respectively. (RA.I/285, 288-89.) Defendant-Appellant Breanne Peterson ("Peterson") was the ongoing clinical social worker for Samara and Alessa, and

[1] Plaintiffs-Appellees refer to Samara and Alessa by their first names both because other parties to this action have the surname Sepulveda, and because Samara's surname has changed over the course of this matter. The named plaintiffs are Jaklin Suzeth Gotay, adoptive mother and next friend of Samara; Matthew P. Moran, guardian ad litem for Alessa; and Samara and Alessa's biological parents, Kerri Flanagan Sepulveda and Juan Sepulveda.

Defendant-Appellant Catherine Varian was Peterson's supervisor. (RA.I/285-86; RA.III/57-58.) As ongoing social worker, Peterson was responsible for overseeing the children in the foster home and ensuring that the children's needs were being met. (RA.III/58.) Approval to place Alessa in the home was "contingent on ensuring there is weekly home visits to the Malpass home, coordinated between the on-going and family resource workers." (RA.III/153.)

In March of 2015, a social worker for one of the foster children ("J.E.") in the Malpass home filed a report of abuse or neglect pursuant to G.L. c. 119, § 51A, against Malpass. (RA.I/291; RA.II/178-88.) On March 5, 2015, there was a crucial case conference as a result of this report. (RA.I/293; RA.II/186.) Creen, Johnson-Cruz, Peterson, and Varian were present at this meeting. (RA.I/293; RA.II/186.) At this meeting, the social worker for J.E., Amy Villanueva, reported the following concerns about the Malpass home: that a male, Anthony Mallett ("Mallett"), was living in the home and was possibly a primary caregiver; that he had a criminal history and was linked to the drug scene; and that he had possibly struck a foster child in the home. (RA.III/156-58.) Creen testified that she was "not really sure" whether she paid attention to what Villanueva was saying in the meeting. (RA.II/317.) Peterson also recalled hearing concerns that Malpass's boyfriend was in the home and that he had concerning criminal history. (RA.III/59.) At this meeting, Villanueva also presented to the group Facebook pictures of Malpass and

Mallett "with their heads together and a heart drawn around it" suggesting that the two were in a relationship. (RA.III/159-60.) At this meeting, the group discussed the fact that on March 3, 2015, Malpass had posted bail for Mallett who was in court to answer a charge of robbery. (RA.II/18.) Although it was discussed at the meeting that Malpass had a safety plan with the local police department, nobody sought information from the police about activity at Malpass's home; such an inquiry would have revealed dozens of police responses to her home over a period of several years, and that fact would have raised concerns for Creen if she had been aware of it. (RA.II/313; RA.III/18, 216-17.) The decision was made at that meeting to remove J.E. from the Malpass home but the other foster children would remain in the home. (RA.III/163.) The decision that the other children should remain in the Malpass home was based only on the initial report of abuse and was made before the investigation had been performed. (RA.II/166.) Following that meeting, Creen did not look into how often Mallett was coming over to the Malpass home. (RA.II/322-23.)

The 51A report was screened in for further investigation. (RA.I/293; RA.II/18, 178, 186.) Malpass told the investigator assigned to the case that Creen "told her to get rid of Facebook because there is stuff on there that was incriminating." (RA.II/197; RA.III/174.) Malpass also told the investigator that Mallett went to her home "maybe 2-3 times per month." (RA.II/196.) In addition,

the investigator requested a CORI report on Mallett and received an email from an investigative screener with the following results:

"6 209A's against him. None with the foster mother

3/03/2015 armed robbery out of worc district. open, next court date 4/03/15

2013 & 2012 & 2011 bunch of A&B's

2009 stolen property, A&B on Police Officer, resisting arrest, larceny

2006 bunch of stupid stuff

2001 & 2003 more stupid stuff, A&B larceny, etc.

1999 carrying nunchucks (martial arts wanna be), disturbing the peace

Juveline (sic), 1995 assault wiht (sic) switchblade" (RA.II/200.)

This CORI information about Mallett was included in the investigator's report and, therefore, was available for all the defendants to review; based on the testimony of the Defendants-Appellants, it could be inferred that each of them read the 51B investigation report before August 15, 2015. (RA.III/180.[2])

[2] Creen gave conflicting testimony about whether she had read the 51B report but ultimately acknowledged at her deposition that she could have had access to it and that "[i]t would have probably been important to know." (RA.II/323-24, 327-28, 336-37.) Peterson at first could not remember whether she had read the 51B report in March of 2015, but acknowledged that it would be made available to anyone working on the case. (RA.III/65.) Peterson later agreed that she had probably reviewed the document but could not remember the specifics. (RA.III/69-70.) Johnson-Cruz acknowledged that the 51B report of investigation would be available for her review after it was completed and that she read it sometime prior to August of 2015. (RA.III/30-31.) Varian testified that she had read the 51-B investigation report but could not remember exactly when she read it. (RA.III/164.)

The 51B investigation report included information that caused each Defendant-Appellant to have concerns about Mallett being in the home, as well as information that Malpass was lying about how often Mallett was there and that he was frequently in the Malpass home. (*See* RA.I/295; RA.II/206.) In their depositions, Defendants-Appellants acknowledged that the volume of restraining orders, the violent charges against Mallett, and/or the frequency of his visits to the home reflected in the 51B report were concerning. Shown the section of the 51B report including Mallett's CORI information, Creen testified that "[t]hese charges would have been concerning." (RA.II/331, 333.) Peterson stated that it "would have been a concern" that Mallett was in the Malpass home as many times as was reported in the 51B investigation. (RA.III/70-71.) Johnson-Cruz reviewed the portion of the investigation that contained Mallett's CORI information and agreed that it would be a concern that Mallett had charges against him for armed robbery and assault and battery on a police officer. (RA.III/42-44.) She also stated that it would be important to know whether Mallett had actually physically assaulted any women and children in connection with the six 209A restraining orders issued against him. (RA.III/43-44.) Varian testified that Mallett had "some concerning charges." (RA.III/165.)

The 51B investigator concluded that "Mallett was in the home more often than reported" but did not specifically address whether Mallett was considered a

"household member" or a "frequent visitor" under DCF policies. (RA.I/295; RA.II/117-18, 206.)[3] The Rule 30(b)(6) representative of DCF, Susan Horrigan, addressed how the defendants should have assessed this information about Mallett and his frequency in the Malpass home. She stated that, "[t]he best case practice would have been that he was in the home. If he was determined to be in the home, his CORI information would have been provided and run through the Family Resource unit, and it would have been insisted upon that he not be in the home around the children." (RA.II/115-16.) She added that "the onus was on the Family Resource worker [i.e., Creen] to then take that information and do what was necessary, follow up with Ms. Malpass." (RA.II/119.) Similarly, Johnson-Cruz, the Family Resource supervisor, testified that the best practice in this situation would have been to "obtain a CORI BRC on Mallett and assess him further." (RA.III/47.) This was not done. (RA.III/47.) Johnson-Cruz testified that, if an individual who was charged with robbery was a household member, emergency removal of the foster children would be warranted, and if such an individual was found to be a

[3] The investigator, John Dervishian, testified in his deposition that, as a result of his investigation, he considered Mallett a frequent visitor to the Malpass home. (RA.III/179.) The DCF Background Records Check Policy defined "Frequent Visitor" as: "Any individual who does not live in but spends substantial time in the home, regardless of the reason – or purpose of their visitation. Such visitors may include, but are not limited to: non-custodial parent(s); relatives; significant others; baby-sitters; caregivers; and other individuals who perform a caregiving role for **any** child in the home." (RA.I/292; RA.II/137 (emphasis in original).)

frequent visitor, "we would have to also revoke the [foster parent] license." (RA.III/37-38.) In fact, DCF later found that "there was no increased oversight of the home" following the 51B investigation. (RA.III/217.)

As a result of the March 2015 investigation, Creen and Johnson-Cruz made a plan for Creen, Peterson, and the adoption social worker to make weekly visits to the Malpass home. (RA.II/335; RA.III/40.) No one, however, took oversight responsibility to ensure that such weekly visits were made to the Malpass home. (RA.III/45.) In fact, such weekly visits were not made to the Malpass home. (RA.III/181-83.) Although unannounced visits to the home could have helped determine how often Mallett was in the home, Defendants-Appellants did not do that either. (RA.II/111, 334; RA.III/47, 72, 84.) Peterson did not recall if she increased visits in order to determine whether Mallett was in the home. (RA.III/71-72.) Varian did not recall discussing increased visits with Peterson. (RA.III/84.) On April 4, 2015, Johnson-Cruz recognized the need for "[c]ontinual conversations" with Malpass regarding visitors "as well as the need for CORI/BRC checks for frequent visitors to the home." (RA.III/97-98.) However, Creen did not ask Malpass whether Mallett was coming into the home, and only mentioned to her once that Mallett should not be in the home; Creen did not tell Malpass that if Mallett was living in the home, he needed to undergo a CORI check. (RA.II/320-21.)

Between the March 2015 investigation and August 15, 2015, Mallett was living in the Malpass home. (RA.I/301; RA.II/275.) Mallett later confirmed to a DCF investigator that Malpass had been lying about that to DCF and instructing her children to lie. (RA.II/275.) On the evening of August 14, 2015, Malpass left her home to meet friends, and left Mallett to watch the foster children. (RA.I/298; RA.II/276.) On the evening of August 14, 2015, Mallett put A.C. and Samara to bed. (RA.I/301; RA.II/276.) When Malpass came home later that evening, she was drunk and throwing up. (RA.II/276.) Mallett was angry and told Malpass that he would not get up with the children "because he was with 5 kids all night while she was out." (RA.II/276.) Mallett took two Xanax, went to sleep, and did not wake up again until he heard Malpass screaming the next morning. (RA.I/301; RA.II/276.) At one point during that evening, Mallett heard the children crying but fell back to sleep. (RA.II/276.) He did not check on the children, and he did not know if Malpass checked on the crying children. (RA.II/276.) It appears that, in the course of the night, Samara and A.C. were left unattended in a position where Samara (then 22 months old) was able to turn up the thermostat, resulting in excessive heat that caused the death of A.C. and the injury to Samara, who was found to be seizing and in respiratory failure. (RA.I/300, 303-05.)

On August 15, 2015, Malpass called 911 to report that A.C. and Samara were unresponsive. (RA.1/299; RA.II/253.) They were both transported to UMass

Memorial Medical Center where A.C. was pronounced dead and Samara was found to be critically ill. (RA.I/300; RA.II/253-55, 283.) Samara continues to suffer from her injuries and has limitations on her mobility and ability to communicate verbally. (RA.I/303; RA.II/294.) Alessa was also transported to UMass Memorial Medical Center and remained in the hospital for several days. (RA.III/150.) Alessa suffers from sleep and eating issues, including regular nightmares, as well as behavioral issues at school, and requires counseling to deal with her traumatic experience at the Malpass home, her separation from her sister, and her subsequent movement between foster homes away from her biological family. (RA.III/209-10.)

The record includes an expert affidavit from Paula A. Wisnewski, MSW, LICSW, who reviewed the testimony and records and identified numerous failures by Defendants-Appellants. (RA.III/197-202.) Wisnewski noted that Creen lacked a social work license and that Creen and Johnson-Cruz failed to identify or inquire about apparent issues with Malpass's parental capacity before she was approved as a foster parent, including Malpass's failure to tell her adopted child that he was adopted; Malpass's misleading her son about the identity of his father; previous 51A and 51B reports reflecting poor school attendance by Malpass's children and the Malpass family's "intergenerational neglect"; a doctor's concern that Malpass was overwhelmed by managing her own children's medical needs; and a doctor's

concern that Malpass was not in compliance with her own medical regime. (RA.III/199-200.) Wisnewski concluded that Creen and Johnson-Cruz "were reckless in their work and appeared to be deliberately indifferent to following their own policies" in approving Malpass as a foster parent. (RA.III/200.) Once the 51B investigation found that Mallett was in the home more often than reported, it was the responsibility of Creen and Johnson-Cruz to run a CORI check and Background Records Check on Mallett, but they did not do so. (RA.III/201.) Wisnewski concluded that each of the Defendants-Appellants had responsibility for monitoring or overseeing safety of the foster children in the Malpass home, but that each of them "demonstrated reckless disregard with respect to the Malpass home," and that it was "quite clear from the CORI on Anthony Mallett that was run that he showed a significant potential danger to the home and that should not have been ignored." (RA.III/201-02.)

STANDARD OF REVIEW

This Court reviews the denial of summary judgment de novo, and must "view the evidence in the light most favorable to the party opposing summary judgment, drawing all reasonable inferences in the nonmoving party's favor." *See Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 680 (2016) (quotations, citations, and alterations omitted). As the moving party, Defendants bear the burden of demonstrating the lack of any genuine dispute of material fact. *See id.* at 690,

quoting from *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 426 (1995). The Court may not "assess credibility [] or weigh evidence" because such decisions are for the jury. *See Kernan v. Morse*, 69 Mass. App. Ct. 378, 382 (2007). This Court may affirm the lower court's decision on any basis supported by the record. *See Phone Recovery Svcs., LLC v. Verizon of New England, Inc.*, 480 Mass. 224, 227 (2018); *Commonwealth v. Va Meng Joe*, 425 Mass. 99, 102 (1997).

SUMMARY OF ARGUMENT

The sole issue before the Court on this interlocutory appeal is whether the Superior Court correctly denied qualified immunity to Defendants-Appellants on Plaintiffs' claims under 42 U.S.C. § 1983. The lower court was correct because Samara and Alessa had a constitutionally protected liberty interest in safety in their foster care placement (19-24), and that right was clearly established (24-26). Federal courts have applied two different standards (27-31), but a reasonable jury could find for Plaintiffs on either – that Defendants' dereliction of duty amounted to a failure to exercise professional judgment (31-33), or that they acted with deliberate indifference (33-37), or both. Samara and Alessa both suffered substantial harm from Defendants' acts and omissions. (37-38.) Summary judgment was therefore properly denied.

ARGUMENT

I. Samara and Alessa Had a Substantive Due Process Right to Minimally Adequate Safety and Supervision While in State Custody.

Once the Commonwealth removed Samara and Alessa from the custody of their parents, it created a "special relationship" that constitutionally obligated the Commonwealth to provide for their basic needs, including minimal standards of safety and supervision. *See DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010) (collecting cases). Section 1983 provides for liability for state actors (like Defendants) who violate such constitutional rights. The Court of Appeals for the First Circuit has assumed that this right exists. *See J.R. v. Gloria*, 593 F.3d 73, 78-80 (1st Cir. 2010); *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014). Although the few cases in the First Circuit concerning this right are relevant, this Court may look to other federal courts to understand the scope of rights created by the Fourteenth Amendment's Due Process Clause because it is "not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law." *Commonwealth v. Montanez*, 388 Mass. 603, 604 (1983). The First Circuit has similarly recognized that its precedents do not bind this Court: "As a matter of state law, Massachusetts state

courts do not regard the pronouncements of lower federal courts as binding." *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 48 (1st Cir. 2012).

Federal courts have found due process violations in circumstances analogous to this case. The Tenth Circuit denied qualified immunity to a social worker who failed to investigate circumstances including a new adult moving into the home and did not visit the foster home in person for two months, although state policy required home visits at least monthly. *See Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1137, 1145 (10th Cir. 2006). The plaintiff in *Johnson* presented an expert opinion that these failures constituted an "abandonment of professional judgment." *Id.* at 1145. The court concluded that these circumstances created a jury question on whether the social worker violated the child's constitutional rights. *Id.* Similarly here, Plaintiffs have evidence that Defendants failed to follow up on allegations – and confirmation – that Mallett was at least a frequent visitor to the Malpass home who should have been subject to background checks and had a criminal record, and an expert concluding that Defendants were deliberately indifferent and reckless in their "failures to follow established… standards." (RA.III/202.)

In another case, the Tenth Circuit recognized a "continuing duty imposed on state custodial officials" to protect foster children from known dangers or failures to exercise professional judgment. *See Schwartz v. Booker*, 702 F.3d 573, 581-82

(10th Cir. 2012). In *Schwartz*, the defendants received reports of abuse in the foster home, were required by state law to investigate those reports immediately, but closed that investigation despite evidence to support the allegations. *See id.* at 577-78. When subsequent referrals for possible abuse or neglect were raised, the defendants declined to investigate and again closed the case; a timely investigation would have uncovered that the child was being starved and kept in a locked closet, and the child died as a result of the abuse. *See id.* at 578. The court upheld a denial of qualified immunity based on the defendants' failure to exercise professional judgment, decision to ignore dangers that were likely based on the information they had, and "fail[ure] to properly investigate" the circumstances even though state policies required an immediate response. *See id.* at 586-87. *Schwartz* is analogous to the evidence in this case that Defendants were aware of the likelihood that Mallett was in the home and allegations that Mallett had abused another child in the home (who was then removed by other DCF workers), but failed to take action to address the concerns – even those they believed were necessary (i.e., stepping up in-person visits). *See also Gonzalez v. New Jersey*, 2023 WL 3884114, *3 & n.20 (3d Cir. June 8, 2023) (approving conclusion that consensus of persuasive authority clearly established due process violation where state workers received information indicating significant threat of abuse but failed to act on that threat).

The case law exploring the scope of the right of foster children to reasonable safety is not limited to the Tenth Circuit. The Eleventh Circuit has held that a § 1983 action is viable if state actors had "actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home," or put another way, if "state officials were deliberately indifferent to the welfare of the child." *Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 796, 797 (11th Cir. 1987) (en banc). The Eleventh Circuit thus reversed the dismissal of a complaint alleging that officials "failed to thoroughly investigate the fitness of the foster home" and "failed to maintain proper supervision in inspection of the foster home." *Id.* at 793. In a case cited with approval by the Supreme Court, the Second Circuit held in the context of a foster child that liability under § 1983 is appropriate if defendants "exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution." *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981). *See DeShaney*, 489 U.S. at 209 n.9 (citing *Doe* and *Taylor* but declining to address application of Due Process Clause to foster care). The facts in *Doe* included that a foster care agency psychiatrist believed that the plaintiff was "sexually involved with her foster father and should be immediately removed from the foster home," even though she did not admit having such a sexual relationship.

See Doe, at 649 F.2d at 139. In response to this report, the agency held an administrative review meeting, where it was decided to conduct further investigation, but nothing was actually done other than to delete any references to sexual involvement with the foster father from the psychiatrist's report. *See id.* The agency failed to report the allegations of sexual abuse to the Department of Social Services as required by state law. *See id.* The Second Circuit held that a jury could infer deliberate indifference from repeated negligence and failures to satisfy the requirements of state law. *See id.* at 145-47. The facts of *Doe* are reminiscent of the March 5, 2015, meeting at which Defendants discussed the situation at the Malpass home and decided to remove J.E. but not Samara or Alessa; although DCF did conduct further investigation of the complaint, Defendants did nothing as a result of that investigation.

This case is also distinguishable from First Circuit decisions that have not found liability. In *J.R. v. Gloria*, 593 F.3d 73 (1st Cir. 2010), social workers were aware that there was an undisclosed man (identified as "Thinman") living in and caring for the plaintiffs, but failed to seek a background check on him. *See id.* at 80-81. However, they had no reports of abuse by Thinman or other reason to suspect him of harming the children, and there was no evidence that a background check would have demonstrated a criminal record. *See id.* at 81 n.5. When they received a report of abuse by Thinman and were able to corroborate some of the

information, they promptly removed the children from the foster home. *See id.* at 77. In contrast, here Defendants had information including an allegation of abuse, allegations that Mallett had a criminal record which were proven correct, and a finding that the foster mother was misleading them about the frequency of Mallett's presence in the home. There was a range of actions Defendants could have taken to exercise professional judgment; another social worker decided to remove a child from the home, but they could have made unannounced visits to determine whether Malpass was hiding Mallett's presence from DCF (which she was). In fact, Johnson-Cruz and Creen decided weekly home visits were needed, but Defendants did not conduct them. The known risks and deliberate inaction that were absent in *J.R.* were present here.[4]

II. The Constitutional Right to Minimally Adequate Safety and Supervision Was Clearly Established by 2015.

A reasonable official in the position of Defendants would have understood, by 2015, that Samara and Alessa's constitutional right to a minimally safe foster home was clearly established. The law can be considered "clearly established"

[4] The more recent *Connor B.* case was an attempt to obtain classwide relief for mismanagement of the Massachusetts foster care system, not an attempt to address the abuse suffered by the named plaintiffs and "not a typical *Youngberg* case, in which the plaintiffs challenge a professional's particular decision or practice that applies to them." *See Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 54 n.10, 55 (1st Cir. 2014).

either based on "controlling authority or a robust consensus of persuasive authority." *Penate v. Sullivan*, 73 F.4th 10, 18 (1st Cir. 2023). Defendants concede, or at least assume, that a "special relationship" existed because of Plaintiffs' placement in foster care, which inserted state authority into their care and protection, and thereby obligated DCF to assure that their basic needs were met. (Blue Br. 26-28.) Even if the First Circuit has only assumed that this type of substantive due process right applies to the foster care context, the consensus of federal courts renders the right clearly established. *See Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (assuming special relationship without deciding); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010) (holding that state is required to provide reasonable safety and minimally adequate care to foster children, and describing similar holdings from seven other circuits); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990) (after removing children from their homes, state "assumed the responsibility to provide constitutionally adequate care for these children").

Defendants' argument that this clearly established right did not apply to risks unknown to social workers misses the mark. A defendant does not need to predict the exact way that harm will occur in order to understand that dangerous conditions exist, as Defendants appear to argue. (Blue Br. 28 n.10.) *See Hernandez ex rel. Hernandez v. Tex. Dept. of Protective and Regulatory Svcs.*, 380 F.3d 872, 877,

881-82 (5th Cir. 2004) (where defendants were aware of foster parents' previous history of allegations of abuse and neglect, not necessary to show that social workers had "actual knowledge of suffocation" as opposed to "facts from which the inference could be drawn, that placing children in the [] foster home created a substantial risk of danger"). This is a case of deliberate indifference to known risks, not merely negligent failure to address unknown risks. All Defendants were in a meeting where information about Mallett's criminal history and presence in the home was discussed, and where a decision was made to remove another foster child from the home. It was Creen's responsibility in particular to follow up on that information, but instead she warned Malpass to remove incriminating information from Facebook. All Defendants believed that Mallett's criminal history was concerning and warranted further follow-up when they were asked to focus on it, and Johnson-Cruz testified that if she knew that Mallett was a resident or frequent visitor with his record, she would have removed the children from the home. Johnson-Cruz and Creen, at least, subjectively understood that the information about Mallett created risks to Samara's and Alessa's safety because after the March 5, 2015, meeting, they made a plan to ensure weekly visits to the home. But then they failed to follow through. Defendants' actions and inactions, as the jury could find them, related directly to Plaintiffs' clearly established rights.

III. A Reasonable Jury Could Find That Each Defendant-Appellant Violated This Clearly Established Right.

Triable issues of fact preclude summary judgment because a reasonable jury could find that Plaintiffs satisfied either or both of the possible standards for violating their due process rights. Two different lines of cases set forth legal tests (abdication of professional judgment, or conscience-shocking behavior that may be proven through deliberate indifference), and different circuits have synthesized that authority in different ways. Some have adopted one or the other, while others have combined them or concluded that they are essentially the same in practice. The jury could find a violation under either standard, so this Court should remand the case for trial.

a. The Supreme Court Has Articulated Two Different Standards for Conduct Violating Substantive Due Process Rights.

The Supreme Court has not directly addressed the standard applicable to due process claims by foster children in circumstances like this, but courts have looked to two standards in arguably related contexts. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court held that individuals who were involuntarily committed to mental institutions had due process rights at least to safe conditions and freedom from unnecessary bodily restraint, as well as the state's conceded duties to provide adequate food, shelter, clothing, and medical care. *See id.* at 315-16, 324. And the

Court determined that these rights were violated, in the context of "professional" decisionmakers "competent, whether by education, training or experience, to make the particular decision at issue," if "the decision… is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323 & n.30. Thus, liability under *Youngberg* is premised on an abdication of professional judgment, which can be proven through expert testimony. *See id.* at 323 & n.31.

In other contexts like risky behavior by police, the Court has imposed liability for behavior that shocks the conscience. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), where an unnecessarily risky high-speed police chase caused the death of a bystander, the Court traced the history of substantive due process as protecting against arbitrary or abusive exercise of government power. *See id.* at 845-47. It noted longstanding case law that state actions subject officials to liability when they "shock the conscience." *See id.* at 847. It held that merely "negligently inflicted harm" does not rise to the level of a due process violation, but when state officials have sufficient time to reflect (unlike, say, a prison riot), deliberate indifference to an individual's rights may meet that standard. *See id.* at 848-51. It emphasized that context is important, and that failure to meet the medical needs of pretrial detainees is in the zone where deliberate indifference suffices for liability.

See id. at 849-50. The Court in *Lewis* did not purport to displace *Youngberg*, but emphasized that in *Youngberg* "[t]he combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare." *Id.* at 852 n.12. Thus, *Lewis* reaffirmed the vitality of the *Youngberg* formulation for a context closely analogous to foster care, where the state has removed children from their biological families and taken responsibility for their safety and care. In other words, the failure to exercise professional judgment was, itself, conscience-shocking in that context.

Courts have taken different approaches to articulating the liability standard in the foster care context. The Washington Supreme Court has rejected the deliberate indifference standard, holding that "[s]omething more than refraining from indifferent action is required to protect these innocents." *Braam ex rel. Braam v. State*, 150 Wash. 2d 689, 703, 81 P.3d 851, 859 (2003). In Washington, the standard for whether conduct by those charged with the custody of foster children is conscience-shocking is "whether the State's conduct falls substantially short of the exercise of professional judgment, standards, or practices." *Id.* at 701. Other courts have applied the *Youngberg* standard as the bar for liability. *See Kara B. by Albert v. Dane Cnty.*, 205 Wis. 2d 140, 160, 555 N.W.2d 630, 638 (1996) ("foster children should be entitled to greater rights than prisoners…. the duty of public

officials to provide foster children with a safe and secure placement is based on a professional judgment standard"); *Yvonne L., By & Through Lewis v. New Mexico Dep't of Hum. Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (applying *Youngberg*, liability may be based on "abdication of the duty to act professionally"); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990) (under *Youngberg*, "conformity to minimal professional standards" was established standard of liability). Other courts have required deliberate indifference under the *Lewis* line of cases. *See Lintz v. Skipski*, 25 F.3d 304, 307 (6th Cir. 1994) ("[t]here must be deliberate indifference" (quotation omitted)); *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006) (requiring deliberate indifference "[w]hen deliberation is practical"); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010) (applying deliberate indifference standard). Some courts have concluded that, in the context of foster care, there is little or no difference between an absence of professional judgment and deliberate indifference. *See Yvonne L.*, 959 F.2d at 894 ("[a]s applied to a foster care setting we doubt there is much difference in the two standards"); *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 251 n.22 (5th Cir. 2018) (applying deliberate indifference standard but concluding that "case law… indicates that the standards are… roughly equal"). Because foster children should receive the benefit of professional judgment and state officials entrusted with their care should be held to a higher standard than

those dealing with prisoners, this Court should follow the lead of the courts of Washington and Wisconsin and some federal courts and apply the professional judgment standard, but under either standard summary judgment was properly denied.[5]

b. The Jury Could Find That Defendants' Conduct Demonstrated An Absence of Professional Judgment.

The evidence would permit a reasonable jury to conclude that Defendants (and particularly Creen and Johnson-Cruz) displayed an absence of professional judgment. Defendants have not made any reasoned appellate argument in their brief that Plaintiffs have failed to meet this standard; indeed, they barely discuss *Youngberg* or the professional judgment standard at all. (Blue Br. 32, 42.) They have therefore waived any challenge to the Superior Court's ruling that Plaintiffs have shown a dispute of material fact as to the *Youngberg* standard. (Add. 42.) *See* Mass. R. App. P. 16(a)(9)(A); *Tedeschi-Freij v. Percy Law Group, PC*, 99 Mass.

[5] There is no support for Defendants' contention that possible tension between the *Youngberg* and *Lewis* standards "alone should have been enough to conclude that the law in this area is not clearly established." (Blue Br. 32.) As described herein, courts have taken different approaches to reconciling the two standards, but none of them has held that uncertainty about the interplay between *Youngberg* and *Lewis* renders the underlying due process rights not clearly established. *See Connor B. ex rel Vigurs v. Patrick*, 774 F.3d 45, 54 (1st Cir. 2014) ("Whatever tension there is between the *Youngberg* standard and the *Lewis* shocks-the-conscience test is of no moment here." (footnote omitted)).

App. Ct. 772, 781 (2021), and cases cited. The expert affidavit submitted by Plaintiffs describes, with specific citation to evidence in the record, dozens of ways that Defendants violated state laws and policies[6] and professional standards, providing a solid foundation for a finding that Defendants including Creen and Johnson-Cruz failed to exercise professional judgment. (RA.III/198-202.) *See Youngberg*, 457 U.S. at 323 n.31; *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1145 (10th Cir. 2006) (denying summary judgment where expert described abandonment of professional judgment). There is evidence in the record that, if Mallett was a frequent visitor with his criminal history, the children had to be removed from the home and Malpass should not have been a foster parent. (RA.III/37-38.) And Defendants had information that Mallett was in the Malpass home more than had been disclosed and that he qualified as a frequent visitor. (RA.I/295; RA.II/117-18, 206; RA.III/179.) Professional judgment required Defendants to do *something* with this information, as another worker did in removing another child from Malpass's home. But they did not. Their inaction constituted a failure to exercise professional judgment. *See Schwartz v. Booker*,

[6] Although violation of state law may not by itself establish conscience-shocking behavior or failure to exercise professional judgment (Blue Br. 33, citing *J.R. v. Gloria*, 593 F.3d 73, 81 (1st Cir. 2010)), that does not mean it is irrelevant. Defendants' choices not to do what state laws and policies require are evidence from which the jury could infer liability. *See Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 145-47 (2d Cir. 1981).

702 F.3d 573, 586 (10th Cir. 2012) (finding abdication of professional judgment where defendant ignored allegation of abuse and failed to conduct mandatory investigation).

c. The Jury Could Find That Defendants Displayed Deliberate Indifference.

To the extent that it is required in order to find conscience-shocking lapses, a reasonable jury could infer deliberate indifference on the part of Defendants. Deliberate indifference includes ignoring an "objectively substantial risk of harm" based on the information known by defendants, even if they subjectively buried their heads in the sand but "a reasonable official would have been compelled to draw [an] inference" of the risk of harm. *See Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 845 (9th Cir. 2010). Defendants, by reading the 51B report, knew that Mallett had a dangerous criminal history and that he was frequently in the home.[7] Ignoring that information constituted deliberate indifference. *Cf. Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 793, 796, 797 (11th Cir. 1987)

[7] If any of the Defendants engaged in willful blindness by not even reading the 51B report, that is also deliberate indifference because they knew it was important for them to read it. (RA.II/325-28 (Creen, "It would have been probably important to know"); RA.III/65-66 (Peterson, "I should have" read it); RA.III/86 (Varian, Q: "[W]ould it be incumbent upon you to review that document?" A: "Yes.").) There is no dispute that all Defendants were aware of the allegations in the 51A report, which were discussed in the March 5, 2015, meeting.

(en banc) (finding sufficient allegations of deliberate indifference where defendants "knew or should have known the foster parents were unfit to be trusted with her care, custody, and supervision; [and] failed to maintain proper supervision in inspection of the foster home"). *Contrast Sheila S. v. Commonwealth*, 57 Mass. App. Ct. 423, 425, 431-32 (2003) (defendants did not see signs of sexual abuse and, after learning that uncle had lied about his family circumstances, tried to remove plaintiff from his home). Even if, as Defendants argue, they must have been subjectively aware of the risks of harm (Blue Br. 28-31), there is evidence to support such a conclusion. Creen and Johnson-Cruz discussed the situation after the March 5, 2015, meeting, and concluded that it was necessary to ensure weekly in-person home visits to Malpass. From this, the jury could conclude that at least those two Defendants were subjectively aware of the risk of a harmful situation. And Johnson-Cruz's decision to do nothing other than have Creen check in with Malpass meets the standard for supervisory liability under § 1983, i.e., condoning or acquiescing in her subordinate's deliberate indifference. *See Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir. 2008) (requiring "supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference" where subordinate's behavior results in constitutional violation (quoting from *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988)); *Jones v. Han*, 993 F. Supp. 2d 57, 68-69 (D. Mass. 2014) (applying *Pineda* and

holding that "an official can be deliberately indifferent to constitutional violations by her subordinates without holding a subjective belief that their actions would result in constitutional harms"). And although Defendants attempt to view each single violation of laws, DCF policies, and standards in isolation, deliberate indifference may be inferred from repeated noncompliance with legal requirements or professional standards. *See Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 145-47 (2d Cir. 1981). Based on the totality of circumstances, a reasonable jury could find the deliberate indifference standard met.

Each of the laundry list of cases cited by Defendants where liability was not found (Blue Br. 39) is distinguishable.[8] In one such case, qualified immunity was found because the defendant social workers did exactly what Defendants here did not: prompt investigation of complaints of abuse or neglect, including multiple unannounced visits to the home. *See Hernandez ex rel. Hernandez v. Tex. Dept. of Protective and Regulatory Svcs.*, 380 F.3d 872, 883-84 (5th Cir. 2004). In that case, the evidence showed that one defendant might have "conducted a more thorough inquiry," but in this case, Defendants failed to undertake any action at all. *See id.* In *Miller v. Philadelphia*, 174 F.3d 368 (3d Cir. 1999), the defendant pursued an

[8] The Seventh Circuit in *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) held that *Youngberg* set the boundary of qualified immunity at the exercise of professional judgment, but did not decide whether the complaint in that case stated a claim that would survive a motion to dismiss. *See id.* at 854.

investigation into an allegation of abuse and obtained temporary custody of children because he "reasonably believed that the children were in danger of abuse"; that has no relevance to this case of inaction in the face of known dangers. *See id.* at 374, 376-77. Similarly, the plaintiff in *Mitchell v. Dakota Cnty. Soc. Svcs.*, 959 F.3d 887 (8th Cir. 2020), complained that the defendants acted too hastily in removing children based on abuse allegations from the plaintiff's ex-wife and children. *See id.* at 895, 898. The defendants in *Cox v. Dept. of Soc. & Health Svcs.*, 913 F.3d 831 (9th Cir. 2019), relied upon court orders and the findings of medical professionals and a guardian ad litem report that supervised visits with the father were appropriate despite safety concerns, and could not reasonably have anticipated that the father would kill the children during a *supervised* visit. *See id.* at 835-36, 838. If the defendants in *Cox* had ignored the safety concerns by approving *unsupervised* visits, the result may well have been different. In *Ray v. Foltz*, 370 F.3d 1079 (11th Cir. 2004), there was no allegation that the defendants actually knew of risks of harm, only that they negligently failed to gather information that would have revealed those risks. *See id.* at 1084. The complaint in the unpublished decision in *Hubbard v. Oklahoma ex rel. Okla. Dept. of Human Svcs.*, 759 Fed. Appx. 693 (10th Cir. 2018), contained few individualized allegations about specific defendants and failed to show that one social worker's limited action to make sure children attended therapy appointments to address

previous abuse rose to conscience-shocking levels in light of what other workers were doing at the same time. *See id.* at 710-11. In arguing that Defendants had no knowledge of a risk of "overheating of the bedroom," (Blue Br. 38), they ignore the evidence that they knew Mallett was dangerous and was likely in the home when he should not have been. It is this risk of harm to which they were deliberately indifferent.

d. Both Samara and Alessa Experienced Substantial Harm As a Result of Defendants' Actions.

Plaintiffs have submitted evidence that both girls sustained significant damages from Defendants' conduct. As to Samara, there can be little question that the failure to ensure a safe home caused immense medical consequences and left her with profound medical needs that her biological parents were not able to manage. (RA.I/303; RA.II/294; RA.III/209.) Although Defendants argue that Alessa cannot recover without sustaining direct physical injury (for which they cite no legal authority on point), she experienced a deprivation of safety and adequate supervision, even if, by sheer luck, she sustained less serious injuries than Samara; she was hospitalized for several days after the incident. (RA.III/150.) An affidavit from Juan Sepulveda summarizes the lasting medical, mental, and emotional effects of Alessa's experience and her resulting separation from her sister, including recurring nightmares. (RA.III/209-10.) Having removed Samara and

Alessa from their biological parents and placed them in foster care, DCF took on the responsibility of providing minimally adequate "basic human needs — e. g., food, clothing, shelter, medical care, and reasonable safety." *See DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989). This is a liberty interest, and Defendants should be held responsible for all damages found by the jury to result from their violations of Plaintiffs' rights. *See M.D. v. Abbott*, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015) (collecting cases for the proposition that a foster child's right to be free from unreasonable risks of harm includes psychological as well as physical harms), *aff'd in part sub nom. M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 250-51 (5th Cir. 2018); *Jonathan R. v. Justice*, 2023 WL 184960, *7 (S.D. W. Va. Jan. 13, 2023) (similar).

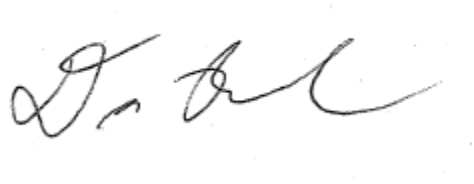
REQUEST FOR FEES AND COSTS

Pursuant to 42 U.S.C. § 1988, Plaintiffs request that the Court award them costs and reasonable attorney's fees as prevailing parties.

CONCLUSION

For all of the above reasons, the order of the Superior Court should be affirmed.

Respectfully submitted,



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September 26, 2024

CERTIFICATE OF COMPLIANCE

I, David A. Russcol, hereby certify that this brief complies with the Rules of Appellate Procedure that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(3) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). I further certify that this brief complies with Rule 20's length limit in that it was prepared in 14-point Times New Roman font using Microsoft Word 365 and, according to Microsoft's Word Count tool, contains 8,185 words.

/s/ David A. Russcol

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that I have this 26th day of September, 2024, served a copy of this document upon counsel of record for the Defendants-Appellants by email and by electronic filing.

/s/ David A. Russcol

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-01114

JAKLIN SUZETH GOTAY[1] & others[2]

vs.

KIMBERLY MALPASS & others[3]

MEMORANDUM OF DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES AND JULIE ANN CREEN, ROXANNA JOHNSON-CRUZ,[4] BREANNE PETERSON, AND CATHERINE VARIAN

42.

This action arises out of a tragic incident on August 15, 2015, involving two children, Samara Gotay (f/k/a Samara Sepulveda) ("Samara") and Alessa Sepulveda ("Alessa") (collectively, "children"), in the care of their foster parent, defendant Kimberly Malpass ("Malpass"). In July 2018, Matthew Moran ("Moran"), as Guardian Ad Litem of the children, and Juan and Kerri Sepulveda ("the Sepulvedas"), the children's biological parents, brought this action contending that Malpass; the Massachusetts Department of Children and Families ("DCF") and its former or current employees Julie Ann Creen ("Creen");[5] Roxanna Johnson ("Johnson-Cruz");[6] Breanne Peterson ("Peterson");[7] and Kathy Varian ("Varian")[8] (collectively, "Department Employees"); and DCF Commissioner Linda Spears ("Spears")[9] are responsible for the children's

[1] Parent and next friend of Samara Kristine Gotay f/k/a/ Samara Sepulveda
[2] Matthew P. Moran, Guardian Ad Litem of Alessa Sepulveda; Kerry Flanagan Sepulveda; and Juan Sepulveda
[3] Massachusetts Department of Children and Families; Linda Spears, as Commissioner of DCF; Juliann Creen; Roxanna Johnson-Cruz; Breanne Peterson; and Catherine Varian
[4] Pled as Roxanna Johnson
[5] Family Resource Worker assigned to the children's case.
[6] Creen's supervisor, later promoted to Area Program Manager.
[7] Samara's ongoing clinical social worker as of July 2014.
[8] Peterson's supervisor until at least August 2015.
[9] The amended complaint lacks any allegations of specific actions by Commissioner Spears. Therefore, the court assumes that Commissioner Spears has been named as a defendant only in her official capacity. See *Harihar* v. *United States Bank Nat'l Assoc.*, 2017 WL 1227924 at *14 (D. Mass. 2017). A claim against Commissioner Spears in her official capacity is functionally identical to a claim against DCF. See *Will* v. *Michigan Dep't of State Police*, 491 U.S.

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injuries. The amended complaint[10] asserts claims against DCF for vicarious liability for Malpass's negligence (Counts I and II), negligent hiring (Counts III and IV), negligent supervision/oversight (Counts V and VI), and violation of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670, *et seq.* (Counts XI and XII). It also asserts claims for violations of 42 U.S.C. § 1983 against Malpass (Counts VII and VIII) and the Department Employees (Counts IX and X). In addition, the Sepulvedas assert claims for loss of consortium (Counts XIII, XIV, XV, and XVI) against DCF.

On April 22, 2019, the court (Sullivan, W.) dismissed the negligent hiring claims against DCF (Counts III and IV) and the claims for violation of the Adoption Assistance and Child Welfare Act (Counts XI and XII). The case is now before the court on DCF's motion for summary judgment on Counts I and II alleging vicarious liability for Malpass's negligence; Counts V and VI asserting negligent supervision/oversight of DCF employees; Counts II and VI, brought on Alessa's behalf, for negligence; and Counts XIII through XVI alleging loss of consortium by the Sepulvedas. The Department Employees also move for summary judgment on Counts IX and X of the amended complaint for violation of 42 U.S.C. § 1983 (substantive due process). For the reasons set forth below, DCF's motion is **ALLOWED** in part and **DENIED** in part. The Department Employees' motion is **DENIED**.

58, 71 (1989) ("A suit against a state official in their official capacity "is not a suit against the official but rather is a suit against the official's office"). Accordingly, the court's analysis of DCF's claims will apply to the claims against Commissioner Spears.

[10] The complaint was amended as of September 22, 2022, to substitute Samara's adoptive mother, Jaklin Suzeth Gotay, in place of Moran.

BACKGROUND

The following facts are taken from the summary judgment record and are viewed in the light most favorable to the plaintiffs as the non-moving party. See *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 680 (2016).[11]

Samara and Alessa, biological sisters, were minors under DCF's care and custody. Samara was removed from the Sepulvedas' custody and placed in DCF custody on or about June 26, 2014. She was placed in foster care with Malpass from June 26, 2014 to August 15, 2015. Alessa was removed from the Sepulvedas' custody on February 17, 2015, and placed in foster care with Malpass on February 20, 2015. She stayed in Malpass's care until August 15, 2015.

Malpass was a single mother with three children at the time of the incident. In 2008, a report was filed against her pursuant to G. L. c. 115, § 51A ("51A report") alleging that her children were "malnourished and very skinny," that the "condition of the home was deplorable," and that she was taking out credit cards, cell phones, and books in the children's names.[12] DCF screened in the report for further investigation and determined that the allegations were unsupported. Another 51A report was filed against Malpass in June of 2012 by her neighbor alleging abuse and neglect of Malpass's children, but the investigator assigned to the case screened out the report, finding that the neighbor was fighting with Malpass and that the report was retaliatory.

Malpass applied to be a foster parent with DCF in April of 2013. Creen was the family resource worker assigned to perform the license study of Malpass's home to assess the suitability of the home for foster care.[13] DCF's Policy #2006-01 ("Family Resource Policy"), revised in 2008, stated that the license study was performed in order "[t]o assure quality of care, children

[11] The plaintiffs did not properly respond to the defendants' Statement of Material Facts, and therefore the facts summarized below were either admitted or are deemed to be admitted for their failure to respond properly.
[12] The report was partially based on the statements made by the father of Malpass's two sons.
[13] Although Creen had been a social worker for thirty-five years at that time, she did not have a social worker license.

who are in Department care or custody are to be placed only in fully assessed, prepared and licensed homes." It further provided that the license study process should include "[a]t least 3 interviews, at least 2 of which are home visits," and "[a]t least 1 interview with each household member as appropriate to her/his age and verbal capacity, including an individual interview with each applicant."

Past 51A/B activity was not addressed in the Family Resource Assessment, as required by CMR 5.09(4)(c)(4) and DCF Standards 10 CMR 7.103 Services (3)(i). Johnson-Cruz, supervisor of the family resource unit, admitted in her deposition that it was an "oversight" not to have reviewed all of the prior 51A reports filed on the Malpass home. These past 51A/B reports included the fact that Malpass's children had poor school attendance and that that the family was known for having "intergenerational" neglect. According to Malpass's medical doctor, she was not in compliance with her medical regimen. Malpass had multiple medical issues, including Lupus, high blood pressure, and kidney failure, which could impact her capacity to serve as a foster caregiver. Indeed, Malpass was receiving social security income and the foster home assessment failed to explore the reason for that governmental assistance. The family resource worker did not follow up on a concern raised by a physician of one of the children, who reported that Malpass was overwhelmed by managing her own children's medical needs. Multiple regulations were violated in failing to address incomplete areas of the application.

Under the Family Resource Policy, "[a]fter the family has been licensed, the [Family Resource Worker] normally contacts the family at least monthly. During the probationary period [the first six months after a child has been placed in the home], the monthly contacts will normally be home visits . . . . After the probationary period ends, the [Family Resource Worker] visits the foster family at least once every other month."

As part of the study, Creen gathered information about Malpass and her home and family. In September 2013, Creen communicated with Malpass, her family members, and the medical providers and educators of her children. Creen conducted two home visits and one phone interview and had approximately ten additional interactions with Malpass during Malpass's foster care training in 2013. Creen did not record any interviews with Malpass's children as part of the study. During Malpass's six-month probationary period, Creen recorded three visits to her home.

Malpass was approved as a licensed foster parent in March 2014 for a six-month probationary period. The plaintiff's expert, Paula Wisnewski ("Wisnewski"), MSW, LICSW, concludes, "[w]hile each one of the above events in and of themselves could be understood as a mistake, in looking at the breadth and depth of the concerns and oversights, it is clear that ... Creen and ... Johnson-Cruz and their supervisors at the [DCF] were reckless in their work and appeared to be deliberately indifferent to following their own policies."

March 2015 51A report

In March of 2015, a social worker for one of the children in the foster home, J.E., filed a 51A report against Malpass. The March 2015 51A report alleged that Anthony Mallett ("Mallett") was a drug addict living in the foster home, was charged with either armed or unarmed robbery, and had hit J.E. on the head.[14] The Family Resource Policy stated: "The [foster/pre-adoptive] home must not have any household member, alternative caretaker or frequent visitor who would, in the judgment of the Department, pose a threat of abuse or neglect to children placed in the home, or would impede or prevent the provision of adequate foster/pre-adoptive care in the home." The Background Records Check Policy defined "Frequent Visitor" as follows:

> Any individual who does not live in but spends substantial time in the home, regardless of the reason or purpose of their visitation. Such visitors may include, but are not limited to:

[14] The allegations were made by J.E.'s biological mother who had contact with Malpass and allegedly had harassed her.

non-custodial parent(s); relatives; significant others; baby-sitters; caregivers; and other individuals who perform a caregiving role for any child in that home.

The Background Records Check Policy stated that a background records check is part of the licensing process for foster homes to determine "whether the applicant and the members of her/his household age 15 years and older (and those younger household members about whom concerns exist) and other frequent visitors to the home meet Department BRC standards for being a Department licensed foster/pre-adoptive home." The Background Records Check Policy identifies the categories of criminal offender registry information ("CORI") that result in various types of presumptive or discretionary disqualifications from being a foster parent.

On March 5, 2015, after J.E.'s social worker filed the March 2015 51A report, a case conference on the foster home was conducted with the following social workers and supervisors: Amy Villanueva, Kelly Prendergast, Natasha Webster-Lester, Donna Pearce, Heather Kerr, Tori Ginetti, Philip Ekeson, Johnson-Cruz, Peterson and Creen [and perhaps Varian]. At the March 5, 2015 case conference on the Malpass home, a decision was made to "screen in" the 51A report for further investigation by the Special Investigations Unit. J.E. was moved from the Malpass foster home to her grandparents' home, but the other children were left in the foster home.

Wisnewski summarized the following evidence related to the defendants' involvement. Creen colluded with the foster mother Malpass by advising her to take down information about her boyfriend Mallett on Facebook because it was incriminating. Creen admitted this to her supervisor. The 51B investigation found that Mallett was in the home more than Malpass admitted and that, in effect, he was a "frequent visitor" under DCF regulations. A CORI-BRC report should have been run at the time, and it was the responsibility of the social worker and supervisor at DCF to do so. Ultimately, the 51B investigator ran a CORI report on Mallett and found six abuse prevention (209A) orders, open armed or unarmed robbery charges, convictions

for assault and battery, assault and battery of a police officer, larceny and resisting arrest. Creen admitted at deposition that she had not even read the 51A report or 51B investigation report, although she agreed it would have been important to do so. Johnson-Cruz admitted to reading the report but failing to take any action as a result of it. Neither Peterson nor Varian recalled reading the 51B investigation.

An investigator from the Special Investigations Unit was assigned to investigate the March 2015 51A report. As part of the investigation, the investigator communicated with social workers, Malpass, Mallett, J.E.'s mother, J.E., daycare providers, and educators regarding the allegations. The investigator for the March 2015 51A report wrote the following in partial summary of a March 12, 2015 interview with Malpass:

> Ms. Malpass stated that she is fully aware that she would need to notify DCF if someone new moved into her home or if there was someone that was coming over on a frequent basis. She explained that she knew Anthony from years ago. They dated about 15 years ago. She stated that they reconnected over a year and a half ago. She stated that they would get together, now and then. She stated that he might have been at the home "maybe 2-3 times a month." She stated that he never slept over and was never left alone with any foster children, or her own children. She stated that they have gone away together with her kids, but never with foster children. She expressed that she did not realize that he would need to have a DCF background check based on the little time she did spend with him. She stated that [redacted] had met him, and [redacted] last saw him at a birthday party she had for [redacted] at her mother's home.

The investigator for the March 2015 51A report recorded statements from J.E. that described "AJ," i.e., Mallett, as both an adult who lived in the Malpass home and as a child who lived near her father. The investigator for the March 2015 51A report stated that Malpass had received subtle threats from J.E.'s mother and had concerns for her safety. The investigator for the March 2015 51A report completed his 51B investigation report on March 18, 2015, and

concluded that the allegations were unsupported. The investigator for the March 2015 51A report stated in his conclusions:

> Investigator does feel that Mr. Anthony Mallett was in the home more often than was reported, but again does not feel that this is indicative of Neglect. Ms. Malpass is fully aware of what is expected and was told to contact her FRW with any questions about who needs to be approved. She was told that she cannot have anyone around the foster children on a frequent basis, who has not been approved by DCF.

The supervisor of the investigator for the 51A report agreed with the investigator's decision that the allegations were unsupported.

A conference took place as a result of this report. The Department Employees were present at this meeting. At the meeting, the social worker, Amy Villanueva, reported that a male, Mallett, was living in the home and was acting as a primary caretaker for the children in the residence. He had a criminal history as outlined above. It was reported that he had possibly struck J.E. in the home. At the meeting, the group also discussed the fact that on March 3, 2015, Malpass had posted bail for Mallett, who had been charged with an unarmed robbery. The decision was made to remove J.E. from the home but to leave the rest of the children with Malpass.

After the March 2015 51A report was filed, Creen had a conversation with Malpass in which Creen told Malpass that Mallett was not supposed to be in the foster home. In April 2015, Creen completed a Background Record Check Approval Request for the March 2015 51A report that was found unsupported, in which she wrote: "Worker has been able to meet with Kim and discuss the allegations. It appears that Kim has a new understanding of who she can and cannot associate with while she has foster children in the home and is very much aware of the responsibilities of caring for foster children." After the March 2015 51A report was filed,

Peterson looked in the Malpass home for evidence that Mallett was present and reported that she found no such evidence.[15]

Johnson-Cruz approved the April 2015 Background Record Check Approval Request, in which she wrote: "Continual conversations will be had with Kim regarding visitors and the need to keep the Department informed as well as the need for CORI/BRC checks for frequent visitors to the home."

According to Wisnewski, none of the Department Employees did what was required in light of this new information, which was to deem Mallett to be a frequent visitor to the home, run a background check on him, and reconsider the safety of the home in light of the new information. Despite the 51A report and 51B investigation, there was no increased oversight of the home and the plan to have weekly visits by social workers was never monitored. Instead of weekly visits, there were only three home visits between March and August 2015.

Incident of August 14-15, 2015

On the evening of August 14, 2015, Malpass left her home to meet friends while Mallett was at home and left to care for the foster children. Mallett told a DCF investigator that "he got [Avalena Conway ("Avalena")] and Samara ready for bed. He (sic) fed them waffles and bananas, changed them and put them to bed." Mallett told a DCF investigator that "there was no air conditioning in the babies room." On the night of August 14, 2015, Alessa slept in Malpass's bedroom, which had a window air conditioning unit.[16] Malpass returned home that evening intoxicated.

[15] The plaintiffs also fault the defendants for granting a waiver of Malpass's DCF history under the condition that a social worker verify the medications prescribed to the family members and make sure that all utilities were in an appropriate adult name as a part of the home study process. Creen never performed the required verifications.
[16] According to the Family Resource Policy, "[n]o foster/pre-adoptive child over age one shall share a bedroom with an adult."

During DCF's investigation into the events of August 15, 2015, Mallett stated that he had provided childcare in the Malpass foster home, including on the evening of August 14, 2015. One or both of the allegedly overheating and distressed children apparently cried from their rooms/cribs, with no response from Malpass (by inference, due to her intoxication or indifference to the children's needs) or Mallett (by inference, due to his indifference to the children's needs). Mallett further told the investigator that he woke on August 15, 2015, to Malpass screaming about Samara and Alessa not breathing.

On August 15, 2015, Malpass called 911 to report that Avalena[17] and Samara were unresponsive. After Malpass called 911, Samara and Avalena were transported to UMass Memorial Medical Center at approximately 12:30 p.m. At the hospital, Avalena was pronounced dead. Doctors found Samara critically ill and her conditions included respiratory failure and seizure disorder, and she was hyperthermic (high temperature) and hypotensive.

During DCF's investigation into the events of August 15, 2015, the investigator summarized Mallett's statements to him regarding his presence in the Malpass home as follows:

> Mr. Mallett reported that he has been living in Ms. Malpass home for a year and a half. He told Inv[estigator] that he was living there back in March when Inv[estigator] met with him before. He told Inv[estigator] that Kim lied and she had her children lie to Investigator about that. He stated that they were just a normal family doing normal things. He stated that he helped Kim with all the children.

On or around September 24, 2015, Malpass's license to be a foster parent with DCF was revoked.

In 2019, the Worcester District Court conducted an inquest into the death of Avalena, which included evidence regarding the injuries to Samara. *Worcester Cnty. Dist. Attorney v. Avalena Conway-Coxen*, No. 1862IN000001 (Worcester Dist. Ct.). A thermostat for an electric

[17] Avalena is not a party to this action.

heater was located on the wall of Avalena and Samara's bedroom. After the August 15, 2015 incident, police forensic scientists from the Massachusetts State Police collected a swab of material from the dial on an "electric thermostat in that upstairs bedroom," which was processed for latent fingerprints. A DNA analyst from the Massachusetts State Police Crime Laboratory analyzed the material collected from the thermostat in Samara and Avalena's bedroom and concluded that "the DNA profile of S.S. [Samara] is consistent with the major profile from the swab of the thermostat."

On August 18, 2015, investigators with the Massachusetts State Police and Auburn Police Department performed a heat study in Samara and Avalena's bedroom. During that heat study, the baseline temperature at 8:01 p.m. was 88 degrees Fahrenheit, and that the final temperature was 109 degrees Fahrenheit at midnight. Malpass's brother, Andrew Malpass, testified at the inquest that Malpass told him that "[s]he walked into the bedroom and that the room was really hot and she noticed that the heat was on."

Samara and Alessa's care and custody

Samara has been legally adopted and lives in Rhode Island, and her care and petition proceeding in the Juvenile Court has been closed. Samara continues to suffer from her injuries from August 2015, with limitations on her mobility and ability to communicate verbally.

On March 5, 2022, Alessa began to reside with her father, Juan Sepulveda. Alessa's care and petition proceeding remains pending in the Juvenile Court and DCF currently has legal custody over her.

Affidavits

The plaintiffs included in the summary judgment materials affidavits from Wisnewski and Juan Sepulveda. Wisnewski is a licensed independent social worker and has over twenty-six

years of experience working within child placement and family resource development, with most of those years within the DCF system. Upon review of the Sepulveda matter, and all the litigation documents associated therewith, Wisnewski concluded that Creen and Johnson-Cruz failed to take various steps in approving Malpass's home for approval of a foster home, including, but not limited to, failing to (1) assess Malpass's adopted child in the home study; (2) review all prior 51A reports concerning Malpass's home, including one where she placed bills and credit cards in the names of her children; (3) assess Malpass's medical needs and whether she complied with her medical regimen; and (4) include enough interview/home visits. Wisnewski also determined that Creen, Johnson-Cruz, Peterson, and Varian failed to follow DCF regulations and policies, amongst others, that led to Samara's injuries, in particular with respect to investigating Mallett's relationship with Malpass and whether Mallett lived at the premises. In conclusion, Wisnewski opined that "DCF, its servants, agents and employees . . . demonstrated reckless disregard with respect to the Malpass home."

Juan Sepulveda's affidavit alleges that on August 15, 2015, Samara suffered "nonaccidental trauma with subsequent hypoxic ischemic insult to the brain resulting in cortical visual impairment, epilepsy, right-sided hemi-paresis and global development delays." While Juan Sepulveda has visitation with Samara, he ultimately agreed to release her for adoption given the severity of her needs after the August 15, 2015 incident. Juan Sepulveda has had continued visitation with Alessa from the date of the incident through February2022, when he received physical custody of Alessa. He is still awaiting legal custody of her. Since the incident, Alessa had had mood swings, nightmares, eating issues, and behavioral issues in school. Alessa verbalizes missing Samara on a weekly basis, and when they go to visit Samara, Alessa does not

understand why Samara does not go with them. Alessa requires continued counseling for the trauma she sustained while living in foster care, among other reasons.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue." *Scholz* v. *Delp*, 473 Mass. 242, 249 (2015). "The party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if the moving party demonstrates that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case" (brackets, ellipsis, quotation, and citation omitted). *Id.*

"When a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e). See also *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991) (when moving party makes necessary showing, opposing party must respond with evidence of specific facts establishing existence of genuine dispute); *LaLondè* v. *Eissner*, 405 Mass. 207, 209 (1989) ("the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment"). A court does not assess credibility or weigh evidence at the summary judgment stage. *Bulwer*, 473 Mass. at 689 ("The question of whose interpretation of the evidence is more believable, raised by the [parties'] conflicting

evidence as to the defendant[s'] motive, is not for a court to decide on the basis of [briefs and transcripts], but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of witnesses.").

II. DCF's Motion for Summary Judgment

a. Vicarious Liability for Negligence of Kimberly Malpass pursuant to G.L. c. 258 (Counts I and II)

DCF argues that it is not vicariously liable for Malpass's negligent actions because they were not performed in her scope as a public employee under G. L. c. 258, § 1. Under the Massachusetts Tort Claims Act ("MTCA"), "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances . . . ." G. L. c. 258, § 2. The MTCA's definition of "public employee" includes foster caregivers, provided their tortious conduct "was not intentional, or wanton and willful, or grossly negligent." G. L. c. 258, § 1. Generally, "[w]hether an individual is a public employee is a question of fact." *Williams* v. *Hartman*, 413 Mass. 398, 400 (1992). Here, however, the Legislature has defined a "public employee" to explicitly include "an approved or licensed foster caregiver" G.L. c. 258, § 1. The full section for this portion of the statute is as follows:

> For purposes of this chapter, the term "public employee" shall include an approved or licensed foster caregiver with respect to claims against such caregiver by a child in the temporary custody and care of such caregiver or an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver; provided, however, that such conduct was not intentional, or wanton and willful, or grossly negligent.

G.L. c. 258, § 1.

The plaintiffs have submitted sufficient evidence in the summary judgment record that the minor plaintiffs were in the "temporary custody and care of such caregiver" and that their injuries were "caused by the conduct of such caregiver," within the scope of Malpass's employment as a foster caregiver. See G. L. c. 258, §§ 1, 2.

DCF also argues that Malpass's conduct constituted gross negligence and, therefore, she was not acting as a public employee within the meaning of the MTCA. "[G]ross negligence is substantially and appreciably higher in magnitude than ordinary negligence . . . . It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care . . . . It is a heedless and palpable violation of legal duty respecting the rights of others[.] Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence." *Parson* v. *Ameri*, 97 Mass. App. Ct. 96, 106 (2020), quoting *Altman* v. *Aronson*, 231 Mass. 588, 591-592 (1919). "[S]ome of the more common indicia of gross negligence are set forth as 'deliberate inattention,' 'voluntary incurring of obvious risk,' 'impatience of reasonable restraint,' or 'persistence in a palpably negligent course of conduct over an appreciable period of time.'" *Rosario* v. *Vasconcellos*, 330 Mass. 170, 172 (1953). "[W]hether factual allegations fall within the scope of conduct that can be deemed grossly negligent is typically a question of fact." *O'Flynn* v. *Pingree School, Inc.*, 2022 WL 1694104 (2022). See *Borella* v. *Renfro*, 96 Mass. App. Ct. 617, 622 (2019).

Because there are genuine issues of material fact as to whether Malpass's conduct was within the scope of her employment as a foster caregiver as a "public employee" and whether her conduct rose to the level of gross negligence (or other exemptions set forth in the definition

sections of G. L. c. 258), summary judgment is not appropriate on Counts I and II of the amended complaint.

b. Negligent Supervision/Oversight Claims based upon G.L. c. 258, § 2 as to DCF (based upon conduct of Peterson, Varian, Creen and Johnson-Cruz) (Counts V and VI)

DCF argues that it is immune from liability for the tort claims alleged under the MTCA due to the application of G. L. c. 258, § 10(b), known as the discretionary function rule, and § 10(j), which provides immunity for failure to prevent harm by a third party except in cases where the harm was originally caused by the public employee(s). See *Brum* v. *Town of Dartmouth*, 428 Mass. 684, 690-691 (1999). With respect to § 10(b), DCF asserts that it cannot be liable in negligence for discretionary functions in evaluating the suitability of the foster home and investigating allegations of neglect. Further, with respect to § 10(j), DCF asserts that the alleged negligent supervision of Malpass's home was not the original cause of the children's injuries as required by the statute.

Section 10(b) of the MTCA sets out one of several exceptions to liability, excluding "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." G. L. c. 258, § 10(b).[18]

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[18] The Supreme Judicial Court has found that the "discretionary function" exception to governmental tort liability does not apply in a wide variety of cases that did not involve policy making or planning:

> See, e.g., *Harry Stoller & Co.* v. *Lowell*, 412 Mass. 139, 145-146 (1992) (no immunity where fire fighters chose not to use buildings' sprinkler systems to fight fire and negligently failed to conform to generally accepted firefighting practices); *Dobos* v. *Driscoll*, 404 Mass. 634, 652-653, cert. denied sub nom. *Kehoe* v. *Dobos*, 493 U.S. 850 (1989) (no immunity where supervisors' conduct in deciding whether and how to discipline State trooper constituted improper implementation of existing police policy); *A.L.* v. *Commonwealth*, *supra* at 245-246 (no immunity where probation officer negligently failed to monitor probationer's compliance with policy decisions made by sentencing judge); *Doherty* v. *Belmont*, 396 Mass. 271, 276 (1985) (no immunity where town failed to maintain municipal parking lot in reasonably safe condition); *Kelley* v. *Rossi*, 395 Mass. 659, 665 & n.6 (1985) (no immunity where city physician's treatment of emergency room patient governed by standard of accepted medical practice); *Irwin* v. *Ware*, 392 Mass. 745, 753 (1984) (no immunity where police officer failed to remove intoxicated motorist from

"The exception distinguishes between discretionary acts, defined as conduct that involves policy making or planning, and functionary acts, that is, those actions that simply implement established policy" (quotation and citation omitted). *Magliacane* v. *City of Gardner*, 483 Mass. 842, 859 (2020).

> Although almost every act involves some degree of discretion, "[t]he discretionary function exception is narrow, 'providing immunity only for discretionary conduct that involves policy making or planning.'" *Greenwood* v. *Easton*, 444 Mass. 467, 470 (2005), quoting *Harry Stoller & Co.*, supra. Discretionary acts do not include those that involve only the "carrying out of previously established policies or plans." *Barnett* v. *Lynn*, 433 Mass. 662, 664 (2001), quoting *Whitney*, 373 Mass. at 218.

Id. at 860.

Determining whether the exception applies requires a "two-step analysis" in which the court must decide: (1) "whether the governmental actor had any discretion at all as to what course of conduct to follow"; and (2) "whether the discretion that the actor had is that kind of discretion

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roadway in accordance with established statutory provisions); *Whitney* v. *Worcester*, *supra* at 223-224 (no immunity for teacher's failure to seek medical attention for injured student where only adoption, not implementation, of plan to integrate handicapped students into public schools was discretionary act). See also *Chiao-Yun Ku* v. *Framingham*, 62 Mass. App. Ct. 271, 277-278 (2004) (no immunity where town's supervision of snow removal constituted ministerial act of maintenance, not discretionary act of policy making or planning); *Alake* v. *City of Boston*, 40 Mass. App. Ct. 610, 612-614 (1996) (city's decision concerning number of chaperons to send on school field trip was discretionary function involving allocation of limited resources, but claim that chaperons were negligent in supervising students was not barred by discretionary function exception because chaperons' conduct did not rise to level of policy making or planning); *Tryon* v. *Lowell*, 29 Mass. App. Ct. 720, 724 (1991) (city's decision to erect fence between school and abutting railroad tracks was discretionary act, but city's inadequate maintenance of such fence did not entail discretionary function warranting immunity under § 10 [b]); *Sanker* v. *Orleans*, 27 Mass. App. Ct. 410, 412-413 (1989) (municipality's decisions concerning location of utility poles and design of public roads were discretionary functions, but municipality's failure to prune tree branch overhanging road was not discretionary act). Contrast *Barnett* v. *City of Lynn*, 433 Mass. 662, 664 (2001) (immunity conferred where city's decision not to erect fence on city property to prevent sledding was based on allocation of limited resources and, as such, was discretionary function); *Pina* v. *Commonwealth*, 400 Mass. 408, 414-415 (1987) (immunity conferred where State employees who evaluated and processed claim for Social Security disability insurance benefits were performing discretionary function); *Patrazza* v. *Commonwealth*, 398 Mass. 464, 469-470 (1986) (immunity conferred where design of highway guardrail and policy implementing its use were encompassed within discretionary function exception of § 10 [b]); *Alter* v. *City of Newton*, 35 Mass. App. Ct. 142, 146 (1993) (immunity conferred where city's decision not to erect fence around school athletic field constituted integral part of governmental policy making or planning); *Wheeler* v. *Boston Housing Authority*, 34 Mass. App. Ct. 36, 40 (1993) (immunity conferred where decision regarding security measures in public housing complex constituted discretionary function).

Greenwood v. *Town of Easton*, 444 Mass. 467, 471 n.6 (2005).

for which § 10(b) provides immunity from liability" (quotation and citation omitted). *Id.* In considering the first step, the court must ask whether there was a statute, regulation or established agency practice prescribing the course of conduct at issue. See *Barnett* v. *City of Lynn*, 433 Mass. 662, 664 (2001). If the Commonwealth had no discretion because a course of action was prescribed by a statute, regulation, or established agency practice, then the discretionary function exception does not apply. *Harry Stoller & Co.*, 412 Mass. at 141; see also *Brum*, 428 Mass. at 691 (discretionary function immunity does not apply in cases in which government official's actions were mandated by statute or regulation).

Here, the plaintiffs allege that DCF failed to follow its own written regulations and policies (including the Family Resource Policy) in multiple ways including a failure to conduct the number of required home visits, which would have uncovered that Malpass's home was not a suitable placement. Rather than discretionary policy decisions, the plaintiffs have put forth sufficient evidence to defeat summary judgment on this ground. Wisnewski's expert report identifies numerous regulations and policies that the Department Employees failed to follow surrounding their investigation into the allegations concerning J.E.

With respect to § 10(j), the Commonwealth's agencies, such as DCF, retain tort immunity for:

> any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer[.]

G. L. c. 258, § 10(j). The purpose of this section is to immunize public employers for harm the public employer failed to prevent, which was caused by a third person. *Brum*, 428 Mass. at 692. Under § 10(j), immunity is only removed "where 'the condition or situation' was 'originally caused by the public employer.'" *Id.*, quoting G. L. c. 258, § 10(j). "Original cause" means "an

affirmative act (not a failure to act) by a public employer that creates the 'condition or situation' that results in harm inflicted by a third party." *Kent* v. *Commonwealth*, 437 Mass. 312, 318 (2002), quoting *Brum*, 428 Mass. at 695. It is not enough for a plaintiff to simply "recast . . . failures as affirmative acts." *Audette* v. *Commonwealth*, 63 Mass. App. Ct. 727, 732-733 (2005). Instead, a plaintiff must show that the public employer's act "materially contributed" to creating the specific "condition or situation" that resulted in the harm. *Kent*, 437 Mass. at 319. In this analysis, courts "must determine . . . whether the [public] employees took an affirmative act that materially contributed to creating a condition or situation that resulted in [the plaintiffs'] injuries." *Cormier* v. *City of Lynn*, 479 Mass. 35, 41 (2018).

Recently, the Appeals Court held that "the actual harmful condition that is alleged is the placement of [the plaintiff's decedent, who was held in protective custody] ... in the cell at the jail with arrestees," so that the MTCA claim was not barred by G. L. c. 258, § 10(j). *Baptista* v. *Bristol Cnty. Sheriff's Dep't*, 100 Mass. App. Ct. 841, 856 (2022). Similarly, the plaintiffs argue that DCF's placement of the child in Malpass's home was the "original cause" of the harm and therefore § 10(j) does not apply. The plaintiffs have submitted extensive evidence through their expert affidavit of Wisnewski (as well as deposition testimony) that DCF repeatedly failed to take actions required by their own regulations and policies, and consequently placed the minor plaintiffs in an unsafe foster home. Wisnewski has identified approximately twenty-three (23) areas of deficiencies where DCF employees failed to follow their own regulations and policies in their decision to approve the Malpass foster home.[19] In addition, Wisnewski identifies approximately eight (8) areas of deficiencies where DCF employees failed to follow their own regulations and

[19] While the plaintiff's expert opines that these departures from the appropriate standards were reckless and constituted deliberate indifference, a jury would be entitled to consider the same underlying facts and conclude that DCF's actions were negligent.

policies in failing to remove the minor plaintiff from the Malpass home following the 51A report in March 2015 and follow-up investigation taken in connection with that.

Therefore, this count survives summary judgment as to DCF, despite the potential availability of immunity under G. L. c. 258, § 10(b) and 10(j), based upon the conduct of its employees in by allegedly failing to follow DCF's own regulations and policies (eliminating immunity under § 10(b) - discretionary function) and allegedly creating the dangerous situation (i.e., being the "original cause" under § 10(j)).[20]

c. Alessa's Negligence Claims (Counts II and VI)

DCF contends that the negligence claims brought on behalf of Alessa – who slept in a bedroom with air conditioning, rather than in the bedroom that reached excessive temperatures – fail because she was not physically harmed on August 15, 2015. However, the plaintiffs have denied the defendant's contention that Alessa was physically unharmed:

> 110. Alessa was not physically injured in the Malpass home on August 14 – 15. 2015. Alessa has not suffered physical injuries as a result of the emotional distress, if any, caused by the incidents of Aug. 14 – 15, 2015. Ex. 25 at 8.
>
> **Response of Plaintiffs:**
>
> Denied.

The plaintiffs have submitted the affidavit of Juan Sepulveda, Alessa's biological father, to address the harm suffered by Alessa. His affidavit alleges that Alessa has mood swings, eating

[20] The court notes that in in any MTCA matter, the public employer - rather than any individual employee - is liable for its employees' negligent conduct, committed in the scope of their employment to the same extent as a private employer, when the requirements of the MTCA are met. Whether there are four employees who were negligent or one employee who was negligent on behalf of DCF, the single cap of $100,000.00 is in place as to this incident, for each plaintiff who has a claim (whether for negligence or for loss of consortium or any other claim). See *Irwin v. Ware*, 392 Mass. 745, 767-769 (1984). In addition, if the public employer is liable through the MTCA for the conduct of Malpass, the cap of $100,000.00 does not increase because these counts are directed at the social workers and supervisors; rather, they are all still considered public employees who are subject to the single cap of $100,000.00 for the claims to each plaintiff.

issues, sleep issues, nightmares, and behavioral issues, which he attributes to the events of this case. In addition, the plaintiffs have put forth evidence that Alessa was kept in the hospital for several days for evaluation, among other things.

In addition, Mr. Sepulveda's affidavit states:

> Alessa verbalizes that she misses her sister on a weekly basis and most especially after we go visit Samara (every 2 months, 6 visits per year). Alessa asks me on a weekly basis if Samara is coming home or if she will be going back to live with her, will she come over to sleepover, or when will we go to see her. ... When we go to visit Samara, she becomes withdrawn and wonders why she isn't leaving with us and seems very confused and affected ... (par. 9).
>
> [Alessa] requires counseling to deal with the loss of her sister, transition to my home and due to trauma she sustained from moving to numerous different foster home[s]. I also believe she has trauma of the incident because it required her to be removed from the Malpass foster home, into the hospital for several days and then began her being moved between foster homes (par. 10).

Whether Alessa's claims are framed as negligence resulting in physical injury or negligent infliction of emotional distress, pursuant to *Sullivan* v. *Boston Gas Co.*, 414 Mass. 129 (1993), the moving party has not carried its burden to demonstrate that there are no issues of genuine fact. The record at this stage is sufficient to show that Alessa suffered emotional distress which manifests in trouble sleeping and eating, as well as behavioral issues. Whether the child's emotional disturbances manifested themselves in physical harm is a question for the fact finder that is not appropriate for resolution on the present record.

To the extent the injuries were the emotional injuries from being removed abruptly from the Malpass home and/or foreseeably created by the alleged negligence, those claims will survive summary judgment. However, to the extent the plaintiffs claim that Alessa's injuries are essentially loss of consortium of her sibling, those are not cognizable claims under Massachusetts law. Massachusetts recognizes loss of spousal consortium, loss of parental consortium, and loss

of a child's consortium, but there is no claim for loss of a sibling's consortium in a personal injury case.

> We have never recognized the right of a sibling to bring a loss of consortium claim and, in fact, have repeatedly rejected attempts to extend such claims past an actual spouse or parent-child relationship. See, e.g., *Mendoza* v. *B.L.H. Electronics*, 403 Mass. 437, 438 (1988) (stepson); *Feliciano* v. *Rosemar Silver Co.*, 401 Mass. 141, 142 (1987) (de facto spouse). The loss of filial consortium statute, G. L. c. 231, § 85X, inserted by St. 1989, c. 259, § 1, authorizes loss of consortium claims by "parents of a minor child or an adult child who is dependent on his parents for support," and its explicit language does not extend to claims by siblings. See *Leibovich* v. *Antonellis*, 410 Mass. 568, 579 (1991) (loss of filial consortium statute is "narrowly drawn").

Bobick v. *United States Fid. & Guar. Co.*, 439 Mass. 652, 664 (2003) (footnote omitted).

Therefore, the motion for summary judgment is **ALLOWED** to these claims to the extent they seek relief for loss of consortium for loss of a sibling's consortium. The motion is otherwise **DENIED**.[21]

d. Loss of Consortium Claims (Counts XIII, XIV, XV, and XVI)

The Sepulvedas claim that they suffered a loss of consortium as a result of the injuries to the children. DCF argues that, under the loss of consortium statute, G. L. c. 231, § 85X, the parents may not recover for loss of consortium. The statute states that, "[t]he parents of a minor child . . . shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury."

As an initial matter, DCF argues that it is not a "person" under G. L. c. 231, § 85X, and so cannot be held liable for loss of consortium as to any parent's claim for loss of consortium in this case. In *Harrington* v. *Attleboro*, 172 F. Supp. 3d 337, 354-355 (D. Mass. 2016), a federal district court noted that "Massachusetts appellate courts had not yet addressed whether a town is

[21] The court notes that prior to trial, the parties should deal with separating admissible testimony from inadmissible testimony through motions in limine as it relates to testimony regarding how Alessa has been affected by these events by, in essence, missing her sister and other consortium-like claims which are not permitted for siblings under Massachusetts law.

a 'person' under the loss of consortium statute... ." *Id.* (dismissing § 85X because "person" did not include governmental entities). *Doe* v. *Dennis-Yarmouth Reg. Sch. Dist.*, 578 F. Supp. 3d 164, 183 (D. Mass. 2022) similarly concluded that a town is not a person under § 85X.

Significantly, in an unpublished case in 2017, the Appeals Court affirmed the denial of a motion to dismiss as to a spousal loss of consortium claim against the city of Malden and various officials. The Appeals Court analyzed the claim of immunity under G. L. c. 258, § 10(b), and unlike the federal district court, found that the loss of spousal consortium claims could proceed, without any detailed discussion of the precise issue raised in the instant case. *Ryan* v. *City of Malden*, 2017 Mass. App. Unpub. LEXIS 732 (2017). *Doe I* v. *City of Northampton*, 2023 WL 2383775, at * 7-*8 (D. Mass. 2023) disagreed with *Doe* and *Harrington*, concluding that a town can be a "person" under the statute. This court finds the latter two cases to be instructive, and in the absence of Massachusetts appellate courts holding that DCF is not a "person" under the parental loss of consortium statute, these counts may proceed to trial, while awaiting a reported Massachusetts appellate case directly on point.

Next, the defendants argue that Alessa was not "seriously injured" within the meaning of General Laws c. 231, § 85X. This court cannot conclude as a matter of law on this summary judgment record that Alessa's ongoing emotional injuries with physical manifestations are not considered "serious injuries." Rather, this is a genuinely contested issue of material fact. Accordingly, summary judgment is **DENIED** as to Counts XIII, XIV, XV, and XVI.[22]

[22] As noted above, the court's conclusions apply to Commissioner Spears' alleged actions in her official capacity.

III. The Department Employees' Motion for Summary Judgment

a. 42 U.S.C. § 1983 Claims (Counts IX (Samara's claims against the four individual Department Employees) and X (Alessa's claims against the four individual Department Employees))

The Department Employees move for summary judgment on the claims under 42 U.S.C. § 1983 against them for allegedly violating the children's substantive due process rights under the Fourteenth Amendment. The Due Process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the state for the "safety and general well-being" of an individual when the state affirmatively "restrain[s] the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty." *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

> Whether the state deprived an individual of "freedom to act on his own behalf," and so is subject to a correlative constitutional duty, is often described as whether a "special relationship" exists between the state and the individual. *J.R.* v. *Gloria*, 593 F.3d 73, 79 (1st Cir. 2010) (quoting *Rivera* v. *Rhode Island*, 402 F.3d 27, 34 (1st Cir. 2005)) (internal quotation marks omitted). **Though we have never held that such a relationship exists between the state and children in foster care, we have assumed so *arguendo*.** See *Gloria*, 593 F.3d at 80. We do so again here.

Connor B v. *Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (emphasis added).

Thus, the First Circuit has assumed without deciding, as recently as 2014, that a foster child placed by the state in a foster home has a substantive due process right to a safe living environment due to the special relationship between the Commonwealth and a foster child.[23] Assuming there is such a right, the next step is to determine the standard that applies. Both the

[23] The court is aware of the case of *Sheila* v. *Commonwealth*, 57 Mass. App. Ct. 423, 430-431 (2003), which holds that this right was not "clearly established" at the time of the events at issue in that case, as the right to a safe placement in a foster family was only "clearly established" in the Second Circuit at the time of the events. However, in reviewing the federal case law on § 1983 claims, the court concludes that case law has evolved since 2003 on this subject. At the time of these events in 2015, the court assumes without deciding that a special relationship exists between foster children and the Commonwealth, and that a foster child had a clearly established right to a safe foster home, through the substantive Due Process clause.

federal district court for Massachusetts[24] and the First Circuit have addressed – without explicitly deciding – the standard in the context of foster care:

> The Supreme Court has explained that executive branch actors violate an individual's constitutional rights only if they engage in conduct that "shocks the conscience." [*County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998)]; see *Gloria*, 593 F.3d at 79-80. In particular, *Lewis* makes clear that harm caused by officials' negligence categorically cannot be a Due Process violation. *Lewis*, 523 U.S. at 848-[8]49.
>
> Sixteen years before *Lewis*, in *Youngberg*, the Supreme Court found cognizable certain limited substantive due process claims by an adult involuntarily committed in a state institution for the intellectually disabled. In *Youngberg*, the plaintiff claimed due process rights to "safe conditions of confinement," [among other rights]. 457 U.S. at 309. ...
>
> Even those established liberty interest rights were "not absolute." *Id.* at 320. The issue was "not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process." *Id.* Importantly, the Court held that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. This is what is referred to as the *Youngberg* standard.
>
> Whatever tension there is between the *Youngberg* standard and the *Lewis* shocks-the-conscience test is of no moment here. The district court found, on the facts, that neither standard was met. It suffices that we agree that the *Youngberg* standard was not met and do not go further.

Connor B., 774 F.3d at 53-54.

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[24] The District Court noted the following regarding the different standards which could apply to § 1983 cases arising out of foster care:

> "[S]ubstantial departure," as articulated in the case law, requires more than mere deviance from professional norms; contrary to intuition, courts have construed this standard to require the most wanton abandonment of caretaking responsibilities. See *Yvonne L.*, 959 F.2d at 894 ("As applied to a foster care setting we doubt there is much difference in the [deliberate-indifference and substantial-departure] standards. "Failure to exercise professional judgment" does not mean mere negligence as we understand *Youngberg*; while it does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally in making the placements."); *Connor B.*, 771 F. Supp. 2d at 162 n.4 ("It is far from obvious . . . that the professional judgment standard creates an appreciably lower hurdle for plaintiffs" [than the deliberate indifference standard].).

Connor B. v. *Patrick*, 985 F. Supp. 2d 129, 160 (D. Mass. 2013).

Confirming this analysis regarding the standard to be applied, in 2021, a federal district court within the First Circuit wrote:

> In *Connor B.*, the First Circuit also sidestepped the question of what standard applies to a substantive due process claim in the foster care context. See *id.* at 54. The court explained that two different standards have arisen in evaluating substantive due process violations: the "shocks the conscience" test from *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), and the absence of professional judgment test outlined in *Youngberg* v. *Romeo*, 457 U.S. 307, 323, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). See *id.* at 53–54. The First Circuit recognized that there might be some "tension" between the two tests but decided that it did not need to reconcile these tests because it found that the plaintiffs could not meet the *Youngberg* standard. See *id.* at 54.

Bryan C. v. *Lambrew*, 340 F.R.D. 501, 516 (D. Me. 2021).

The plaintiffs survived a motion to dismiss on the substantive due process claim in order to give them the opportunity to obtain discovery. Now, after discovery has closed, the plaintiffs have provided sufficient facts, taken in the light most favorable to the plaintiffs, to survive summary judgment. Unlike *Connor B* v. *Patrick, supra*, the summary judgment record (including Wisnewski's expert opinion) taken in the light most favorable to the non-moving parties, demonstrates that the actions taken by the Department Employees are sufficient to satisfy both the *Youngberg* standard and the "shocks-the-conscience" standard, and thereby defeat qualified immunity under § 1983. Further, Wisnewski's expert opinion concerning the Department Employees, accompanied by the information alleged in Juan Sepulveda's affidavit, create a genuine issue of material fact that the Department Employees acted with reckless disregard and/or deliberate indifference to the rights of the minor children in their duties with respect to Malpass's home. Thus, the Department Employees motion for summary judgment on these counts fail.

ORDER

For the foregoing reasons, DCF's motion for summary judgment is **ALLOWED** in part and **DENIED** in part. The motion is **ALLOWED** as to any portions of Alessa's claims under Counts II and VI for loss of her sister's consortium but **DENIED** as to the remaining portion of damages for negligence. DCF's motion is otherwise **DENIED**. The Department Employees' motion for summary judgment is **DENIED.**

V. Yarashus, J.
Valerie A. Yarashus
Justice of the Superior Court

Dated: August 17, 2023

2023 WL 3884114
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

Zenaida GONZALEZ, Administratrix Ad Prosequendum of the Estate of Alison Chavez, and Zenaida Gonzalez, Individually, Appellant in 21-2439
v.
State of NEW JERSEY (Department of Children and Families; Division of Child Protection and Permanency) f/k/a Division of Youth and Family Services (DYFS), Allison Blake, Andrea Moody; Luisa Cordero, Olga Huynh, Brigid Egwu-Onyema, David Henningsen, Kean University, Child Advocacy Resources Association, (C.A.R.A.S); Victoria Cerda, Monica Avila, Haizel Lazala-Krohn, Lucrecia Vega, John Does 1-20 (fictitious), and ABC Corp 1-20 (fictitious), Defendants
State of New Jersey (Department of Children and Families; Division of Child Protection and Permanency) f/k/a Division of Youth and Family Services (DYFS), Allison Blake, Andrea Moody, Luisa Cordero, Olga Huynh, Brigid Egwu-Onyema, David Henningsen, Third-Party Plaintiffs
Dr. Anita Kishen, M.D., F.A.A.P. and Al & Jeans Children First and Unique Day Care, Inc., Third-Party Defendants
Andrea Moody; Luisa Cordero, Appellants in 21-2395

Nos. 21-2395 and 21-2439
|
Argued March 21, 2023
|
(Opinion Filed: June 8, 2023)

On Appeal from the United States District Court For the District of New Jersey (D.C. No. 2-14-cv-07932), District Judge: Honorable Kevin McNulty

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Before: JORDAN, GREENAWAY, JR., and McKEE, Circuit Judges

OPINION *

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

McKEE, Circuit Judge.

***1** We are asked to review the District Court's denial of a motion for summary judgment in a suit under 42 U.S.C. § 1983 filed by Luisa Cordero, a caseworker with the Department of Children and Families Division of Child Protection and Permanency ("DCF") and her supervisor, Andrea Moody. The court rejected their assertion of qualified immunity from liability for the tragic death of Alison Chavez, a sixteen-month-old child who died due to head trauma while in foster care. The District Court granted the summary judgment motions filed by the other DCF defendants, and defendants associated with the Child Advocacy Resource Association ("CARAS"). Zenaida Gonzalez, Alison's mother, filed a cross-appeal, arguing that the District Court incorrectly granted summary judgment in favor of the remaining DCF and CARAS defendants. For the following reasons, we will affirm the District Court's denial of summary judgment as to Cordero and Moody and dismiss Gonzalez's cross-appeal for lack of jurisdiction.

I. [1]

1 Under the collateral order doctrine, we have jurisdiction to review a denial of a summary judgment motion based on qualified immunity. See

Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985); 28 U.S.C. § 1291. We exercise plenary review over the denial of a summary judgment motion. *Acierno v. Cloutier*, 40 F.3d 597, 609 (3d Cir. 1994). "We apply the same test required of the district court and view inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party." *Haybarger v. Lawrence County Adult Prob. & Parole*, 551 F.3d 193, 197 (3d Cir. 2008) (internal quotation marks and citation omitted). We may affirm the District Court on any ground supported by the record. *MRL Dev., LLC v. Whitecap Inv. Corp.*, 823 F.3d 195, 202 (3d Cir. 2016).

The events relevant to Cordero and Moody's liability took place between August 27, 2012—when Cordero placed Alison and her siblings into Haizel Lazala-Krohn and Lucrecia Vega's foster home—and October 10, 2012—when Alison's case was ordered to be reassigned to other caseworkers.

After placing Alison and her siblings in the foster home, Cordero's initial impressions were that Lazala-Krohn was "a little bit overwhelmed" caring for five children ages five and under.[2] Cordero reported this concern to her supervisor Moody, but by the second visit, believed Lazala-Krohn "was more in control."[3]

2 App. 372, 353. Lazala-Krohn had expressed interest in fostering a maximum of four children but agreed to foster five children so that Alison and her siblings could remain together.

3 App. 376.

It is undisputed that Alison was injured in the foster home on September 27, 2012.[4] According to Lazala-Krohn, she left four children downstairs. After hearing a "boom," she went downstairs where she discovered Alison on the floor.[5] The children explained that Alison fell out of a chair and struck her head, which resulted in a bump on Alison's head. Despite that apparent injury, Lazala-Krohn did not take Alison to the hospital or seek medical help.[6] The following day, Friday, September 28, Lazala-Krohn left a message informing Cordero about the incident. When Cordero listened to that message on Monday October 1, she instructed Lazala-Krohn to make Alison an appointment with a pediatrician, and to let her know when that appointment had been scheduled.

4 App. 10.

5 App. 573.

6 Lazala-Krohn did call Lucrecia Vega's sister Maria who has "some medical knowledge." App. 578. Concerned that Alison had a concussion, Maria told Lazala-Krohn to keep Alison awake.

***2** On October 2, Alison's daycare called Cordero to inform her that Alison had a bump on her forehead and black eyes. Cordero immediately told her supervisor Moody, who responded, "let's go and take the baby to the doctor like right away."[7] Although the examining physician suggested that Alison should have been immediately brought to a physician, he concluded that Alison was healthy. Despite Lazala-Krohn's decision to leave Alison alone without supervision, and her failure to take Alison promptly to the pediatrician following this incident, Cordero and Moody did not remove Alison from the foster home.

7 App. 387. Although the District Court made contradictory statements about whether Lazala-Krohn ever scheduled a doctor's appointment for Alison, *compare Gonzalez v. N.J. Dep't of Child. & Fams.*, 545 F. Supp. 3d 178, 195-96 (D.N.J. 2021) with *id.* at 206-07, the record shows that it took additional prodding from Cordero on the morning of October 2 before Lazala-Krohn "finally did make the appointment," *id.*, at 195-96. And it wasn't until Alison's daycare called Cordero later in the day on October 2 that Cordero and Moody took matters into their own hands to get Alison to a doctor.

During the period in which Cordero and Moody served as the caseworker and supervisor responsible for Alison's wellbeing, Alison's daycare documented other concerns. On September 17, the daycare noted two bruises to Alison's forehead. On September 25, 2012, the daycare stated that Alison's sister had come to daycare with a "busted lip" and Alison had a "rash/chaffing [sic] around [her] vagina and buttocks."[8] On October 10, 2012, the daycare documented another bruise on Alison's forehead.

8 App. 410–412.

Cordero testified she did not know about the September 17, September 25, or October 10 occurrences. However,

the Division of Child Protection and Permanency ("DCPP") employees who transported Alison to and from the daycare recalled receiving incident reports from the daycare and testified that it was their practice to provide them to the caseworker who was responsible for putting them in Alison's casefile. [9]

9 During her deposition, Cordero was shown a contact sheet created by Shonda Emanuel, a transportation aide for DCPP, documenting the September 25 incident. She acknowledged that the contact sheet was "in the system. But [she] failed probably to read it." App. 446.

II.

"The doctrine of qualified immunity insulates government officials who are performing discretionary functions 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " [10] To determine whether a government official is entitled to qualified immunity, we ask whether (1) the facts put forward by the plaintiff show a violation of a constitutional right and whether (2) the right was clearly established at the time of the alleged misconduct. [11] Where "issues of fact ... preclude a definitive finding on the question of whether the plaintiff's rights have been violated, the court must nonetheless decide whether the right at issue was clearly established." [12]

10 *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

11 *Peroza-Benitez v. Smith*, 994 F.3d 157, 165 (3d Cir. 2021). Courts can exercise their discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

12 *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 637 n. 4 (3d Cir. 2015).

***3** The District Court correctly held that there exists a clearly established right for a foster child to be protected from a known substantial risk of serious harm. In *Nicini v. Morra*, we held that "when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983." [13] The sufficiently culpable circumstances are those that "shock the conscience." [14]

13 *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000).

14 *Id.* at 811. Relying on our sister courts, we applied a "deliberate indifference standard" to the foster care context. *Id.*

Alone, *Nicini* does not demonstrate a clearly established right because the caseworker's behavior there did "not shock the conscience or demonstrate [ ] deliberate indifference to or reckless disregard of [the child's] constitutional rights." [15] However "a 'robust consensus of cases of persuasive authority in the Courts of Appeals' " [16] establishes the right of a child in foster care to be protected from a known substantial risk of serious harm. [17]

15 *Nicini*, 212 F.3d at 812.

16 *James v. N. J. State Police*, 957 F.3d 165, 170 (3d Cir. 2020) (quoting *Bland v. City of Newark*, 900 F.3d 77, 84 (3d Cir. 2018)).

17 *See, e.g., Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981) (recognizing that a state foster agency could be liable for deliberate indifference to a foster child's right to adequate agency supervision over the placement of a foster child); *Meador v. Cabinet for Hum. Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (holding that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes"); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) ("[T]he basic duty of the state to children in state custody [is] clear"); *Norfleet v. Ark. Dep't of Hum. Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) ("[I]t was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision [to foster children]"); *Yvonne L. v. N. M. Dep't of Hum. Servs.*, 959 F.2d 883, 892–93 (10th Cir. 1992) (foster children have a "clearly established right to protection while in foster care"); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 847 (9th Cir. 2010) ("[I]t was clearly

established in 1996 that Appellees had a protected liberty interest in safe foster care placement once they became wards of the state"); *Smith v. District of Columbia*, 413 F.3d 86, 95 (D.C. Cir. 2005) (citing approvingly *Doe*, 649 F.3d at 141-42 and *Nicini*, 212 F.3d at 808 for proposition that the state owes children in foster homes a constitutional duty of care); *Taylor v. Ledbetter*, 818 F.2d 791, 795-96 (11th Cir. 1987) (citing approvingly to *Doe* for same proposition); *Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (assuming such a duty).

Although this right is clearly established, here, disputed issues of fact "preclude a definitive finding on the question of whether the plaintiff's rights have been violated." [18] It is undisputed that Cordero and Moody placed five children aged five and under in a foster home even though Lazala-Krohn (quite understandably) appeared overwhelmed. Cordero and Moody then failed to remove Alison from the home after the September 27 head injury. However, the record reflects a dispute as to whether Cordero knew—or should have known—about the September 17, September 25, or October 10 incidents documenting potential abuse. This dispute is material because it bears on whether Cordero and Moody knowingly disregarded a substantial risk of serious harm that "shocks the conscience." [19] Therefore, we will affirm the District Court's denial of defendants Cordero and Moody's motion for summary judgment. [20]

18 *Spady*, 800 F.3d at 637 n. 4.

19 *Nicini*, 212 F.3d at 810–12.

20 Cordero and Moody appealed their denial of qualified immunity on the grounds that the District Court defined the alleged right at too high a level of generality and failed "to identify prior case law that involves factual circumstances that are sufficiently similar to the case under consideration." Cordero and Moody's Br. at 12.
In concluding that the right to be free from "abuse or neglect in a foster home" was clearly established, the District Court paid particular attention to *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d at 145, *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010), *Meador*, 902 F.2d at 475 (6th Cir. 1990). *Gonzalez*, 545 F. Supp. 3d at 211-13. The District Court correctly stated that—in each case—"state foster care workers received information which indicated that circumstance [sic] in a foster household posed a significant threat of abuse ... [,] failed to act on the threat, and the child was thereafter abused by a member of the foster household." *Id.* at 213. To the extent Cordero was informed about the other incidents documented by the daycare, our sister courts have clearly established that a failure to respond to known threats of abuse is a constitutional violation.

III.

***4** We do not have jurisdiction to review Gonzalez's cross-appeal arguing that the District Court improperly granted summary judgment as to other defendants. Our jurisdiction extends only to review of final orders of the District Court. [21] Here, the District Court's order, dated June 25, 2021, was not a final order resolving all issues as to all parties because summary judgment was "granted in part and denied in part." [22]

21 *See Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 476 (3d Cir. 2006); *Carter v. City of Phila.*, 181 F.3d 339, 343 (3d Cir. 1999) ("an order which terminates fewer than all claims, or claims against fewer than all parties, does not constitute a 'final' order for purposes of appeal under 28 U.S.C. § 1291.").

22 App. 4. Gonzalez asks this Court to exercise its discretion in favor of review under the doctrine of pendent appellate jurisdiction. Plaintiff's Reply Br. at 8. We reject this request as the District Court's decision granting summary judgment in part was not "inextricably intertwined with that court's decision to deny [Cordero and Moody's] qualified immunity motions, [nor is] review of the former decision ... necessary to ensure meaningful review of the latter." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 203 (3d Cir. 2001) (citing *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50–51 (1995)).

IV.

For the reasons described above, we therefore affirm the District Court's denial of summary judgment as to Cordero and Moody and dismiss Gonzalez's cross-appeal for lack of jurisdiction.

All Citations

Not Reported in Fed. Rptr., 2023 WL 3884114

759 Fed.Appx. 693
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

Ken HUBBARD; Connie Hubbard, as Administrators of the Estate of Andrew DeWayne Prior, deceased, and as guardians and next friends of C.E.H., a minor child, and E.J.H., a minor child, Plaintiffs - Appellants,
v.
The State of OKLAHOMA EX REL. The OKLAHOMA DEPARTMENT OF HUMAN SERVICES; Francia Allen; Tonya Busby; Krystal Caraway; Latoya Clark; Linda Devin; Brooke Demers; Ryan Dugger; Cody Eason; Jessica Elmore; Kellie Heath; Jermaine Johnson; Kathleen Keany; Heather Kelley; Michael Kindrick; Aubrey King; Amy Mccartney; Aubrey Meeker; Tia Morgan; Joyce Porter; Janet Rhyne; Colette Thompson; Rob Williams, Defendants - Appellees.

No. 17-6162
|
Filed December 28, 2018

Synopsis

Background: Children's great uncle and great aunt, as administrator of estate of one of the children and guardians of two remaining children, filed suit in State court against Oklahoma Department of Human Services and several employees. After case was removed from State court, great uncle and great aunt filed amended complaint alleging a federal civil-rights violation against individual Department employees under § 1983, asserting that their conduct deprived the children of their substantive due-process rights, alleging negligence and wrongful-death violations, and seeking declaratory judgment that Department failed to allocate necessary and adequate funding such that Department, through its employees, was not able to meet regulatory and legislative requirements regarding appropriate supervision, protection, and oversight of minors. The United States District Court for the Western District of Oklahoma, D.C. No. 5:16-CV-01443-HE, dismissed amended complaint. Great uncle and great aunt appealed.

Holdings: The Court of Appeals, Scott M. Matheson, Jr., J., held that:

reunification of children with their parents following removal was not a violation of the Due Process Clause;

conduct of employee in charge of children's case when in foster care was not a violation of Due Process Clause under special-relationship exception;

conduct of employees, in allegedly not taking action to protect children in foster home, was not a violation of Due Process Clause under special-relationship exception.

conduct of employee who received referrals discussing sexual activity among children in foster home was not a violation of Due Process Clause under special-relationship exception;

employees did not affirmatively act to create, or increase, children's vulnerability to danger presented by foster parents and, thus, their conduct did not violate Due Process Clause under state-created danger exception; and

District Court's failure to address issue of whether it would exercise supplemental jurisdiction over negligence and wrongful-death claims warranted remand.

Affirmed in part; remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

***695** (D.C. No. 5:16-CV-01443-HE) (W.D. Oklahoma)

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Before LUCERO, McKAY, and MATHESON, Circuit Judges.

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Scott M. Matheson, Jr., Circuit Judge

Ken Hubbard and Connie Hubbard are the great uncle and great aunt of minor children E.J.H. and C.E.H., as well as the administrators of the estate of minor child A.P. (together, "the Hubbards"). The Hubbards sued numerous employees of the Oklahoma Department of Human Services ("DHS") under 42 U.S.C. § 1983 for violations of the children's substantive due process rights under the Fourteenth Amendment. In addition, they brought tort claims for negligence and wrongful death under Oklahoma state law against DHS and individual DHS employees. They sought injunctive relief and a declaratory judgment based on the federal claims. The Hubbards now appeal the district court's order dismissing their amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

***696** Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's dismissal of the federal claims and remand on the state claims to consider whether supplemental jurisdiction should be declined to enable the Hubbards to bring their state claims in state court.

I. BACKGROUND

A. *Factual Background*

In considering a motion to dismiss, we accept the allegations in the complaint [1] as true and view the allegations and all reasonable inferences in favor of the plaintiffs—here, the Hubbards. *Mayfield v. Bethards*, 826 F.3d 1252, 1258 (10th Cir. 2016).

1 The amended complaint, the operative complaint here, is located at pages 277-304 of Volume II of the Appellants' Appendix. We cite to the relevant Appendix page number when referencing the amended complaint.

1. **Biological Parent Custody**

Between August 2011 and February 2013, DHS received nine referrals expressing concerns that E.J.H., C.E.H., and A.P. were being abused and neglected by their biological parents. Aplt. App., Vol. II at 284. These referrals included the following allegations: (1) the presence of a convicted sex offender in the home, substance abuse, and apparent mental health issues with the parents; (2) lack of supervision and a convicted sex offender still in the home; (3) open drug use in the home; (4) unattended children while a fire burned in the backyard and firefighters later noting a "horribly dirty" and unsafe home; (5) failure to provide A.P. with food or clothing and failure to visit A.P. in the hospital when he was suffering respiratory problems (he had been taken there by a babysitter); and (6) a "filthy beyond filthy" home, with the children unattended and the parents using methamphetamine. *Id.* at 279-82.

Following referral (4) about the fire, the biological father admitted to DHS to having schizophrenia and using marijuana. *Id.* at 281. The maternal grandmother, who resided in the home, admitted to DHS a history of smoking crack cocaine and stated that her own children had previously been taken away from her due to drug abuse and failure to protect them from sexual abuse. *Id.* Following referral (6), E.J.H. told DHS that he received a "whoopin' on his butt with a paddle and belt." *Id.* at 282. He also complained about bugs in the house and said his parents made no attempt to get rid of them. *Id.* In follow-up interviews, the biological father again admitted he had schizo-affective disorder and bipolar disorder but was not on medication for them. *Id.* at 282-83. He also admitted he had hit his wife. *Id.* at 282. The biological mother admitted to using marijuana. *Id.* at 283.

In February 2013, the Tulsa Police Department was called about allegations of neglect, dangerous conditions, and child abuse (A.P. had recently been hospitalized for grease burns). *Id.* When officers arrived, they noted that the house was stacked with garbage, had no running water, and that the bathroom was full of feces. *Id.* The police determined that the biological parents' home was unsuitable for the children and directed that they be removed. They made this determination

just weeks after a DHS employee had visited the home and determined it was suitable. *Id.* at 284.

A state court adjudicated the children to be deprived. *Id.* DHS formulated Individualized Service Plans for the biological parents, but before those plans were implemented, and before the unsuitable home conditions were corrected, DHS employees ***697** recommended a trial reunification. The state court adopted the trial reunification plan in May 2013, and the children were returned to their biological parents' home. *Id.*

The biological parents, however, continued to keep an unsafe home, and the trial reunification was unsuccessful. The parents were arrested for child abuse in August 2013 after a referral to DHS for serious neglect was relayed to police. *Id.* at 284-85. Reporting on their visit to the home, the police stated that it smelled of "spoiled food, animal urine and feces and garbage." *Id.* at 285. Police officers noted "the two children's beds were both filthy and stained with what appeared to be urine, there was a large cockroach nest in the children's bedroom, with thousands of cockroaches crawling on the bedding, clothing, walls, and windows." *Id.*

2. **Foster Placement with the Krajians**

In August 2013, DHS placed the children in the foster care of Mallory and Peter Krajian ("the foster parents").[2] DHS records show that the Krajians, when they enrolled in the foster parent program, indicated they were unwilling to accept foster children with a history of "inappropriate sexual activity, sexually abusing others," or being "sexually active." *Id.* at 286.

2 At the time of their placement with the Krajians, E.J.H. was 5 years old, Aplt. App., Vol. III at 407; C.E.H. was 3, *id.*; and A.P. was 2, *id.,* Vol. I at 63.

During the time the children were in foster care, DHS continued to receive referrals concerning their welfare. In September 2013, a referral from the Krajians alleged that E.J.H. was sexually assaulting his sister C.E.H. *Id.* at 287. In associated interviews, C.E.H. said her brother "made her touch his pee pee," that more than once he "touched her pee pee with his mouth," and that he "made [her 'pee pee'] hurt." *Id.* Ms. Krajian told DHS employees that C.E.H. also said her brother "stuck his private in [A.P.]'s butt." *Id.*

DHS arranged therapy for E.J.H. and C.E.H., but the Krajians often failed to take the children to their scheduled session, missing at least six appointments. *Id.* at 288. One DHS supervisor, Joyce Porter, wrote of the failed appointments that her employee Tonya Busby's lack of effort on the case was "heinous & shocking" and that "we cannot allow one more week to go by without therapeutic intervention." *Id*.

In October 2013, a babysitter sent DHS another referral indicating that the children continued to act out sexually. *Id.* Investigating this referral, a DHS supervisor, Amy McCartney, detected "a strong odor of Marijuana" at the home and noticed that Ms. Krajian had bloodshot eyes. *Id.* E.J.H. said in an interview that he was being disciplined through spanking, that he was made to sleep on the floor when he was bad, that his foster parents smoked something in the home, and that he had been "bad with his sister by having sex with her." *Id.* at 289. C.E.H. told Ms. McCartney that her brother came into her room in the night and touched her sexually, and stated "I don't like it when he touches my privates." *Id.* The same evening, supervisor Krystal Caraway contacted supervisor Rob Williams expressing concerns about the Krajian household. *Id.* Mr. Williams told her that he was working toward removing E.J.H. from the home and placing him elsewhere. *Id.* The next month, at a staffing conference, DHS supervisor Ms. McCartney reported smelling marijuana on a visit and reported the children were being spanked and made to sleep on the floor. *Id.* at 290. DHS employees decided at this point (early November) to make future unannounced visits to the home. *Id.*

In February 2014, E.J.H. was removed from the home and placed in a different ***698** foster program called the Integris Medical STAR program. *Id.* The STAR program received a report that Ms. Krajian had scalded and injured A.P. by placing him in a hot bath, and that she blamed these injuries on E.J.H. *Id.* DHS did not open a referral incident based on this report. *Id.* at 291. E.J.H. remained in the STAR program until July and was then released back into the Krajian household. *Id.* During his time away, the Krajians did not participate in his STAR program treatment and also missed or cancelled roughly half of the therapy appointments scheduled for C.E.H. *Id.* at 290-91. E.J.H. told a STAR therapist in May 2014 that he had previously had sexual contact with his sister. *Id.* at 231.

On August 27, 2014, DHS received a referral reporting that A.P. was in the hospital. He had sustained a C-1 vertebral fracture and an occipital skull fracture, which resulted in his death on August 31, 2014. *Id.* at 291-92. E.J.H. maintained that the injury was from A.P.'s falling off a couch while

jumping and hitting his head on a coffee table. *Id.* at 292. C.E.H. disclosed in an associated interview that she had been spanked with a wooden hanger until she bled and that Mr. Krajian had pulled out tufts of her hair, leaving bald patches (which were noted by the doctors as well). *Id.* Ms. Krajian was charged in state court with felony child abuse murder. *Id.* at 278. Following A.P.'s death, E.J.H. and C.E.H. were removed from the foster home and placed with the Hubbards.

B. ***Procedural History***

The Hubbards filed a complaint in Oklahoma state court against DHS and several employees, along with Dayspring Community Services ("Dayspring") and Laura Fox, an employee there, over the death of A.P. while in foster care. Aplt. App., Vol. I at 15. The Defendants removed the case to federal district court and filed motions to dismiss. *See id.* at 33, 49, 61, 122. The Hubbards were granted leave to amend their complaint, and they dropped their claims against some defendants, including against Dayspring and Ms. Fox.

The amended complaint alleged a federal civil rights violation against individual DHS employees under 42 U.S.C. § 1983, asserting that their conduct deprived the children of their substantive due process rights.[3] Aplt. App., Vol. II at 292. It also alleged state law negligence and wrongful death violations against DHS and individual DHS employees. *Id.* at 297, 301. Additionally, the amended complaint sought "a declaratory judgment that declares that DHS has failed to allocate necessary and adequate funding such that DHS, through its employees, was not able to meet regulatory and legislative requirements regarding appropriate supervision, protection and oversight of minors...." *Id.* at 295-96.

3 The Hubbards did not allege a federal civil rights claim against DHS itself. *See* Aplt. App., Vol. II at 292 ("The conduct of the individual Defendants ... deprived [the children] of the following [constitutional] rights."); *see also* Aplt. Br. at 31-39, 40-43 (discussing federal civil rights claim in "Individual Defendants" section of briefing and not in "Department of Human Services" section).

The Defendants again moved to dismiss, and the district court granted their motion. Aplt. App., Vol. III at 418.

1. **Summary of the Hubbards' Claims**

The Hubbards' allegations against individual DHS employees are summarized alphabetically below. For the purposes of a motion to dismiss, the allegations are taken as true:

a. *Pre-foster care*

***699** • Francia Allen: Ms. Allen appears to have been the children's case manager up until June 2013. Aplt. App., Vol. II at 285. Ms. Allen recommended a trial reunification of the children with their biological parents despite DHS not yet implementing its plan for the home, thereby allegedly placing the children "in imminent risk of further abuse" and increasing their "vulnerability to such abuse." *Id*. at 284.

• Tonya Busby: Ms. Busby "took over" the children's "case" in mid-June 2013. *Id.* at 285. She had visited the home only "a couple of times" between June and early August. *Id.* A referral in August during the trial reunification with the biological parents eventually led to their arrest for child abuse. *See id.* at 284-86. The police responding found a large cockroach nest in the children's bedroom and an extremely filthy home. *Id.* at 285. Ms. Busby had noted flies in the home, but was not sure where they were coming from (even though a police officer reported that there were feces and urine all over the bathroom). *Id.* at 286. She did not normally check the home to see if there was food available. *Id.* Upon the arrest of the biological parents, Ms. Busby "chuckl[ed]" and said that her scheduled unannounced visit to the home was no longer necessary. *Id.* at 286.

• Krystal Caraway: Ms. Caraway was a supervisor during trial reunification, which resulted in the referral and the arrest of the biological parents for child abuse. *Id.* at 284-86.

• Latoya Clark: Ms. Clark was a supervisor who received the August 2011 referral (1)[4] regarding a convicted sex offender living in the home, as well as substance abuse and mental health issues alleged regarding the parents. *Id.* at 279-80. She allegedly "took no action to protect or safeguard the [c]hildren from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 280.

• Linda Devin: Ms. Devin was a supervisor who received the December 2011 referral (4) regarding a fire burning

in the backyard. *Id.* at 280-81. She allegedly "determined that the children were in a safe environment without any safety threats," *id.* at 281, and "took no action to protect or safeguard the [c]hildren from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.*

- Cody Eason: Mr. Eason was present for the referral during the trial reunification that led to the parents' arrest for child abuse based on a squalid home. *Id.* at 284-85.

- Jessica Elmore: Ms. Elmore recommended a trial reunification of the children with their biological parents despite DHS's not yet having implemented its plan for the home, thereby allegedly placing the children "in imminent risk of further abuse" and increasing their "vulnerability to such abuse." *Id.* at 284.

- Kathleen Keaney: Ms. Keaney received a September 2011 referral (3) alleging open drug use in the home. DHS screened out this referral. *Id.* at 280.

- Heather Kelley: Ms. Kelley was on duty during an August 2011 referral ***700** (1). She requested an interview with A.P. the next day but was told he was unavailable because he was at an aunt's house. *Id.* at 279. She observed E.J.H. and C.E.H. bite and attack one another during a visit in August 2011. *Id.* at 279-80. She received a referral (4) concerning an unattended fire burning in the backyard in December 2011. *Id.* at 280. Following this referral she interviewed the biological family and learned about prior drug use by the parents and relatives and parental mental history. *Id.* at 280-81. Despite the fire incident and her learning of new information about the family, she "determined that the children were in a safe environment without any safety threats." *Id.* at 281. She received a February 2012 referral (5) regarding neglect of A.P. (no food, no clothing, and a necessary hospital visit for respiratory problems where neither of his parents visited him). *Id.* at 281-82. Ms. Kelley allegedly waited five days to open an investigation into the matter. *Id.* at 282. For each of these referrals, Appellants allege Ms. Kelley "took no action to protect or safeguard the [c]hildren from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 281, 282.

- Michael Kindrick: Mr. Kindrick was on duty during an August 2011 referral (1). *Id.* at 279. He allegedly "took no action to protect or safeguard the [c]hildren from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 281.

- Aubrey King-Meeker: Ms. King-Meeker received a February 2013 referral (6) alleging lack of supervision, threat of harm to the children (because of drug abuse in the home), and inadequate, dirty, and dangerous shelter. *Id.* at 282. It took her days to make contact with the family. *Id.* Upon investigating, she saw a scar on E.J.H.'s face. He told her that he had been "whoop[ed]" with a paddle and belt and about being bitten by bugs in the home. *Id.* The parents told her about abuse and violence between them, about mental health diagnoses, and self medication. *Id.* at 282-83. In the same month, police came to the house and started the process of removing the children after they found "deplorable living conditions" and after A.P. suffered grease burns and had to go to the hospital. *Id.* Only upon the police department's intervention did Ms. King-Meeker petition the court for the children's removal from the home. *Id.* at 283-84. Ms. King-Meeker allegedly "took no action to protect or safeguard the [c]hildren from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 283. [5]

- Tia Morgan: Ms. Morgan was a supervisor on the February 2012 referral (5). *Id.* at 281.

- Janet Rhyne: Ms. Rhyne was a supervisor on the February 2013 referral (6) with Ms. King-Meeker alleging lack of supervision and threat of harm to the children. *Id.* at 282. Through Ms. ***701** King-Meeker's interview, she learned of abuse and violence by the parents as well as their drug and mental health history. She allegedly "took no action to protect or safeguard the [c]hildren from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 283.

b. *During foster care*

4 The numbers listed in these excerpts about individual defendants correspond to the numbered referrals in the second paragraph of the "Factual Background" section above.

5 Although the Hubbards stated in their amended complaint that Ms. King-Meeker and other pre-

> foster-care defendants took no action to protect the children from sexual abuse, the first reports to DHS of sexual activity listed in the amended complaint were in September 2013, following foster placement with and a referral from the Krajians. Aplt. App., Vol. II at 287.

The children were placed in foster care in August 2013 and lived with the Krajians.

- Tonya Busby: Ms. Busby received a September 2013 referral that E.J.H. was sexually assaulting his sister. *Id.* at 287. Through interviews with C.E.H. and Ms. Krajian, she received more detailed information, including that E.J.H. sexually assaulted A.P. *Id.* DHS set up therapy sessions for the children, but Ms. Busby allegedly did not follow up with the Krajians on the missed appointments. *Id.* at 288. Her supervisor, Ms. Porter, described Ms. Busby's lack of effort on the case as "heinous & shocking." *Id.* Ms. Busby also received an October referral that the children were acting out sexually and did not seem to take action. *Id.* She reported to her supervisor that she had only been to the Krajian home once, and on a scheduled and announced visit (rather than unannounced visits, as DHS had, at least by early November, determined to pursue). *Id.* at 290.

- Krystal Caraway: Ms. Caraway, a supervisor, received the September and October 2013 referrals, both of which detailed the children's sexual activity with one another. *Id.* at 287-88. She allegedly "took no action to protect or safeguard the [c]hildren ... from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 287, 288. She was present for a meeting where it was decided to do unannounced home visits going forward. [6] *Id.* at 290. She had a discussion with Mr. Williams about next steps and was told that Mr. Williams was planning to remove E.J.H. from the home. *Id.* at 289.

- Brooke Demers: Ms. Demers received the September 2013 referral concerning sexual activity among the children and was also present at a November meeting where DHS decided to do unannounced home visits going forward. *Id.* at 287, 290. She allegedly "took no action to protect or safeguard the [c]hildren ... from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 287.

- Ryan Dugger and Jermaine Johnson [7]: Mr. Johnson received the August 2014 referral concerning A.P.'s skull fracture and a bad bruise on A.P.'s arm. *Id.* at 291. Mr. Dugger also learned through an interview with a doctor about the missing patches of hair on C.E.H.'s head. *Id.* at 292.

- Cody Eason: Mr. Eason received a September 2013 referral that E.J.H. was sexually assaulting his sister. *Id.* at 287. Through interviews with ***702** C.E.H. and Ms. Krajian, he received more detailed information (including that E.J.H. sexually assaulted A.P.). The complaint alleges that Mr. Eason took no action to protect the children. *Id.*

- Kellie Heath: Ms. Heath served as a DHS district director. She was present at a November meeting where Ms. McCartney discussed her October home visit and where it was decided to do unannounced home visits going forward. *Id.* at 290.

- Amy McCartney: Ms. McCartney conducted a home visit after the October 2013 referral. She smelled marijuana and saw Ms. Krajian's bloodshot eyes. *Id.* at 288. During an interview, E.J.H. told her he was spanked and told to sleep on the floor when bad, and also told her that "he was bad with his sister by having sex with her." *Id.* at 289. Appellants allege she "took no action to protect or safeguard the [c]hildren ... from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* Ms. McCartney told various other DHS employees about what she learned at the visit and said that she did not believe the Krajians were equipped to handle their foster assignment. *Id.* at 290. DHS decided to start conducting unannounced visits sometime after this conversation, but it is not clear how Ms. McCartney was involved in that decision. *Id.* Ms. McCartney also received the August 2014 referral concerning A.P.'s skull fracture and interviewed E.J.H., C.E.H., and Ms. Krajian's sister. In those interviews she learned from C.E.H. that Mr. Krajian had been pulling out her hair, leaving missing patches, and that the Krajians had spanked her with a wooden hanger until she bled. *Id.* at 292. Ms. Krajian's sister told Ms. McCartney that she had seen the children with bruises and bald spots on multiple occasions. *Id.*

- Joyce Porter: Ms. Porter was Ms. Busby's supervisor. Ms. Porter allegedly allowed the Krajians to miss

their therapy appointments. *Id.* at 288. Ms. Porter also received the August 2014 referral concerning A.P.'s skull fracture. *Id.* at 291.

- Colette Thompson: Ms. Thompson received the October 2013 referral concerning the children acting out sexually while in a babysitter's care. *Id.* at 288. She allegedly "took no action to protect or safeguard the [c]hildren ... from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* She was present at a November meeting where Ms. McCartney discussed her October home visit and where it was decided to do unannounced home visits going forward. *Id.* at 290. She was also one of Ms. Busby's supervisors. *Id.* at 288.

- Rob Williams: Mr. Williams received the September and October 2013 referrals discussing the sexual activity among the children. *Id.* at 287, 288. He allegedly "took no action to protect or safeguard the [c]hildren ... from physical and/or sexual abuse, which inaction either enhanced the risk of further abuse, or increased the vulnerability to such abuse." *Id.* at 288. He was present at a November meeting where Ms. McCartney discussed her October home visit (which noted drug use, spanking, and sleeping on the floor) and where it was decided to do unannounced home visits going forward. *Id.* at 290. It took ***703** Mr. Williams approximately four months to arrange the removal of E.J.H. from the home (after stating his intention to do so to another DHS employee). *Id.* at 289, 290. He also served as one of Ms. Busby's supervisors. *See id.* at 287.

6 The unannounced home visits allegedly did not happen. Aplt. App., Vol. II at 290 ("[N]o such unannounced visits are reflected in DHS records.").

7 It is unclear whether Mr. Dugger was dropped as a defendant between complaints. The district court treated him as a party and dismissed the claims against him. Aplt. App., Vol. III at 412 n.5.

2. **District Court Decision**

The district court concluded the amended complaint failed to state a claim against any defendant and granted the Defendants' motions to dismiss. *Hubbard v. Oklahoma ex rel. Oklahoma Dep't of Human Servs.*, No. CIV-16-1443-HE, slip op. at 18-19 (W.D. Okla. June 19, 2017) (unpublished).

a. *Federal substantive due process claims under the Fourteenth Amendment*

The district court dismissed the § 1983 Fourteenth Amendment substantive due process claims against the individual defendants for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Aplt. App., Vol. III at 414.

i. DHS employees involved in pre-foster-placement

The district court dismissed all § 1983 claims against DHS employees who were involved with the children only before the foster placement. It said no viable theory of constitutional relief was available on these claims. *See* Aplt. App., Vol. III at 405-06. Section 1983 does not provide for claims against government officials for failure to protect individuals from the private violence of another except when (1) there is a special relationship or (2) if the state created the danger. The district court held that neither exception applied to the pre-foster-care defendants. *Id.* Accordingly, the court dismissed the federal claims against defendants Allen, Clark, Devin, Elmore, Keaney, Kelley, Kindrick, King-Meeker, Morgan, and Rhyne. *Id*. at 406.

ii. DHS employees involved during foster placement

The district court dismissed all of the § 1983 claims against the during-foster-care-placement DHS defendants. The court held that the "special-relationship" exception applied because DHS had placed the children in foster care. *Id.* at 405. But the Hubbards needed to show that each defendant's conduct "shocked the conscience." *Id.* The court held that, at most, the Hubbards' allegations may have shown negligence but not the "more exacting constitutional standard" of "shock the conscience." *Id.* at 406. As a result, it held the § 1983 allegations failed to state a claim against any of the defendants. *Id.* at 414.

More specifically, the district court reviewed the claims against each during-foster-care defendant as follows:

- Ms. Busby: Ms. Busby's acts "would certainly constitute negligence and perhaps come closer to meeting the constitutional ['shock the conscience'] standard than do the allegations against other individual defendants. However, they do not ultimately allege conduct that meets the 'shock the conscience' standard." *Id.* at 408.

- Ms. Caraway: Ms. Caraway's failure to help follow up on the November plan to start making unannounced visits to the Krajian home may have been negligent, but not conscience-shocking, in part because she voiced her concerns to others. *See id.* at 410-11.

- Ms. Demers: Ms. Demers's failure to follow up on the November plan to start making unannounced visits to the Krajian home may have been negligent, but not conscience-shocking. Also, a September 2013 referral she ***704** received was followed-up with an investigation. *Id.* at 411.

- Defendants Dugger and Johnson: They became involved in the case in August 2014, after the abuse concluded. *Id.* at 412-13.

- Mr. Eason: "At most, the amended complaint arguably supports an inference that Mr. Eason (or someone) should have responded to the accounts of sexual acting out by E.J.H. sooner than he did. But that is, at most, simple negligence and does not constitute behavior that shocks the conscience." *Id.* at 407.

- Ms. Heath: "At worst, Ms. Heath failed to follow up as to the allegations of abuse. As with the other defendants, such inaction may have constituted negligence, but does not shock the conscience." *Id.* at 412.

- Ms. McCartney: "[T]he amended complaint's allegations indicate Ms. McCartney did respond to the issues in the Krajian home in various ways. Those responses may have been inadequate and reflect negligence in responding to the information she had, but they do not suggest action, or lack of action, which shocks the conscience." *Id.* at 409-10. She also made an effort to voice her concerns to others in DHS. *Id.* at 409.

- Ms. Porter: "Rather than alleging that Ms. Porter failed to act, the amended complaint shows that when Ms. Porter learned that the Krajians were not taking the children to therapy, she worked to correct that mistake." *Id.* at 408-09. She also criticized her supervisee Ms. Busby's sluggishness in this regard, calling it "heinous & shocking." *Id.* at 408. The court found no due process claim against Ms. Porter. *Id.* at 408-09.

- Ms. Thompson: Ms. Thompson's failure to help follow up on the November plan to start making unannounced visits to the Krajian home may have been negligent, but not conscience-shocking. *Id.* at 410.

- Mr. Williams: "[Mr. Williams's] delay in removing E.J.H. from the home after the second referral is troubling, and may indicate negligence on Mr. Williams'[s] part in not moving more quickly. However, the allegations do not suggest present behavior which goes beyond negligence and 'shocks the conscience.' " *Id.* at 411-12.

Additionally, the district court held that no § 1983 claims based on supervisory liability were viable (as against defendants Caraway, Demers, Heath, Porter, Thompson, or Williams) because the amended complaint alleged no basis that a supervisor "create[d], promulgate[d], [or] implement[ed] ... a policy" that violated the Hubbards' constitutional rights. *Id.* at 413 (citing the standard in *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010)).

b. *State claims—negligence and wrongful death*

The district court dismissed the state law claims against all Defendants—DHS and its employees—due to the Hubbards' failure to allege compliance with the Oklahoma Governmental Tort Claims Act ("OGTCA"), which establishes certain procedural prerequisites to bringing suit. *See id.* at 415-16. It stated that all tort claims, even if they are derived from the Oklahoma Constitution, must comply with the OGTCA's procedural notice and claim requirements. *Id.* at 417-18. [8]

8 The district court thus did not address whether there is a private right of action (i.e., outside of the OGTCA framework) for a due process violation under the Oklahoma Constitution. The court said that even if there were such a claim, the OGTCA's procedural rules would apply, which the Hubbards have not followed here. *Id.* at 417-18.

***705** The Hubbards argued that their state claims did not need to adhere to the OGTCA's notice provisions because they alleged "willful and wanton" negligent conduct by individual defendants, which would put them outside the scope of their employment. *See id.* at 415. The district court rejected this argument: "[The] amended complaint alleges nothing which would suggest the individual DHS defendants were pursuing some agenda of their own or otherwise acting outside the scope of their employment by DHS. Conclusory allegations of 'willful and wanton' behavior do not change that fact." *Id.*

c. *Injunctive and declaratory relief*

The district court denied the Hubbards' request for injunctive or declaratory relief because there was no basis for either "[i]n the absence of an underlying violation." *Id.* at 418.

* * * *

The Hubbards appealed the district court's dismissal of the amended complaint and the denial of injunctive and declaratory relief.

II. **DISCUSSION**

We start with comments about the amended complaint. It names DHS and 20 individuals as defendants, though only the individuals were sued under § 1983. As we explain further below, the allegations against most of the individuals show no more than minimal involvement in this matter, and their inclusion in the amended complaint along with general references to DHS make it difficult to discern the conduct and knowledge of other individual defendants. The allegations often merely allege that someone has attended a meeting or received a referral and then has failed to act to protect the children—allegations that plainly fail to state a claim under the most generous reading of the amended complaint. The amended complaint attempts to list events that occurred in chronological order, but it fails to clearly show how each individual defendant caused particular injury to a specific child. These shortcomings in the amended complaint make it a candidate for dismissal under Federal Rule of Civil Procedure 8(a)(2) for failure to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," but they also inform our analysis of the ground on which the district court dismissed the federal claims—failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Turning to our review of the district court's ruling, we note that the amended complaint alleged a systemic failure by DHS to serve and protect the children. The federal substantive due process claims, however, do not seek relief from DHS, but from each of 20 DHS employees who had varying degrees of involvement. Collectively and as alleged, these employees mishandled the case and failed to protect the children from harm. But we must decide whether the amended complaint adequately alleged a substantive due process claim against any one of them.

Individually, many of the defendants had only limited participation. They should not have been sued for a substantive due process violation. For those who participated more actively and with more responsibility, the amended complaint alleged conduct that was almost certainly negligent. But it did so in conclusory terms and did not allege the level of conscience-shocking conduct, and in some instances the causation, ***706** that our cases require for a substantive due process claim.

The individual defendants' alleged actions, in the aggregate, may come closer to the shocks the conscience standard than any individual defendant's actions, but the Hubbards' § 1983 claims must stand or fall based on the conduct of each defendant individually. Under § 1983, there is no respondeat superior or vicarious liability. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691-92, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013).

As alleged in the amended complaint, DHS's performance was deeply troubling, and the conduct of several individual defendants was blameworthy. But the law constrains us to affirm dismissal of the federal claims against the individuals because the amended complaint fell short. We are mindful that § 1983 is not supposed to replace state tort law, *see Currier v. Doran*, 242 F.3d 905, 920 (10th Cir. 2001), and remand for the district court to determine whether to decline jurisdiction over the state claims.

A. ***Fourteenth Amendment Claims***

1. **Standard of Review**

"We review a Rule 12(b)(6) dismissal de novo." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015) (quotations omitted). In doing so, "[w]e accept all the well-pleaded allegations of the complaint as true and ... construe them in the light most favorable to [the Hubbards]." *Id.* (quotations omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Threadbare

recitals of the elements of a cause of action, supported by mere conclusory statements" are not sufficient to state a claim for relief. *Id.*; *see also Hall v. Bellmon*, 935 F.2d 1106, 1109-10 (10th Cir. 1991).

2. **Legal Background**

a. *42 U.S.C. § 1983*

Section 1983 provides that a person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

State actors, such as the individual defendants, "may only be held liable under § 1983 for their own acts." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). A defendant-supervisor may be liable under § 1983, however, when that supervisor "creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement ... of which" violates a plaintiff's constitutional rights. *Dodds*, 614 F.3d at 1199. Supervisors cannot be liable under § 1983 where there is no underlying violation of a constitutional right by a supervisee. *See Martinez v. Beggs*, 563 F.3d 1082, 1092 (10th Cir. 2009).

b. *Section 1983 substantive due process claims and private actors*

The Due Process Clause of the Fourteenth Amendment provides, "No State shall ... deprive any person of life, liberty, ***707** or property, without due process of law." U.S. Const. amend. XIV § 1. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Accordingly, "[a]s a general matter, ... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. 998; *see also Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) ("[S]tate actors are generally only liable under the Due Process Clause for their own acts and not for private violence.").

c. *Exceptions*

Courts have recognized two exceptions to *DeShaney*'s rule against substantive due process claims based on harms committed by private actors—the special relationship and danger creation exceptions.

i. Special relationship

State officials "can be held liable for harm done by third parties if the state has a special relationship with the harmed individual," that is, "when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual." *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1142-43 (10th Cir. 2006) (quotations omitted). "[F]oster care is recognized as one of the custodial relationships that creates a special relationship." *Schwartz v. Booker*, 702 F.3d 573, 580 (10th Cir. 2012); *see also Yvonne L., By & Through Lewis v. N.M. Dept. of Human Servs.*, 959 F.2d 883, 892-93 (10th Cir. 1992). "This 'special relationship triggers a continuing duty' that 'is subsequently violated if a state official knew of the asserted danger to [a foster child] or failed to exercise professional judgment with respect thereto, ... and if an affirmative link to the injuries [the child] suffered can be shown.' " *Gutteridge v. Oklahoma*, 878 F.3d 1233, 1238-39 (10th Cir. 2018) (alterations in original) (quoting *Schwartz*, 702 F.3d at 580).

To state a claim under the special-relationship doctrine, a plaintiff must demonstrate that (1) the state official "kn[ew] of the asserted danger or failed to exercise professional judgment"; (2) the conduct had "a causal connection to the ultimate injury incurred"; and (3) the official's conduct "shock[s] the conscience." *Schwartz*, 702 F.3d at 583. To show a state official failed to exercise professional judgment, a plaintiff must show "more than mere negligence; the official must have abdicated her professional duty sufficient to shock the conscience." *Id.* at 585-86. Regardless of whether it is alleged that an official knew of a danger or failed to exercise professional judgment with respect to it, "a plaintiff must separately demonstrate the conscience-shocking nature of a defendant's conduct in order to mount a successful special-relationship claim." *Gutteridge*, 878 F.3d at 1241. We address that element further below.

ii. State-created danger

"[T]his court has recognized that, as an exception to *DeShaney*'s general rule, a state official may be liable when 'a state actor affirmatively acts to create, or increase[ ] a plaintiff's vulnerability to, danger from private violence.'

" *T.D. v. Patton*, 868 F.3d 1209, 1221 (10th Cir. 2017) (alterations in original) (quoting *Currier*, 242 F.3d at 923).

To invoke the danger-creation theory, a plaintiff must make—at a minimum—"a showing of affirmative conduct and private violence." ***708** *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013). Then the plaintiff can establish a claim by showing:

> (1) [T]he charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Currier, 242 F.3d at 918.

"[I]f the danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed." *Armijo By & Through Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir. 1998). In assessing a custody placement case based on danger-creation theory, we take into account a state employee's conduct only before legal custody was awarded. *See Currier*, 242 F.3d at 919.

d. *"Shocks the conscience"*

Under either the special-relationship or danger-creation exceptions to the *DeShaney* rule, the plaintiff must show that the defendant's conduct "shocks the conscience." "Conduct that shocks the judicial conscience ... is deliberate government action that is 'arbitrary' and 'unrestrained by the established principles of private right and distributive justice.' " *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). "To show a defendant's conduct is conscience shocking, a plaintiff must prove a government actor arbitrarily abused his authority or employ[ed] it as an instrument of oppression. The behavior complained of must be egregious and outrageous." *Hernandez v. Ridley*, 734 F.3d 1254, 1261 (10th Cir. 2013) (alteration in original) (quotations omitted). A defendant's "conduct as a whole"—including "both action and inaction"—are relevant in evaluating whether it "shocks the conscience." *Estate of B.I.C.*, 710 F.3d at 1174. This court considers the following principles when evaluating substantive due process claims in this context: "(1) the general need for restraint; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policy decisions impacting public safety." *Currier*, 242 F.3d at 920.

The precise boundaries of conscience-shocking behavior are elusive. In a previous case, "[w]e declined to precisely define this level of conduct, but left it to evolve over time.... We do know, however, that [it] requires a high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort." *Armijo*, 159 F.3d at 1262 (quotations omitted).

"Conscience-shocking" is often defined by what it is not, or what it exceeds. *See, e.g., Lewis*, 523 U.S. at 849, 118 S.Ct. 1708 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."); *Gutteridge*, 878 F.3d at 1238-43 ("[A] social worker who simply makes a mistake of judgment under what are admittedly complex and difficult conditions will not find herself liable in damages under § 1983." (quoting *Schwartz*, 702 F.3d at 583)); *DeAnzona v. City & Cty. of Denver*, 222 F.3d 1229, 1235 (10th Cir. 2000) ("Even knowingly permitting unreasonable risks to continue does not necessarily rise to the level of conscience shocking."); ***709** *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 528 (10th Cir. 1998) ("[A] plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power." (quotations omitted)).

3. **Analysis**

As noted earlier, the allegations against the DHS employees, considered collectively, are deeply troubling. And the allegations against some of the individual defendants are also concerning. The amended complaint, however, while it may have alleged sufficient facts for tort claims against some

defendants, did not meet the highly demanding standard for substantive due process.

We therefore affirm the district court's dismissal of the § 1983 substantive due process claims under Rule 12(b)(6). We begin with the general rule that state actors are not liable for private violence and then consider whether an exception to that rule applies. Assessing claims against both the pre- and during-foster-care defendants, we conclude no claim has been stated under either the special-relationship or danger-creation exceptions.

a. *Pre-foster-care defendants*

Two time periods are relevant to the Hubbards' pre-foster-care claims. The first period is the time the children lived with their biological parents leading up to February 2013, when the Tulsa Police directed their removal from the home. The second period was May to August 2013, when the children were reunited with the biological parents.

i. Special relationship

The special relationship exception applies when a child is placed in foster care. *Schwartz*, 702 F.3d 573 at 580. It does not apply when the children are in the custody of their biological parents. *Yvonne L.*, 959 F.2d at 891 ("[T]here is no affirmative duty of the state to protect a child who is in his *parents'* custody." (citing *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998)). Accordingly, the Hubbards do not a state a claim for relief under this theory.

ii. State-created danger

Nor does the amended complaint allege a claim against the pre-foster-care defendants under a state-created danger theory.

First, the Hubbards have not pled sufficient facts to show that the state *created* the danger of private violence to the children. "[I]f the danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed." *Armijo*, 159 F.3d at 1263. Even if the pre-foster-care defendants put the children in danger by restoring them to their biological parents' home, they did not create the danger.

Second, the Hubbards have not pled sufficient facts to show that the pre-foster-care defendants *increased* the danger of private violence to the children. *T.D.*, 868 F.3d at 1221 (state actors may be liable when they "affirmatively act[ ] to create, or increase[ ] a plaintiff's vulnerability to, danger from private violence" (second alteration in original) (quotations omitted)). The amended complaint fails to allege that the living conditions worsened for the children following reunification with their biological parents. [9]

9 State-created danger claims can apply to placement with a biological parent as well as a foster parent. *See Currier*, 242 F.3d at 919 ("When the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability.").

The Hubbards cite an unpublished district court case, *Tazioly v. City of Philadelphia*, No. CIV.A.97-CV-1219, 1998 WL 633747 (E.D. Pa. Sept. 10, 1998), to argue that a state can increase danger of private violence to a child by placing the child with a biological parent. *See* Aplt. Br. at 38. This case is not binding and is readily distinguishable. In *Tazioly*, the child was born addicted to cocaine. *Tazioly*, 1998 WL 633747, at *3. At birth, the child was taken from his mother (who herself remained addicted to cocaine) and placed with another caretaker. *Id.* at *3-*4. The mother appeared "hostile, abusive, ... paranoid" and "bizarre" to social workers. *Id.* at *3. During one visit with the child, she held him out of a second story window and threatened to drop him. *Id.* at *4. Internal DHS notes showed strong doubt about placing the boy with his mother, noting "no psychological evaluation," "no risk assessment," "no drug testing," and "why return home?" *Id.* at *5. But Defendants nonetheless placed the child with his mother. Once in her custody, he experienced severe abuse. He suffered skull and leg fractures, was beaten while in a full-body cast, and was burned with cigarettes tied naked in a chair. *Id.* at *5-*6.

The child in *Tazioly* experienced an immediate increase of vulnerability to private danger when placed with his biological mother (with whom he had never previously lived). DHS had significant pre-placement warning signs of the mother's

behavior. The Hubbards' allegations regarding the children's reunification with their biological parents fall far short of the level in *Tazioly*.

***710** b. *During-foster-care defendants*

i. Special relationship

Both parties acknowledge that foster care establishes a "special relationship" for § 1983 purposes. Nonetheless, as the district court concluded, the amended complaint's allegations against the during-foster-care defendants did not state a claim because they did not satisfy the demanding "shocks the conscience" standard. The amended complaint also was lacking as to certain defendants on the causation element. We address the allegations about Ms. Busby, Mr. Eason, Ms. McCartney, and Mr. Williams before turning to the remaining defendants.

1) Ms. Busby

The allegations about Ms. Busby covered mid-June 2013, when she "took over the case," to October 28, 2013. Aplt. App., Vol. II at 285 ¶ 17-290 ¶ 27. The amended complaint said nothing about Ms. Busby after that date, or how she had anything to do with A.P.' s injuries in February or August 2014. Although Ms. Busby may have been the lead caseworker from June to October 2013, the allegations identified seven other DHS employees and supervisors by name who also were involved during this time. The amended complaint also referred generally to "DHS workers," *e.g.*, *id.* at 287 ¶22, making it clear that multiple DHS employees, not just Ms. Busby, were working on the case.

The Hubbards repeatedly alleged that DHS employees "took no action to protect or safeguard the [c]hildren." *See, e.g.*, *id.* at 289 ¶26. But these conclusory allegations conflict with actions that were taken. According to the amended complaint, after the first report of sexual activity between the children in September 2013, DHS, with Ms. Busby as the lead case worker, arranged for therapeutic intervention. *Id.* at 287 ¶¶22-23. After the second report of sexual activity in October, Ms. McCartney responded to the referral and interviewed the children, *id.* at 288 ¶25, and Mr. Williams "placed services in the home to address E.J.H.'s behaviors" and initiated steps to "mov[e] E.J.H. out of the home to safeguard C.E.H. and [A.P.]," *id.* at 289 ¶26.

The allegations about Ms. Busby must be considered in light of what her DHS co-workers were doing on the case. For example, even though the Hubbards alleged ***711** that Ms. Busby visited the foster home only once between August and October, *id.* at 290 ¶27, the amended complaint also alleged that Ms. McCartney visited the home in October, showing that at least more than one person made home visits. *Id.* at 288 ¶25. After DHS arranged for therapy sessions to address the reports of sexual activity, the children attended some of the therapy sessions, but the Krajians did not take them to six sessions. Although the amended complaint alleged that Ms. Busby failed to take steps to ensure better attendance, and that her supervisor, Ms. Porter, called this lack of attention "heinous & shocking," *id*. at 288 ¶23, it did not allege facts showing conscious disregard of risk. It also did not allege that Ms. Busby was responsible for any delay in removing E.J.H. from the foster home. When the allegations about Ms. Busby are "viewed in total," *Robbins v. Oklahoma*, 519 F.3d 1242, 1251 (10th Cir. 2008), they do not meet the demanding shocks the conscience standard for a substantive due process claim. [10]

10 Because the "special relationship" exception applies only to post-foster-care conduct, we consider the allegations against Ms. Busby after the children's placement with the Krajians. The knowledge Ms. Busby acquired about the children *before* the foster placement may still be relevant to the analysis to the extent it informed her conduct regarding the children once they were living with the Krajians.

These allegations are nonetheless troubling, showing that Ms. Busby was negligent in her handling of the children's case. But, as the district court concluded, based on the high bar that substantive due process case law sets for conscience-shocking conduct and Ms. Busby's awareness of what other DHS workers were doing on the case, her alleged acts and omissions do not state a claim under 42 U.S.C. § 1983. Under our precedent, "Even knowingly permitting unreasonable risks to continue does not necessarily rise to the level of conscience shocking." *DeAnzona*, 222 F.3d at 1235.

"State officials will only be held liable for violating a foster child's Fourteenth Amendment substantive due process rights if the official knew of the asserted danger to [a foster child] or failed to exercise professional judgment with respect thereto, ... and if an affirmative link to the injuries [the child] suffered can be shown." *Schwartz*, 702 F.3d at 585 (alterations

in original) (quotations omitted). Furthermore, "a plaintiff must separately demonstrate the conscience-shocking nature of a defendant's conduct in order to mount a successful special-relationship claim." *Gutteridge*, 878 F.3d at 1241.

Ms. Busby allegedly knew about the children's sexual conduct, but she also knew that DHS had recognized the need to take action and had arranged for therapy sessions. Her alleged failure to ensure that the children attended more therapy sessions was poor job performance, but the Hubbards have not sufficiently pled conduct that shocks the conscience.

Ms. Busby did not, according to the amended complaint, know about the Krajians' physically abusing the children during August to October 2013, other than reports of spanking. *See* Aplt. App., Vol. II at 288. The information available to her then would not have put her on notice of the risk of violence culminating in A.P.'s death many months later. The Hubbards have not sufficiently pled that (1) Ms. Busby knew of physical abuse or abdicated her professional duty with respect to the risk of physical abuse; (2) her conduct caused the resulting harm (A.P.'s and C.E.H.'s injuries); or (3) her conduct shocked the conscience. [11]

11 Even if we consider Ms. Busby's pre-foster-placement conduct—infrequent home visits, inattention to the living conditions, and her flippant response to the biological parents' arrest—this conduct is likely negligent but does not shock the conscience.

***712** 2) Mr. Eason and Ms. McCartney

According to the amended complaint, Mr. Eason interviewed the children in September 2013 and Ms. McCartney interviewed them in October 2013 about their sexual activity. *Id.* at 287 ¶23-288 ¶25. Ms. McCartney also witnessed evidence of marijuana use in the foster home in October and learned that the Krajians were spanking E.J.H. and making him sleep on the floor. *Id.* at 288 ¶25. About two weeks later, she told at least four of her DHS colleagues that the foster parents were "not equipped to handle the level of care that the children need at this time." *Id.* at 290 ¶28. These allegations provide only minimal information about these defendants and fail to describe their roles in the case. The Hubbards do not plead that either Mr. Eason or Ms. McCartney specifically knew of risks of physical abuse from the Krajians other than reports of spanking.

As with Ms. Busby, the allegations about Mr. Eason and Ms. McCartney should not be viewed in a vacuum. The DHS team was gathering information, arranging for therapy sessions, providing home service, and planning for E.J.H.'s eventual removal from the foster home. As the district court concluded, even if the amended complaint alleged negligent conduct against these defendants, it did not adequately allege a substantive due process violation. With respect to sexual activity, the complaint did not sufficiently show causation or conscience-shocking conduct as to these defendants. As to physical abuse, the complaint did not sufficiently show knowledge, failure to exercise professional judgment, or conscience-shocking conduct. [12]

12 Ms. McCartney is mentioned only one more time in the amended complaint. It alleged that she was notified on August 27, 2014, that A.P. had been hospitalized with bone fractures and that she had interviewed C.E.H. and Ms. Krajian's sister shortly after A.P.'s death. Aplt. App., Vol. II at 291 ¶ 33-292 ¶ 34.

3) Mr. Williams

The amended complaint alleged that Mr. Williams was at least partially responsible for initiating E.J.H.'s removal from the foster home to receive therapy regarding his sexual activity with his sister. Although this took about four months to accomplish, when Ms. Caraway asked him about the situation in October 2013, he expressed "some concerns for the home" and said he "had placed services in the home to address" the boy's behaviors. *Id.* at 289 ¶26. Also, he said that once he learned of a babysitter's reporting of continued sexual activity between the children, he "began work towards moving the child from the home." *Id.*

The Hubbards' allegations do not state a substantive due process claim under 42 U.S.C. § 1983. Although Mr. Williams allegedly had knowledge of the sexual activity, the Hubbards have not sufficiently pled causation and conscience-shocking conduct. The amended complaint states that Mr. Williams "place[d] services in the home" and "work[ed] towards moving the child from the home" upon learning of the September and October referrals. *Id.* Although the removal of E.J.H. took four months, the Hubbards have not sufficiently pled an affirmative link between this delay and Mr. Williams's conduct, nor have they pled facts showing that any delay

caused sexual abuse. Considering the allegations about Mr. Williams in the context of what various DHS employees were doing contemporaneously on this case, we find the ***713** amended complaint does not sufficiently allege "conscience-shocking" behavior. *See Gutteridge*, 878 F.3d at 1241. As to the Krajians physical abuse of the children, the amended complaint did not sufficiently plead that Mr. Williams had knowledge of or failed to exercise professional judgment regarding that risk. For example, the last reference to Mr. Williams in the amended complaint was November 4, 2013, Aplt. App., Vol. II at 290 ¶ 28, months before the injuries to A.P.

4) Other defendants

We agree with the district court that the allegations against other during-foster-care defendants are insufficient to state a claim. As to many of these defendants, the amended complaint alleged nothing more than their attendance at a meeting. Their alleged inaction tells us very little. Absent allegations that they were responsible for a broader policy that harmed the children, the amended complaint's vague claims against supervisors do not state a claim. *See Dodds*, 614 F.3d at 1199. And some defendants, such as Mr. Dugger and Mr. Johnson, seemingly had nothing to do with what happened based on the amended complaint's allegations. They were DHS employees who received a referral once A.P. had already been fatally injured. *See* Aplt. App., Vol. II at 292 ¶ 34. No further harm to the children is pled after that referral.

ii. State-created danger

The during-foster-care § 1983 substantive due process claims based on a state-created danger theory fail to state a claim. In assessing a custody placement case based on a danger-creation theory, we consider only a state employee's conduct before legal custody was awarded. *Currier*, 242 F.3d at 919. The Hubbards have not pled sufficient facts to show why any defendant would have been on notice that the children would be at risk of danger from living with the Krajians. The amended complaint therefore lacks allegations that any defendant exhibited "affirmative conduct" that created danger for the children. *Estate of B.I.C.*, 710 F.3d at 1173 (to invoke the danger-creation theory, a plaintiff must make—at a minimum—"a showing of affirmative conduct and private violence").

B. ***State Claims (Negligence and Wrongful Death)***

The Hubbards, in addition to their federal claims under § 1983, alleged state law claims for negligence and wrongful death and for a violation of the Oklahoma Constitution. Although their amended complaint does not state a jurisdictional basis for their state claims, they need to rely on the federal supplemental jurisdiction statute, 28 U.S.C. § 1367. After the district court dismissed the Hubbards' federal claims, it considered their state claims, dismissing them largely for failure to comply with the notice and claim procedures in the OGTCA. We question whether the court should have continued to exercise jurisdiction over those claims.

We have held that supplemental jurisdiction over state claims "is exercised on a discretionary basis" and that "[i]f federal claims are dismissed before trial, leaving only issues of state law, 'the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.' " *Bauchman v. West High Sch.*, 132 F.3d 542, 549 (10th Cir.1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), and *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); *see* Wright & Miller, Federal Practice & Procedure § 3567.3 (3d ed. 2018) ("As a general matter, a court will decline supplemental jurisdiction if the underlying ***714** [federal] claims are dismissed before trial."). We generally decline to exercise supplemental jurisdiction when no federal claims remain because "[n]otions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." *Brooks v. Gaenzle*, 614 F.3d 1213, 1229-30 (10th Cir. 2010) (quoting *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir.1995)).

When, as here, a district court dismisses all federal claims, it would normally dismiss the state claims without prejudice so that the plaintiff could pursue them in state court. *See Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."). This is especially so when, as here, the claims present potentially unsettled questions of state law. *See, e.g.*, *Wentzka v. Gellman,* 991 F.2d 423, 425 (7th Cir. 1993) (retention of jurisdiction over case held improper where state law was unsettled); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 589 (5th Cir. 1992) ("[T]he interests of federalism and

comity point strongly toward dismissal. All of the remaining legal issues of the case ... are of state law, and ... they are difficult ones."). In *Patel v. Hall*, 849 F.3d 970, 987-88 (10th Cir. 2017), we said, "On remand, the district court should first reconsider whether it should decline to exercise pendent jurisdiction over the state law claims and instead dismiss them without prejudice in light of the limited nature of the sole remaining federal claim in this action and the arguable existence of some unsettled questions of state law."

The district court, after dismissing the Hubbards' federal claims, addressed their state claims, including whether the Hubbards' failure to comply with the procedural requirements of the OGTCA should preclude them from proceeding on all of their state law claims. That question is challenging due to undeveloped state court precedent, the Hubbards' allegations of willful and wanton conduct, their naming both the DHS and the individuals as defendants, and their attempt to assert a state constitutional claim. The district court did not explain why it chose to address the state claims. Nor did it analyze, in light of comity and federalism concerns, whether continued supplemental jurisdiction was appropriate after dismissal of the federal claims. [13]

13 Discretionary factors to exercise supplemental jurisdiction are listed in 28 U.S.C. § 1367(c):

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Without the benefit of explanation or analysis to assess the district court's discretionary exercise of supplemental jurisdiction under § 1367, and having affirmed the dismissal of the Hubbards' federal claims, we reverse the dismissal with prejudice of the state law claims and remand to the district court. *See Patel*, 849 F.3d at 987-88 (remanding for reconsideration of supplemental jurisdiction). The court should address whether to decline supplemental jurisdiction over the state law claims and dismiss them without prejudice. This would allow the state courts to address ***715** the viability of the Hubbards' state tort claims under the OGTCA should they choose to continue to pursue them there. *See Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1237 (10th Cir. 1997) ("The Supreme Court has instructed us that federal courts should consider the propriety of exercising supplemental jurisdiction 'in each case, and at every stage of the litigation.' " (quoting *Carnegie-Mellon Univ.,* 484 U.S. at 350, 108 S.Ct. 614)). [14]

14 In *VR Acquisitions, LLC v. Wasatch County*, 853 F.3d 1142 (10th Cir. 2017), this court recently held "that the district court should have simply declined to exercise supplemental jurisdiction over [the plaintiff's] state-law claims after it dismissed [the plaintiff's] federal claims." *Id.* at 1149. We thus "reverse[d] the district court's order dismissing [plaintiff's] state-law claims with prejudice and remand[ed] with instructions to dismiss those claims without prejudice." *Id.* at 1150.

III. CONCLUSION

Our opinion should not be read to condone or approve of the Defendants' conduct as alleged in the amended complaint—just the opposite—especially DHS. Under the amended complaint, DHS failed to protect these children, and the results were tragic. But DHS is not a defendant under the § 1983 substantive due process claim, and the Hubbards' amended complaint does not meet the exacting standard for pleading conscience-shocking behavior, and in some instances causation, on the part of individual defendants standing on their own. Accordingly, we affirm the district court's dismissal of the Hubbards' federal claims. We remand for the district court to decide whether it should decline supplemental jurisdiction on the remaining state law claims. [15]

15 Because we agree with the district court and hold that the Hubbards have not sufficiently stated a claim showing an underlying § 1983 violation, any associated request for injunctive or declaratory relief based on the § 1983 allegations is accordingly denied.

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JONATHAN R., et al., Plaintiffs,
v.
Jim JUSTICE, et al., Defendants.

Civil Action No. 3:19-cv-00710
|
Signed January 13, 2023

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ORDER

THOMAS E. JOHNSTON, CHIEF JUDGE

***1** Pending before the Court is Defendants Jim Justice, Bill Crouch, Jeremiah Samples, Linda Watts, and the West Virginia Department of Health and Human Resources' (collectively "Defendants") Motion to Dismiss Plaintiffs' Complaint. (ECF No. 17.) For the reasons more fully explained below, the Motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

Plaintiffs are children in the West Virginia foster care system. (ECF No. 1 at 2, ¶ 2.) They allege this system, as run by Defendants, is structurally inept, in violation of their constitutional and statutory rights. (*Id.* at 6, ¶ 10.) Seeking system-wide reform, Plaintiffs brought this putative class action on behalf of all children who are, or will be, placed in West Virginia foster care. (*See id.*)

Plaintiffs' Complaint describes a legion of shortcomings in the foster care system. For instance, Plaintiffs allege that the West Virginia Department of Health and Human Resources ("DHHR") "lacks a sufficient number of foster care placements." (*Id.* at 4, ¶ 9(a).) This, in turn, leads to DHHR "segregate[ing] children in institutions," placing some in temporary shelters for indefinite stints of time, leaving others in "known abusive or neglectful homes," or placing them in poorly vetted and overcrowded foster homes. (*Id.* at 4, ¶ 9(b).) Among this slate of improper placements, Plaintiffs allege DHHR has a go-to: institutions. (*Id.* at 4, ¶ 9(c).) Nearly three-quarters of the children in DHHR custody between the ages of 12 and 17 are institutionalized. (*Id.* at 3, ¶7.) Plaintiffs allege these institutions run "rampant [with] sexual, physical, and emotional abuse," (*Id.* at 69, ¶ 281), and are more akin to "youth corrections facilit[ies]" than foster placements. (*See e.g., id.* at 33, ¶ 127.) Worse yet, Plaintiffs allege many of these institutions are outside West Virginia, which all but isolates foster children from their families and communities. (*Id.* at 69, ¶ 278.) Even when DHHR keeps foster children in-state, they are routinely separated from their siblings, and DHHR fails to arrange any visitation or communication between them. (*Id.* at 21–22, ¶ 71.) Plaintiffs further allege that all these placements, institutions and foster homes alike, are unstable, and that DHHR oftentimes shuttles them from one placement to another rather than securing them a permanent home. (*Id.* at 59–62, ¶¶ 244–55.)

Staff shortages also plague the foster care system. DHHR, according to Plaintiffs, "fails to employ and retain a sufficient number of appropriately trained caseworkers." (*Id.* at 5, ¶ 9(f)). This leaves caseworkers swamped with "unmanageable caseloads," sometimes "two or three times ... the recommended standard." (*Id.* at 71, ¶ 288.) DHHR unsurprisingly has an "alarmingly high caseworker turnover" rate. (*Id.* at 72, ¶ 292.) Unfortunately, DHHR's hiring practices only make matters worse: it routinely fills vacancies with unqualified applicants that have no training or education in social work. (*Id.* at 72, ¶ 293.) These shortcomings, Plaintiffs allege, have resulted in DHHR employing caseworkers that are "poorly trained [and] ill-equipped to help West Virginian families." (*Id.* at 70, ¶ 283.)

***2** Unqualified, overworked caseworkers lead to other deficiencies in West Virginia's foster care system. High

caseloads prevent caseworkers from "timely assess[ing] [the needs of] children entering the foster care system." (*Id.* at 75, ¶ 308.) Without timely assessments, DHHR cannot properly develop a foster child's individualized case plan. (*Id.*) Caseworkers are often unable to engage in meaningful visits with foster children, which further impedes case plan development. (*Id.* at 76, ¶ 313.) Unsurprisingly, individualized case plans are sometimes never developed. (*Id.*) DHHR then adds insult to injury by "fail[ing] to engage in necessary permanency planning for [foster] children." (*Id.* at 79, ¶ 328.) These failures, Plaintiffs allege, force foster children to "languish in the foster care system for years." (*Id.*)

Similar shortcomings permeate the foster care system, further exacerbating an already difficult situation. For example, a considerable number of foster children—Plaintiffs included—have mental health disabilities, ranging from attention deficit hyperactivity disorder ("ADHD") to post-traumatic stress disorder ("PTSD"). (*Id.* at 78, ¶ 321.) Yet DHHR has failed to create sufficient community or home-based mental health services to treat foster children; institutionalization is the only option. (*Id.* at 78–79, ¶¶ 323–24.) DHHR does not provide certain foster parents with much-needed services, such as financial assistance and training for how to raise foster children with disabilities. (*Id.* at 62–67, ¶¶ 256–74.) When it comes time for a foster child to age out of the system, DHHR all but abandons them—caseworkers "sometimes [wait until] as late as weeks before a teen's 18th birthday" to develop any sort of transitional plan for adulthood. (*Id.* at 83, ¶ 342.) Plaintiffs allege these last-minute efforts are futile, and foster children are inevitably thrust "into either unstable situations or directly into homelessness." (*Id.* at 82, ¶ 340.)

Plaintiffs filed suit in this Court on September 30, 2019. (ECF No. 1.) The Complaint proposes one General Class, consisting of all children who are will be in West Virginia foster care, and three subclasses. (*Id.* at 10–11, ¶ 30.) The proposed Kinship Subclass consists of children who are, will be, or have been placed in kinship placements. [1] (*Id.* at 10–11, ¶ 30(a)(i).) The proposed ADA Subclass consists of children who have or will have physical, intellectual, cognitive, or mental health disabilities. (*Id.* at 11, ¶ 30(a)(ii).) The proposed Aging Out Subclass consists of children who are or will be 14 years old and older, who are eligible to receive age-appropriate transition planning but have not been provided the necessary case management and services. (*Id.* at 11, ¶ 30(a)(iii).)

1 West Virginia law defines "kinship placement" as "the placement of the child with a relative of the child, as defined herein, or a placement of a child with a fictive kin, as defined herein." W. Va. Code § 49–1–206. Further, "relative of the child" is defined as "an adult of at least 21 years of age who is related to the child, by blood or marriage, within at least three degrees" and "fictive kin" is defined as "an adult of at least 21 years of age, who is not a relative of the child, as defined herein, but who has an established, substantial relationship with the child, including but not limited to, teachers, coaches, ministers, and parents, or family members of the child's friends." *Id.*

The Complaint includes five causes of action. First, the General class and each subclass allege violations of their substantive due process rights under the Fourteenth Amendment. (*Id.* at 90–93, ¶¶ 368–74.) Second, each class asserts violations of their right to familial association under the First, Ninth, and Fourteenth Amendments. (*Id.* at 93–94, ¶¶ 375–80.) Third, all classes allege violations of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"). (*Id.* at 94–96, ¶¶ 381–83.) Fourth, the ADA subclass alleges violations of the Americans with Disabilities Act ("ADA"). (*Id.* at 96–98, ¶¶ 384–94.) Fifth, the ADA subclass asserts a claim for violations of the Rehabilitation Act. (*Id.* at 98–99, ¶¶ 395–402.)

***3** Plaintiffs sued Defendants, Governor Jim Justice, then-Cabinet Secretary of the DHHR Bill Crouch, Deputy Secretary of the DHHR Jeremiah Samples, Commissioner of the Bureau for Children and Families Linda Watts, in their official capacity, as well as the DHHR. (*Id.* at 8–9, ¶ 21–25.) Plaintiffs seek declaratory and injunctive relief against Defendants for the alleged deficiencies in the foster care system they oversee. (*Id.* at 99–104, ¶ 403–08.) Boiled down, Plaintiffs seek three things. First, a declaration that these systematic deficiencies are unlawful. (*Id.* at 99–100, ¶ 404.) Second, injunctive relief that would require Defendants to overhaul the West Virginia foster care system. (*Id.* at 100–03, ¶ 405.) Third, a court-appointed Monitor to oversee Defendants' compliance with the injunction. (*Id.* at 104, ¶ 406.)

Defendants moved to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). [2] (ECF No. 17.) The matter has since been fully briefed and is now ripe for adjudication. (ECF Nos. 18, 29, 35, & 52.)

2 In their motion, Defendants also moved to dismiss the case for lack of subject-matter jurisdiction under Rule 12(b)(1), arguing that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37 (1971), or, alternatively, the *Rooker-Feldman* doctrine. (ECF No. 18 at 4–14.) The Court previously granted this motion and abstained from exercising jurisdiction under *Younger.* (ECF No. 258.) Plaintiffs appealed, and the Fourth Circuit reversed. *Jonathan R. by Dixon v. Justice*, 41 F.4th 316 (4th Cir. 2022). In doing so, the Fourth Circuit held that both *Younger* and *Rooker-Feldman* abstention were inapplicable. *Id.* at 339, 341. Now, on remand, the Court must turn to the merits and determine whether Plaintiffs have stated a claim for relief.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim upon which relief may be granted tests the legal sufficiency of a civil complaint. Fed. R. Civ. P. 12(b)(6). A plaintiff must allege sufficient facts, which, if proven, would entitle him to relief under a cognizable legal claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007). A case should be dismissed if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the plaintiff, the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. In applying this standard, a court must utilize a two-pronged approach. First, it must separate the legal conclusions in the complaint from the factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Second, assuming the truth of only the factual allegations, the court must determine whether the plaintiff's complaint permits a reasonable inference that "the defendant is liable for the misconduct alleged." *Id.* Well-pleaded factual allegations are required; labels, conclusions, and a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) ("Bare legal conclusions 'are not entitled to the assumption of truth' and are insufficient to state a claim." (quoting *Iqbal*, 556 U.S. at 679)). A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," thereby "nudg[ing] [the] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 555, 570.

III. DISCUSSION

As stated above, Plaintiffs allege violations of their substantive due process rights, right to familial association, AACWA, ADA, and Rehabilitation Act. Defendants urge the Court to dismiss each for failure to state a claim. Against this backdrop, the Court turns to the task at hand.

A. Count I – Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This Clause has two distinct components. The first, procedural due process, guarantees citizens "fair procedure[s]" before being deprived of life, liberty, or property. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The second, substantive due process, "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (The Due Process Clause "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." (internal quotation marks omitted)).

***4** The Due Process Clause typically functions "as a negative prohibition on state action." *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995) (en banc). It serves, by and large, "as a limitation on the State's power to act," thereby "prevent[ing] government from abusing [its] power, or employing it as an instrument of oppression." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195–96 (1989) (alteration in original) (internal quotation marks omitted). Thus, the Due Process Clause ordinarily "does not require governmental actors to affirmatively protect life, liberty, or property." *Pinder*, 54 F.3d at 1174.

But there are exceptions to this general rule. One exception exists when the government takes an individual into government custody, thereby creating a custodial relationship between the two. *Id.* at 1174–75. During this custodial relationship, substantive due process imposes an affirmative duty on the government to care for the individual. *Id.* Plaintiffs allege Defendants have failed to carry out this constitutional command. The affirmative duty to care for another is best understood by reviewing the cases developing it. The Court

will first discuss a trilogy of Supreme Court opinions, and then look to Fourth Circuit precedent applying this affirmative duty in the foster care context. Once this is done, the Court will analyze Plaintiffs' claims.

a. Governing Law

The Supreme Court first found an affirmative duty to act in *Estelle v. Gamble*, 429 U.S. 97 (1976). In *Estelle*, the prisoner-plaintiff was working when a cotton bale fell, struck him, and injured his back. *Id.* at 99. Despite receiving medical attention for his injury, the plaintiff's pain never subsided. *Id.* at 99–101. He later sued, claiming he received inadequate medical treatment, which subjected him to cruel and unusual punishment. [3] *Id.* at 101. When analyzing his claim, the Court recognized that the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Id.* at 103. This affirmative duty exits because "inmate[s] *must* rely on prison authorities to treat [their] medical needs; if the authorities fail to do so, those needs will not be met." *Id.* (emphasis added).

3 Notably, the prisoner-plaintiff brought a § 1983 action for an Eight Amendment violation, not substantive due process. *Id.* at 101.

The Court built on this reasoning in *Youngberg v. Romeo*, 457 U.S. 307 (1982), where it outlined the substantive due process rights guaranteed to those involuntarily in state custody for non-penal reasons. Romeo was 33-year-old man with an IQ of between 8 and 10. *Id.* at 309. His mother was unable to care for him or control his violence, so she sought his institutionalization. *Id.* She was successful, and Romeo was involuntarily committed to a mental institution. *Id.* at 310. Once there, "Romeo was injured on numerous occasions, both by his own violence and by the reactions of other residents to him." *Id.* The infirmary doctor then ordered that Romeo be restrained to protect both himself and other patients. *Id.* at 310–11. Romeo's mother challenged his living conditions, arguing the institution "failed to [provide] appropriate preventive procedures" and "appropriate treatment or programs for his mental retardation." *Id.* (internal quotation marks omitted). These failures, she claimed, violated her son's substantive due process rights. *See id.* at 311, 314–15, 316.

The Court held that the state unquestionably owed citizens "wholly dependent" on it several rights. *Id.* at 317. For instance, the state must "provide adequate food, shelter, clothing, and medical care," as well as "reasonable safety [to] all residents." *Id.* at 324. Those, it held, were "the essentials." *Id.* The Court further held that the state must provide some individuals with training or habilitation when necessary to protect the individuals' substantive due process rights, such as their right to safety or freedom from bodily restraint. *See id.* Importantly, however, states "necessarily ha[ve] considerable discretion in determining the nature and scope of [their] responsibilities." [4] *Id.* at 317. They need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Id.*

4 The Court held that when deciding whether training or habilitation should be provided, "courts must show deference to the judgment exercised by a qualified professional." *Id.* at 322. A decision made by a professional is thus "presumptively valid" and will not be interfered with by courts unless "the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323.

***5** Then, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Court explained when this affirmative duty is triggered. In *DeShaney*, the county's department of social services ("DSS") knew that Randy DeShaney was abusing his son, but it failed to intervene. [5] *Id.* at 192. Randy finally beat his boy into a coma, and although the boy survived, he was expected to live out the remainder of his days in an institution for the feeble minded. *Id.* at 192–93. The boy's mother filed suit against Winnebago County, DSS, and various DSS employees, alleging they violated her son's substantive due process right to protection from a "risk of violence at his father's hands," about which they knew or shown have known. *Id.* at 193. Specifically, the mother argued that, notwithstanding there generally being no duty to protect, DSS stood in a "special relationship" to her boy because it knew of his danger. *Id.* at 197. The Court rejected this argument because the boy was in his father's custody, not the State's, when the harm occurred, and the State played no part in creating the danger. *Id.* at 201. In doing so, the Court offered the following explanation for when—and why—this affirmative duty arises:

> Taken together, [*Estelle* and *Youngberg*] stand only for the proposition that when the State takes a

> person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 199–200. (footnotes omitted) (internal citations omitted).

5 The boy had previously been hospitalized from what was suspected child abuse, and DSS had obtained a court order granting temporary custody to the hospital. *Id.* at 192. However, the county determined there was insufficient evidence of child abuse to retain custody, so the boy was returned to his father. *Id.*

The Fourth Circuit then applied *DeShaney* to the foster care context in *Doe ex rel. Johnson v. South Carolina Department of Social Services*, 597 F.3d 163 (4th Cir. 2010). There, state social workers removed two siblings, Jane and Kameron, from their home after receiving reports of sexual abuse. *Id.* at 166. Once in state custody, the social worker placed Jane in a foster home with Kameron, despite knowing Kameron had sexually abused Jane. *Id.* at 166–68. This sexual abuse continued in foster care. *Id.* at 168. Jane's adoptive parents sued on her behalf, arguing that the social worker violated Jane's substantive due process rights by placing her in a foster home the social worker knew was dangerous. *Id.* The Court agreed. *Id.* at 175. It reasoned that "the state ha[d] taken [the] affirmative act" of "involuntarily remov[ing] [Jane] from her home," thereby restraining her liberty. *Id.* at 175. This affirmative act triggered substantive due process protections and thus imposed "some responsibility for [Jane's] safety and general well-being." *Id.* (internal quotation marks omitted) (quoting *DeShaney*, 489 U.S at 200). Children involuntarily placed in foster care therefore enjoy those substantive due process rights guaranteed by *Youngberg* and *DeShaney. Id.* Before concluding, the Fourth Circuit also held that state actors cannot be deliberately indifferent these substantive due process rights. *Id.*

b. Plaintiffs' Claims

The proposed General Class and every subclass assert various substantive due process rights, all of which they allege Defendants have violated. The General Class asserts the following seven substantive due process rights: (1) the right to freedom from maltreatment and repeated maltreatment, while under the protective supervision of the State; (2) the right to protection from unnecessary intrusions into the child's emotional wellbeing once the State has established a special relationship with that child; (3) the right to services necessary to prevent an unreasonable risk of harm; (4) the right to conditions and duration of foster care reasonably related to the purpose of government custody; (5) the right to treatment and care consistent with the purpose and assumptions of government custody; (6) the right not to be maintained in custody longer than is necessary to accomplish the purpose to be served by taking a child into government custody; and (7) the right to services in the least restrictive, most family-like setting. (ECF. No. 1 at 91–92, ¶ 373(a)–(g)).

***6** The proposed Kinship Subclass asserts the following three substantive due process rights: (1) the right to placement in the least-restrictive most family-like setting that is properly assessed to determine whether it is a safe and appropriate placement; (2) the right to supportive and case management services to ensure placement stability and ensure the child is free from harm; and (3) the right to a plan and corresponding services for a permanent home. (*Id.* at 92, ¶ 374(a)(i)–(iii)).

The proposed ADA Subclass claims four substantive due process rights: (1) the right to be free from discrimination by reason of disability; (2) the right to services in the most integrated setting appropriate to the person's needs; (3) the right to be free from unnecessary institutionalization and to be placed in the least restrictive setting; and (4) the right to ensure access to an array of community-based placements and

services to ensure access to the least restrictive alternative. (*Id.* at 92–93, ¶ 374(b)(i)–(iv)).

The proposed Aging Out Subclass claims three substantive due process rights: (1) the right to independent living services to prepare to exit foster care successfully including, but not limited to, vocational and other educational services; money management, household maintenance, transportation, legal issues, health, community resources, housing options, personal hygiene, employment readiness, and educational assistance; (2) the right to assistance to find lawful, suitable permanent housing that will not result in homelessness upon exit from foster care; and (3) the right to a connection with an adult resource who will maintain a stable, long-term relationship with the child after he or she ages out of the system. (*Id.* at 93, ¶ 374(c)(i)–(iii)).

c. Analysis

Defendants take issue with most of Plaintiffs' substantive due process claims. Although Defendants concede that they owe Plaintiffs the "basic human needs" that *Youngberg* and *DeShaney* demand, they argue nothing is owed beyond that. (ECF No. 18 at 16.) Defendants maintain that Plaintiffs are trying to take the "aspirational statutory, regulatory, and private standards" applicable to the West Virginia foster care system and "convert each of them [in]to constitutional requirements." (*Id.* at 14) (quoting *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 55 (1st Cir. 2014)). Plaintiffs, however, counter that they do not seek "an aspirational child welfare system, but merely a constitutionally adequate one." (ECF No. 29 at 17–18) (internal quotation marks and citation omitted.) Plaintiffs believe Defendants are pulling a slight of hand, using precedent to "convert the floor of constitutional protection into its ceiling." (*Id.* at 21.) With these arguments in mind, the Court must now parse through each asserted substantive right, testing the legal basis for each.

i. General Class

Looking first at the proposed General Class, Defendants do not dispute that the Due Process Clause requires them to protect against maltreatment and repeated maltreatment. (*See* ECF No. 18 at 18 n.8.) Instead, Defendants argue that Plaintiffs have not adequately alleged Defendants' deliberate indifference to this duty. (*Id.* at 18–19.) The Court disagrees. Plaintiffs' Complaint adequately alleges that Defendants have placed Plaintiffs in placements known to be dangerous. For example, Plaintiffs allege that Defendants placed Anastasia M., an 11-year-old girl, in a facility with a history of child molestation, sexual battery, and sexual assault by patients and employees alike. (ECF No. 1 at 20, ¶ 63.) Plaintiffs further allege that Defendants placed a then-12-year-old Garrett M. in "an institutional residential placement for male sex offenders." (*Id.* at 29–30, ¶ 111.) Garrett is not a sex offender, nor has he ever been charged with a sex offense. (*Id.* at 30, ¶ 115.) Nevertheless, Defendants placed 12-year-old Garrett among sex offenders, many of whom were 15 years of age and older. (*Id.* at 29–30, ¶ 111.) These claims adequately allege that Defendants turned a blind eye to a known danger that Plaintiffs would be mistreated and abused while in State custody. *Doe*, 597 F.3d at 176 ("[S]tate officials responsible for [placement] decisions ha[ve] a corresponding duty to refrain from placing [children] in a known, dangerous environment in deliberate indifference to [their] right to personal safety and security.").

***7** Defendants next seek dismissal of Plaintiffs claim for the right to protection from unnecessary intrusions into the child's emotional wellbeing while in State custody. The Court declines to do so. As outlined above, the Due Process Clause requires Defendants to protect foster children's well-being. *See, e.g., DeShaney*, 489 U.S. at 200; *Doe*, 597 F.3d at 175. The only issue here is whether this duty extends to protecting a foster child's *emotional* well-being. The Court believes it does. As another district court aptly put it, this "conclusion is grounded in common sense." *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989). Children's physical and emotional well-being are equally important. *Id.* Although physical injuries mend, emotional trauma inflicted during a child's tender years has "an indelible effect" from which they may never recover. *Id.* It would be an odd result for the Fourteenth Amendment to require Defendants to protect against possible short-term injuries, while at the same time providing no protection against lifelong harm. This is hardly a novel idea, and the Court readily accepts it. *See e.g., M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 250 (5th Cir. 2018) (holding that substantive due process ensures the right "to be free from *severe* psychological abuse and emotional trauma") (emphasis in original); *Wyatt B. by McAllister v. Brown*, No. 6:19-cv-00556, 2021 WL 4434011, at *8 (D. Or. Sept. 27, 2021); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 161 (D. Mass. 2011); *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996); *B.H.*, 715 F. Supp. at 1395.

Defendants next take aim at Plaintiffs' third claimed right—the right to services necessary to prevent unreasonable risk of harm. Like the right to prevent maltreatment, Defendants

concede this right "arguably relate[s] to the basic human need of physical safety," but contend Plaintiffs have not plead deliberate indifference to the right. (ECF No. at 18 n.8) (internal quotation marks omitted). The Court rejects, at this juncture, Defendants' position that Plaintiffs have failed to allege deliberate indifference here. The Complaint includes a host of allegations that Plaintiffs have not been provided the services necessary to ensure their reasonable safety. (*See e.g.*, ECF No. 1, at 17, 21, ¶¶ 52, 70.) For example, Plaintiffs allege that Defendants do not conduct background checks on potential foster parents before placing children in their care; Plaintiffs also allege that Defendants do not always inspect foster homes before placing Plaintiffs in them. (*Id.*) Taking these allegations as true, which the Court must at the pleading stage, one could reasonably infer that Defendants were deliberately indifferent to Plaintiffs' rights. *Iqbal*, 556 U.S. at 678.

Next, the Court addresses two overlapping rights: the right to conditions and duration of foster care reasonably related to the purpose of government custody, and the right not to be maintained in custody longer than is necessary to accomplish the purpose to be served by taking a child into government custody. Defendants assert that, although these rights are "sound policy," they are "not constitutionally mandated." (ECF No. 18 at 17.) The Court disagrees. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court said that "due process requires that the *nature and duration* of [custody] bear some reasonable relation to the purpose for which the individual is [in custody]." *Id.* at 738 (emphasis added). Plaintiffs are in Defendants' custody largely because they have been abused or neglected by their parents. These terrible conditions justify Defendants "intru[ding] on [the] family relationships" that are "ranked as of basic importance in our society." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal quotation marks omitted) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). Once these conditions cease, so do the justifications for removal.

The Court now turns to the right to treatment and care consistent with the purpose and assumptions of government custody. Once more, Defendants urge the Court to dismiss this claim, believing it is a matter of state policy, not constitutional law. (ECF No. 18 at 16–17.) *Jackson*, and *Doe* say otherwise. As previously discussed, substantive due process requires that the nature of custody reasonably relate to its purpose. *Jackson*, 406 U.S. at 738. Here, Plaintiffs are in Defendants' custody because Defendants sought to prevent Plaintiffs' abuse and neglect. Due process imposes a corresponding duty on Defendants to ensure that Plaintiffs are neither abused nor neglected while in their custody. *Doe* confirms this: "when a state involuntarily removes a child from her home" to prevent abuse and neglect," due process imposes "some responsibility for [the child's] safety and general well-being.' " *Doe*, 597 U.S. at 175 (alteration in original) (quoting *DeShaney*, 489 U.S. at 200). The Court notes, however, that substantive due process does not demand optimal treatment, *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 507 (D.N.J. 2000), and the State need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Youngberg*, 457 U.S. at 317. Defendants need only provide for Plaintiffs' basic human needs and prevent further abuse and neglect. Thus, to the extent Plaintiffs have alleged Defendants failed to uphold this constitutional duty, they have stated a claim for relief.

***8** Finally, the Court addresses the General Class's last asserted right: the right to services in the least restrictive, most family-like setting. The Court is unconvinced that substantive due process goes this far. Plaintiffs' fail to cite a *single* case where *any* court has stretched substantive due process *this* far. The Court is unsurprised that no court has found this right since *Youngberg* and *DeShaney* merely impose a duty to provide for an individual's basic human needs. Plaintiffs claim that limiting substantive due process protections to their basic human needs—as *Youngberg* and *DeShaney* instruct—is "regressive" and "outdated." (ECF No. 29 at 17.) However, that is the law as it exists today, and the Court declines to "turn[ ] any fresh furrows in the 'treacherous field' of substantive due process." *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter., J., concurring in the judgment) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (opinion of Powell J.)).

ii. Kinship Subclass

The Court now turns to the proposed Kinship subclass, beginning with their second asserted right. Substantive due process, according to this Subclass, guarantees them the right to supportive and case management services to ensure placement stability and ensure the child is free from harm. As noted above, due process requires Defendants to provide for foster children's reasonable safety. *Doe*, 597 F.3d at 175. This, in turn, requires Defendants to implement the services necessary to ensure that the Subclass is free from harm. However, substantive due process goes no further. It simply does not provide a right to stability while in foster care. *Abbott*, 907 F.3d at 268; *Eric L. By and Through Schierberl v. Bird*, 848 F. Supp 303, 307 (D.N.H. 1994) (finding that "[t]he complaint pleads no facts tending to establish that [social

services'] placement of children with successive foster parents is so devoid of justification as to give rise to a substantive violation of the Due Process Clause.").

The first and third rights claimed by this Subclass have no basis in substantive due process. The Court has previously explained that substantive due process does not protect the right to the least-restrictive, most family-like setting available while in foster care; the conditions of foster care need only to relate to its purpose. *Jackson*, 406 U.S. at 738. Similarly, substantive due process does not require Defendants to do more than provide for foster children's basic human needs. *DeShaney*, 489 U.S. at 200. While it would certainly be sound policy for Defendants to adopt, that is a matter for West Virginia's elected officials to address, not the federal judiciary. *Accord Connor B.*, 774 F.3d at 48.

iii. ADA Subclass

The Court can dispose of the proposed ADA subclass' claims in short order. First, there is no substantive due process right to be free from discrimination by reason of disability. That right is protected by the ADA, not the Fourteenth Amendment. *See generally* 42 U.S.C. § 12101, *et seq.* As *DeShaney* explained, not "every [statutory violation] committed by a state actor [is] a constitutional violation." *DeShaney*, 489 U.S. at 202. Second, there is no right to services in the most integrated setting appropriate to the person's needs. *Jackson*, 406 U.S. at 738; *Wyatt B.*, 2021 WL 4434011, at *8–9. Third, the Fourteenth Amendment does not protect against unnecessary institutionalization, nor does it guarantee placement in the least restrictive setting. *Wyatt B.*, 2021 WL 4434011, at *8–9. That, too, is a claim cognizable under the ADA rather than substantive due process. *Compare Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), *with Youngberg*, 457 U.S. 307 (1982). Fourth, "the right to ensure access to an array of community-based placements and services to ensure access to the least restrictive alternative" is a far cry from the basic human needs *DeShaney* requires. Substantive due process does not extend this far.

iv. Aging Out Subclass

***9** Substantive due process also does not protect any of the rights claimed by the proposed Aging Out subclass. Although the services they seek "would obviously ... benefit ... the child[ren] and ... society," *Wyatt B.*, 2021 WL 4434011, at *9, not every laudable goal is enshrined in the Fourteenth Amendment. Each proposed right instead goes well beyond *DeShaney*, and the Court declines to wander into that uncharted territory. This decision comes not from a lack of compassion for Plaintiffs, but instead from a mindfulness that each time the Court "break[s] new ground in this [area of substantive due process]," it strips the West Virginia Legislature of its ability to decide the matter on behalf of the people of West Virginia. *Glucksberg*, 521 U.S. at 720. Cognizant that "the Due Process Clause does not empower the judiciary to sit as a superlegislature," *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978) (internal quotation marks omitted) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)), the Court faithfully applies precedent to reach this conclusion. For these reasons, Defendants' Motion to Dismiss Count I is **GRANTED** in part and **DENIED** in part.

B. Count II – Familial Association

The Court now turns to Count II, wherein Plaintiffs allege Defendants violated their right to familial association under the First, Ninth, and Fourteenth Amendments. The Court will first review each amendment and pertinent case law before analyzing Plaintiffs' claims.

a. Governing Law

i. Fourteenth Amendment

The Supreme Court first recognized that the Fourteenth Amendment's Due Process Clause protects the family unit a century ago. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding the Fourteenth Amendment guarantees the right "to marry, establish a home and bring up children."). The Court has since created a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In these cases, the Court has applied substantive due process to stave off government interference in two aspects of family life: the parent-child relationship, *Santosky v. Kramer*, 455 U.S. 745 (1982), and particularly intimate family decisions, such as marriage and childbearing. *See e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Loving v. Virginia*, 388 U.S.1 (1967).

The lone instance where the Court applied substantive due process beyond these two categories was in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), where it held that family members may live together free from undue government interference. [6] There, the city enacted an ordinance restricting many homes to single-family use. *Id.* at 495–96. The ordinance included a narrow definition of "family," however, which criminalized a grandmother and

grandchild living together. *Id.* at 496–97. Outlawing the grandmother's decision to live with her grandson was "no mere incidental result of the ordinance." *Id.* at 498. Instead, the city intended to "regulate the occupancy of" households, deciding for itself "who may live together and [who] may not." *Id.* at 498–99. The Court struck down the ordinance as an "intrusive regulation" that "slic[ed] deep[ ] into the family itself." *Id.* at 498. Substantive due process prevents the government from regulating family living arrangements, the Court explained, because "this Nation[ ] [has a long] history and tradition" of extended kin "sharing a household" and "major responsibilit[ies] for the rearing of ... children." *Id.* at 503–05. In light of this tradition, the Court found that extended family have a constitutional right to reside together. *Id.* at 504. While the Court acknowledged "the family is not beyond regulation," the city had no compelling interest that justified the ordinance. *Id.* at 499–500.

6 Justice Powell, joined by three other Justices, authored the lead opinion. *Moore*, 431 U.S. at 495. Justice Stevens concurred in the judgment but on somewhat different grounds. He reasoned that the States cannot constitutionally interfere with a residential property owner's right "to determine the internal composition of his household," unless done to ensure that those homes "remain nontransient, single-housekeeping units." *Id.* at 518–19 (Stevens, J., concurring in the judgment). In other words, Justice Stevens would extend the constitutional right to cohabitate to unrelated individuals, so long as there was no "transient occupancy." *Id.* at 516–19. Seeing how Justice Powell's opinion is the narrower of the two, it must be treated as controlling. *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002) ("[W]hen a decision of the [Supreme] Court lacks a majority opinion, the opinion of the Justices concurring in the judgment on the "narrowest grounds" is to be regarded as the Court's holding.").

ii. First Amendment

***10** The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Supreme Court has "long understood as implicit" in these First Amendment guarantees "a corresponding right to associate with others." *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court recognized that this right to association includes the right to intimate, or familial, association. There, the Jaycees, a non-profit organization, limited full-fledged membership to men. *Id.* at 613. A state statute, however, required the Jaycees to provide women equal membership. *Id.* at 614–15. The Jaycees challenged the statute, arguing that requiring women's equal membership violated its members' First Amendment right to freedom of association. *Id.* at 615.

When analyzing this intimate association claim, the Court explained that the First Amendment protects "certain kinds of highly personal relationships" because "individuals draw much of their emotional enrichment from close ties with others." *Id.* at 618–19. The Court looked to its substantive due process cases, such as *Moore* and *Loving v. Virginia*, 388 U.S. 1 (1967), for examples of intimate relationships worthy of "constitutional shelter." *Id.* at 618–20. From these intimate relationships, the Court found a common thread: each "attend[ed] the creation and sustenance of a family," such as marriage, childbirth, raising children, and living with relatives. *Id.* at 619. These constitutionally protected relationships differ from others, the Court reasoned, because they "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 619–20. However, the Court cautioned against extending protection to other relationships, saying that its substantive due process cases "suggest[ed] some relevant limitations" on First Amendment protection. *Id.* at 619. As for the Jaycees, they lacked many of these traits. They were "large and basically unselective." *Id.* at 621. The Jaycees were also anything but intimate and secluded—in fact, "much of the activity central to the formation and maintenance of the [Jaycees] involve[d] the participation of strangers." *Id.*

iii. Ninth Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Framers adopted the Ninth Amendment because they "believed that there are additional fundamental rights ... which exist alongside those fundamental rights specifically mentioned" in the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring). The Ninth Amendment thus stands

for a simple proposition—the first eight amendments are a non-exhaustive list of constitutionally protected rights. *Id.* at 490. Importantly, however, the Ninth Amendment does not confer any individual rights. *See id.* at 493. It merely "lends strong support to the view that" individual liberty, as protected by the Fourteenth Amendment, "is not restricted to rights specifically mentioned in the first eight amendments." *Id.*

b. Analysis

***11** Having now reviewed the First, Ninth, and Fourteenth Amendments, the Court can glean a few principles from each. First, the Ninth Amendment does not confer a right to familial association; it simply provides that the right may exist alongside those included in the Bill of Rights. Second, the First and Fourteenth Amendments each protect the right to familial association, and the two seemingly complement one another. *Roberts*' reliance on the Court's Fourteenth Amendment cases when describing the First Amendment doctrine proves that the two are one and the same. *See Roberts*, 468 U.S. at 619–20 (citing *Loving v. Virginia*, 388 U.S. 1 (1967), for the proposition that the First Amendment "imposes constraints on the State's power to control the selection of one's spouse."). Put differently, those familial relationships worthy of substantive due process protection always have the distinguishing attributes *Roberts* found worthy of First Amendment protection. Third, not every government action that interferes with the family is unconstitutional. The government may, in certain circumstances, have a sufficiently compelling interest, such that the intrusion is not "undue" in the constitutional sense. *Roberts*, 468 U.S. at 617–18; *see also Moore*, 431 U.S. at 499. With these principals in mind, the Court now turns to Plaintiffs' allegations.

Plaintiffs allege that Defendants have violated their right to familial association "[b]y failing to take all reasonable efforts towards fostering familial association and securing [them] a permanent home and family." (ECF No. 1 at 94, ¶ 379.) Plaintiffs further allege that Defendants have "systematically and improperly intruded upon" their " 'intimate human relationships' with their parents, siblings, and other family members." (ECF No. 29 at 25.) Defendants concede that the constitution "may protect some aspects of the parent-child relationship," but contend those protections do not apply "to more extended kinship relationships." (ECF No. 18 at 21.) Defendants also argue that the constitution does not require them "to ensure a particular type of family life," nor does it guarantee the "right to a permanent home and family." (*Id.*) The Court agrees.

For starters, nothing in the First or Fourteenth Amendments require Defendants to nurture Plaintiffs' familial relationships. *Marisol A.*, 929 F. Supp. at 676 ("[C]ourts ... have been loathe to impose a constitutional obligation on the state to ensure a particular type of family life."). These Amendments instead work as negative prohibitions on the government, providing "constitutional shelter" "against undue intrusion by the State." *Roberts*, 468 U.S. at 617–18, 619. Plaintiffs resist this conclusion with an implicit reliance on *DeShaney.* Specifically, Plaintiffs argue that Defendants have "remov[ed] [Plaintiffs] from their homes," "thereby forming a 'special relationship' with [Plaintiffs]." (ECF No. 29 at 26.) Because of this "special relationship," Plaintiffs believe they are constitutionally entitled to services that "foster[ ] [their] familial association" and "secur[e] [them] a permanent home and family." (ECF No. 1 at 94, ¶ 379.) Negative prohibitions on state action afford no such entitlement.[7] Neither the Supreme Court nor the Fourth Circuit have broached—much less recognized—this affirmative duty. The Court declines to do so today.

7 Even if *DeShaney* did impose some affirmative duty on Defendants—a proposition the Court seriously doubts—*Youngberg* makes clear that Defendants need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Youngberg*, 457 U.S. at 317. Thus, Defendant's decision to remove a child to prevent abuse and neglect would not create a corresponding constitutional duty to ensure that the child is later provided a permanent home.

Plaintiffs have also failed to allege that Defendants improperly intruded on their parent-child relationships. To be clear, "[t]he bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994). The Supreme Court has said, however, that States' "*parens patriae* interest in preserving and promoting the welfare of the child" is a sufficiently compelling reason to justify State interference. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). Such is the case here. Defendants, acting according to state law, properly removed Plaintiffs from their parents' care to prevent further abuse and neglect. Plaintiffs do not contend otherwise, so the Court is left with the inevitable conclusion that their removal was constitutional. The only lingering issue then is whether Defendants have "improperly intruded upon"

"Plaintiffs' 'intimate human relationships' with their parents" post-removal. (ECF No. 29 at 25.) Interestingly enough, not a single Plaintiff wishes to be placed back in their parents' custody. The 105-page Complaint is *entirely* devoid of a *single* allegation that *any* Plaintiff was *ever* denied contact with, or access to, their parents. Plaintiffs have thus failed to allege a violation of their right to familial association with their parents.

***12** Nor have Plaintiffs adequately alleged that Defendants violated their right to familial association with their siblings. Plaintiffs make a compassionate argument that Defendants unnecessarily separate Plaintiffs from their siblings, oftentimes failing to arrange any visitation or communication between them. (ECF No. 1 at 21–22, ¶ 71.) Unfortunately for Plaintiffs, the constitution does not, in the foster care context, protect the sibling-sibling relationship. While mapping out the boundaries of the "constitutional shelter" afforded to "certain intimate ... relationships," the *Roberts* Court said that its precedent "suggest[s] some relevant limitations on" the right. *Roberts*, 468 U.S. at 617, 619. And that precedent does not extend to the relationship between siblings. Nearly all the cases *Roberts* cited, many of which were substantive due process cases, involved relationships far more intimate than that between siblings —namely, marriage and the parent-child relationship. *Id.* at 618–20 (collecting cases). The lone case *Roberts* cited that went further was *Moore*, which simply allowed a grandmother to live with her grandson because grandparents—much like parents—have traditionally played a vital role in childrearing. *Moore*, 431 U.S. at 504–05. The Court thinks *Moore* is too thin a reed to justify extending constitutional protection beyond its current, fixed boundaries. [8]

8 While *Roberts* did provide factors to consider when determining whether to extend First Amendment protection to different relationships, *Roberts*, 468 U.S. at 619–20, the Court is unconvinced that the sibling-sibling relationship meets this criteria. Siblings certainly have "deep attachments" to one another, but they lack other critical attributes *Roberts* found necessary for constitutional protection. For instance, siblings are not secluded from others in critical aspects of their relationship in the same way as spouses, nor do they share distinctively personal aspects of their lives as a parent does with their child. *Roberts* explained that only c*ertain* intimate relationships receive constitutional protection, and the Court is unpersuaded that the sibling-sibling relationship is sufficiently similar to those the Supreme Court has previously protected. *Roberts*, 468 U.S. at 617–18.

Even if the Constitution did generally protect the relationship between siblings, that protection would not apply in the foster care context. *Roberts* and *Moore* both recognized that states may have a sufficiently compelling interest that justifies interference with familial relationships. *Roberts*, 468 U.S. at 617–18; *Moore*, 431 U.S. at 499. Here, West Virginia has a compelling *parens patriae* interest in preventing Plaintiffs' abuse and neglect. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981) ("State[s] ha[ve] an urgent interest in the welfare of the[ir] child[ren]."); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) ("The State[ ] [has a] right—indeed, duty—to protect [its] minor children."). West Virginia's compelling interest in protecting Plaintiffs' well-being thus justifies any disruption to Plaintiffs' relationships with their siblings. In other words, even if the constitution did apply to the sibling-sibling relationship, intruding on that relationship in the foster care context would not be "undue" given the State's compelling, countervailing interest. *Roberts*, 468 U.S. at 617–18; *Moore*, 431 U.S. at 499.

Finally, Plaintiffs' claim for interference with their grandparent-grandchild relationships is foreclosed by *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion). In *Troxel*, a mother sought to limit visitation time between her children and their paternal grandparents. *Id.* at 60–61. When the grandparents petitioned for more visitation time than the mother permitted, the Court squarely rejected their efforts to override the mother's decision. *Id.* at 61, 72. The Court, citing *Pierce*, explained that "parents *and guardians*" of young children have a constitutional right "to direct the upbringing ... of children *under their control*." *Id.* at 65 (emphasis added). This includes the right "to make decisions concerning the care, custody, and control of their children." *Id.* at 66. In light of this well-established precedent, the Court concluded that the grandparents had no right to challenge the mother's decision. *Id.* at 69–70.

***13** *Troxel* is persuasive, if not controlling. Plaintiffs' biological parents would typically be the ones to decide every aspect of Plaintiffs' relationships with their grandparents. Everything from whether Plaintiffs would live with their grandparents—or have no communication at all—would normally be their parents' decision alone. But their parental rights have been judicially terminated, and Defendants have stepped into their shoes as Plaintiffs' legal guardians. Defendants thus have "the right, coupled with the high duty,"

to nurture Plaintiffs and "direct the[ir] upbringing." *Troxel*, 530 U.S. at 65 (quoting *Pierce*, 268 U.S. at 535). This includes the right to restrict contact with their grandparents. Make no bones about it, however—cutting off all contact between foster children and their grandparents during this low point in their young lives is unfathomable. But it is not unconstitutional. The Court **GRANTS** Defendants' Motion to Dismiss Count II.

C. Count III – Adoption Assistance and Child Welfare Act

In Count III, Plaintiffs bring a § 1983 claim, alleging Defendants violated the Adoption Assistance and Child Welfare Act ("AACWA"). "Section 1983 imposes liability on anyone who, under color of state law, deprives a person of any rights, privileges, or immunities secured by the Constitution and laws." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (internal quotation marks omitted). Importantly, litigants invoking § 1983 "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.* (emphasis in original). This distinction gives rise to the parties' next disagreement: Plaintiffs allege Defendants violated their rights under certain sections of the AACWA; Defendants counter that those sections do not confer privately enforceable rights.

a. An Overview of the AACWA

Enacted pursuant to the Spending Clause, the AACWA created "a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services." *Suter v. Artist M.*, 503 U.S. 347, 350–51, 356 (1992). States become eligible for reimbursement by satisfying certain requirements. As relevant here, States must submit to the Secretary of Health and Human Services a plan for foster care and adoption assistance. 42 U.S.C. § 671(a). This plan must include 16 different features before the Secretary will approve it. *Id.* Plaintiffs' claim focuses on two. First, § 671(a)(10) requires the plan to

> establish[ ] and maintain[ ] standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and which shall permit use of the reasonable and prudent parenting standard.

Second, § 671(a)(16) requires the plan to

> provide[ ] for the development of a case plan (as defined in section 675(1) of this title and in accordance with the requirements of section 675a of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in sections 675(5) and 675a of this title with respect to each such child.

The cross-references in § 671(a)(16) are definitional, none of which are particularly relevant to the current dispute. Section 675(1) defines "case plan," § 675(5) defines "case review system," and § 675a further defines the requirements for case plans and case review systems.

The State is not home free once the Secretary approves its plan. Following approval, the Secretary continues to monitor the State's compliance with § 671(a). 42 U.S.C. § 1320a-2a. Should the Secretary find that the State is not upholding its end of the bargain, he must withhold funding. *Id.*; 45 C.F.R. §§ 1355.35(c)(4), 1355.36(b). Importantly, the State is not required to be perfect; it need only "substantial[ly] conform[ ]" to § 671(a)'s requirements. 42 U.S.C. § 1320a-2a.

b. Fourth Circuit Precedent

***14** The Fourth Circuit has previously considered whether § 671(a)(10) and § 671(a)(16) create privately enforceable rights, so the Court finds it best to begin there.

i. Section 671(a)(10)

The Fourth Circuit addressed § 671(a)(10) in *White by White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997). There, a mother was suspected of child abuse, so the Department of Social Services ("DSS") took her children into protective custody. *White*, 112 F.3d at 734. Once in protective custody,

DSS placed the children in various foster homes. *Id.* One placement proved tragic—the child died at the hands of her foster parents. *Id.* at 735. The mother sued DSS officials, claiming they violated her daughter's "right to protection" under § 671(a)(10). *Id.* at 738. The Fourth Circuit disagreed. *Id.* Relying on *Suter*, a then-recent Supreme Court opinion that analyzed other subsections of § 671(a), the panel held that § 671(a)(10) does not create a privately enforceable right. *Id.* at 739.

Plaintiffs ignore *White* entirely, urging the Court to nevertheless find a privately enforceable right under § 671(a)(10). (ECF No. 29 at 32–34.) The Court is not at liberty to do so. *United States v. Cobb*, 274 F. Supp. 3d 390, 394 (S.D. W. Va. 2017) ("[A] district court is bound by the precedent set by its Circuit Court of Appeals, until such precedent is overruled by the appellate court or the United States Supreme Court."). Plaintiffs offer no reason to believe that *White* is no longer good law. As such, the Court concludes that § 671(a)(10) does not create a privately enforceable right.

ii. Section 671(a)(16)

The Fourth Circuit's jurisprudence on § 671(a)(16) is anything but cut-and-dry. The Court first grappled with § 671(a)(16) in *L.J. by and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (*L.J. II*). *L.J. II* involved a class action of children in Baltimore's foster care system. *Id.* at 119. The plaintiffs alleged the city's poor administration of the foster care system resulted in their abuse. *Id.* On appeal, the Baltimore defendants argued that §§ 671(a)(9), (10), and (16) of the AACWA were not privately enforceable.[9] *Id.* at 123. The Fourth Circuit disagreed, reasoning that "[t]aken together ... these statutory provisions spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied." *Id.* Thus, it originally appeared that § 671(a)(16) was privately enforceable.

9 Section 671(a)(9) requires States to "report to an appropriate agency or official, known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child."

Subsequent decisions soon began eroding *L.J. II*'s holding. In *Suter*, the Supreme Court considered whether certain portions of the AACWA were privately enforceable. *Suter*, 503 U.S. at 350–51. The Court spent the bulk of its analysis determining that § 671(a)(15) was not privately enforceable, but its conclusion on § 671(a)(9) was equally clear—§ 671(a)(9) "does not afford a cause of action." *Id.* at 259 n.10. Then, in *White*, the Fourth Circuit further undermined *L.J. II* when it held that "[§] 671(a)(10) does not create an enforceable right." *White*, 112 F.3d at 739. *Suter* and *White* thus eliminated two of the three sections *L.J. II* relied on when it concluded that §§ 671(a)(9), (10), and (16)—when "taken together"—create a privately enforceable right. *See L.J. II*, 838 F.2d at 123.

***15** The Fourth Circuit then revisited § 671(a)(16) in *L.J. v. Wilbon*, 633 F.3d 297 (4th Cir. 2011). This time, the Baltimore defendants tried to invalidate a consent decree they entered following the *L.J. II* decision. *Id.* at 301–02. The Baltimore defendants attacked the consent decree by arguing that *Suter* had overruled *L.J. II*, thereby eliminating any legal basis for the consent decree. *Id.* at 308. This argument relied on *dicta* from *Suter* that suggested the States need only "have a plan approved by the Secretary which contains the 16 listed features." *Suter*, 503 U.S. at 358. So long as the States had cleared that low bar, the AACWA as a whole was not privately enforceable. *See id.* There were only two problems. First, Congress rejected this *dicta* following *Suter.* 42 U.S.C. 1320a-2 (rejecting the notion that a statute is "unenforceable because of its inclusion in a section ... requiring a State plan or specifying the required contents of a State plan.").[10] Second, the Court applied the "law of the case doctrine," which requires prior decisions to govern the same issues at all stages of the case, unless they had been overruled or proven clearly wrong. *Wilbon*, 633 F.3d at 308. The Fourth Circuit thus rejected the Baltimore defendants' argument because they "failed to meet the[ir] burden of showing that ... *L.J. II* ha[d] been overruled by *Suter.*" *Id.* Notably, the Court did not reaffirm its prior holding in *L.J II.* The Court instead made "clear [that it did] not [then] hold that § 671(a)(16) provides a private right of action." *Id.* at 312.

10 Importantly, however, Congress did not "alter the holding in [*Suter*] that [§] 671(a)(15) ... is not enforceable in a private right of action." *Id.*

The parties here dispute whether the Court is bound by *L.J. II.* Defendants argue that *Suter* and *White* "clearly ... abrogated" *L.J. II* such that it does not bind the Court. (ECF No. 18 at 29.) Plaintiffs, on the other hand, contend that *Wilbon*'s refusal to hold that "*L.J. II* has been overruled by *Suter*" compels the Court to apply *L.J. II.* (ECF No. 29 at 28.) Plaintiffs also claim that Defendants are making "an identical argument" to the one *Wilbon* rejected. (*Id.* at 30.) Not so.

Defendants' position here is easily distinguishable from the Baltimore defendants in *Wilbon*. As noted above, the Baltimore defendants argued that *Suter* overruled *L.J. II* when it said that a plan need only satisfy § 671(a)'s 16 requirements. The Fourth Circuit, following Congress' lead, rejected this argument. Here, Defendants are making a fundamentally different one: that *L.J. II* does not bind the Court since *Suter* and *White* eliminated two of three provisions *L.J. II* found, "taken together," create a privately enforceable right. And that, coupled with the Fourth Circuit making "clear [that the Court] do[es] not now hold that § 671(a)(16) provides a private right of action," *Wilbon*, 633 F.3d at 312, proves that *L.J. II* did not survive those later cases. The Court agrees. Just as a milking stool cannot stand having lost two of its three legs, *L.J. II*'s conclusion that § 671(a)(16) creates a privately enforceable right cannot stand in light of *Suter* and *White*. [11] The Court must therefore start from scratch, determining for itself whether § 671(a)(16) is privately enforceable.

11 This conclusion is only bolstered by *Wilbon*'s recognition that, rather than finding a right by cobbling different sections together, courts must instead perform "a section-specific inquiry" to determine whether that particular section is privately enforceable. *Wilbon*, 633 F.3d at 309.

c. § 671(a)(16) is not privately enforceable

"[U]nless Congress speak[s] with a clear voice, and manifests an unambiguous intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement by § 1983." *Hensley v. Koller*, 722 F.3d 177, 181 (4th Cir. 2013) (alteration in original) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002)). In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Supreme Court articulated a three-factor test to determine whether Congress unambiguously intended "a particular statutory provision [to create] a federal right" privately enforceable under [ ] § 1983. *Id.* at 340. The *Blessing* test caused confusion in the lower courts and, for a moment, established "a relatively loose standard for finding rights enforceable by § 1983." *Gonzaga*, 536 U.S. at 282. The Supreme Court promptly rejected this laxed standard in *Gonzaga* when it held that nothing "short of an unambiguously conferred right" can support a § 1983 claim. *Id.* at 283. *Gonzaga* instructs courts to analyze the "text and structure of [the] statute" to discern whether "Congress intend[ed] to create new individual rights." *Gonzaga*, 536 U.S. at 286. When doing so, courts should consider whether the statute uses "rights-creating language," has an aggregate, rather than individual, focus, and whether Congress provided a federal review mechanism. *See id.* at 287–88, 289–90.

***16** Plaintiffs here contend that § 671(a)(16)'s focus on "each child" unambiguously creates a privately enforceable, one the Court should not render "illusory." (ECF No. 29 at 29–30.) Defendants, on the other hand, argue that § 671(a)(16) speaks in terms of institutional practices and lacks rights-creating language, which precludes a finding of private enforceability. (ECF No. 18 at 24–25.)

None of the three considerations *Gonzaga* used to determine whether Congress unambiguously conferred a right weigh in Plaintiffs' favor. First, § 671(a)(16) does not feature the rights-creating language Congress typically uses when creating privately enforceable rights. The Supreme Court has explained that rights-creating language focuses on "the individuals protected" instead of "the person regulated." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). Put differently, rights-creating language is "individually focused." *Gonzaga*, 536 U.S. at 287. Here, § 671(a)(16) clearly focuses on Defendants, who it regulates, rather than Plaintiffs, who stand to benefit. Section 671(a)(16) does nothing more than tell Defendants what their plan must include before the Secretary can approve it. If Defendants' plan "provides for the development of a case plan" and "a case review system" for "each child" in West Virginia's foster care system, Defendants will receive federal funding. If not, they will not.

Section 671(a)(16) stands in stark contrast to statutes that *do use* rights-creating language. Take Title VI for instance. It provides that "[n]o person ... shall, on the ground of race, color, or national origin ... be subjected to discrimination." 42 U.S.C. § 2000d. Title IX uses near-identical language: "No person ... shall, on the basis of sex ... be subjected to discrimination." 20 U.S.C. § 1681(a). Congress could have easily written § 671(a)(16) in a similar fashion, using an individual focus. Congress could have said, for example, that "each child shall have a case plan and a case review system." Such "individually focused terminology," "phrased in terms of the person[ ] benefitted," would have shown congressional intent to create an individual right. *Gonzaga*, 536 U.S. at 284, 287. But Congress chose not to focus on the individual. And since Congress "knows how to ... expressly" "create a private cause of action" when it wants, *Carey v. Throwe*, 957 F.3d 468, 479 (4th Cir. 2020), § 671(a)(16)'s focus on the person regulated is telling.

Plaintiffs resist this conclusion, arguing that § 671(a)(16)'s requirement of a case plan and case review system for "each child" shows an unmistakable focus on the individual. (ECF No. 29 at 29.) Plaintiffs essentially ask the Court to read the phrase "each child" out of context, which the Court cannot do. When interpreting statutes, the Court cannot "construe statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828 (1984). The Court must instead read the statutory provision as a whole. *Id.* When the Court reads § 671(a)(16) as whole, as it did above, there is but one conclusion: the statute focuses on the person regulated, not the individual benefited. Plaintiffs' reading may very well hold water when done "in a vacuum," *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016), but it becomes simply "untenable in light of [§ 671(a)(16)] as a whole." *King v. Burwell*, 576 U.S. 473, 497 (2015) (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994)).

***17** Second, § 671(a)(16) focuses on the aggregate, not the individual. Statutes with an "aggregate," rather than individual, focus "cannot 'give rise to individual rights.' " *Gonzaga*, 536 U.S. at 288 (quoting *Blessing*, 520 U.S. at 344). The tell-tale sign of a statute with an aggregate focus is one that is "not concerned with 'whether the needs of *any particular person* have been satisfied.' " *Id.* at 288 (emphasis added) (quoting *Blessing*, 520 U.S. at 343). The Supreme Court has twice dealt with statutes that, like § 671(a)(16), did not require perfect performance by the States. Neither conferred an individual right. In *Blessing*, the statute at issue required "substantial compliance." *Blessing*, 520 U.S. at 335. The *Blessing* Court said that "[f]ar from creating an *individual* entitlement to services, the [substantial compliance] standard is simply a yardstick ... to measure the *systemwide* performance." *Id.* (emphasis in original). Likewise in *Gonzaga*, the Court found that a similar "substantial compliance" requirement was concerned with "polic[ies] and practice[s], not individual[s]." *Gonzaga*, 536 U.S. at 288. Section 671(a)(16) is no different. While § 671(a)(16) imposes a clear obligation on Defendants, they need not comply with it in every individual case—they need only substantially conform to § 671(a)(16) to receive funding. 42 U.S.C. § 1320a-2a. Put differently, so long as Defendants' system—as an aggregate—substantially complies with § 671(a)(16), the Secretary has no cause for concern. The Court is therefore satisfied that § 671(a)(16) has an aggregate, rather than individual, focus.

Third, § 671(a)(16) provides a federal review mechanism to enforce its requirements, which further cuts against private enforceability. Congress required the Secretary to promulgate regulations to review AACWA programs implemented by the States. 42 U.S.C. § 1320a-2a. The Secretary has done so. 45 C.F.R. §§ 1355.35(c)(4), 1355.36(b). This review mechanism, as previously explained, exists to ensure substantial compliance. Should a State fail to substantially comply, the Secretary withholds funding. This, too, is a night-and-day difference from the few Spending Clause statutes the Supreme Court has concluded confer individual rights. *See Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). In each case, the Court relied in large part on the fact that the statute lacked sufficient means of enforcement. *Wilder*, 496 U.S. at 522–23; *Wright*, 479 U.S. at 426; *see also Gonzaga*, 536 U.S. at 289–90 (noting that Congress' decision to provide a federal review mechanism "counsel[s] against ... finding a congressional intent to create individually enforceable private rights."). But here, Congress enabled the Secretary to withhold federal funding, thereby ensuring that § 671(a)(16) is anything but "a dead letter." *Suter*, 503 U.S. at 360–01.

Since Congress has not "spok[en] with a clear voice" and "manifest[ed] an 'unambiguous' intent to confer [an] individual right[ ]," *Gonzaga*, 536 U.S. at 280, the Court finds that § 671(a)(16) is not privately enforceable. Defendants' Motion to Dismiss Count III is **GRANTED**.

D. Counts IV & V – Americans with Disabilities Act and Rehabilitation Act

Plaintiffs' Counts IV and V allege violations of the Americans with Disabilities Act and the Rehabilitation Act, respectively. The parties address the two claims as one, and the Court follows suit. *See e.g., Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012) (construing "the ADA and Rehabilitation Act to impose similar requirements.").

a. Governing Law

Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[12] 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act similarly provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination

under any program" that receives federal funds. [13] 29 U.S.C. § 794.

12 A "public entity" is defined as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State ... or local government." 42 U.S.C. § 12131(1)(A)–(B). Also, a "qualified individual with a disability" "means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). Defendants do not dispute that they are covered by the ADA and Rehabilitation Act, nor do they challenge whether Plaintiffs are qualified individuals under the statutes.

13 The Fourth Circuit has interpreted these to require a three-part showing by litigants bringing Title II and Rehabilitation Act claims. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). Plaintiffs must show that they (1) have a disability; (2) are otherwise qualified to receive the benefits of the government program; and (3) were excluded from the program because of their disability. *Id.* Defendants concede Plaintiffs meet the first two requirements, but argue Plaintiffs have not alleged discrimination on the basis of their disabilities. (*See* ECF No. 29 at 31.) As such, the Court cabins its inquiry to whether Plaintiffs have alleged disability-based discrimination. The Court also notes that Title II and § 504 have different causation standards, *Halpern*, 669 F.3d at 461–62, but believes that this is a non-issue here, as Plaintiffs' Complaint easily meets both standards.

***18** Title II and § 504 do more than share similar language—they also impose similar requirements. *Halpern*, 669 F.3d at 461. One such requirement is the "integration mandate." Public entities must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals." 28 C.F.R. § 35.130(d); *see also* 34 C.F.R. § 104.4(b)(2) (imposing a similar integration requirement). Federal regulations define the "most integrated setting appropriate to the needs of [the] individual[ ]" as one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. B. Public entities must also abide by the "reasonable modification" requirement. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7)(i). This latter command has a caveat. A modification is not required if "the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.*

The Supreme Court interpreted these requirements in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), where it held that the unnecessary institutionalization of individuals with mental disabilities is discrimination under Title II. In *Olmstead*, the plaintiffs, two mentally disabled women, were institutionalized for psychiatric treatment. *Id.* at 593. Their condition later improved, but they remained institutionalized, despite being approved for treatment in community-based settings. *Id.* The plaintiffs alleged that defendants' "failure to place [them] in a community-based program" violated the integration mandate, thus constituting discrimination under Title II. *Id.* at 594. The defendants fought this, arguing that the plaintiffs had not been discriminated against because "no similarly situated individuals [were] given preferential treatment" in placement decisions. *Id.* at 598.

The Court rejected the defendants' narrow reading of Title II because "Congress had a more comprehensive view ... of discrimination" when it enacted the ADA. *Id.* at 598. Title II is not, as the defendants believed, limited to only those instances of "uneven treatment [among] similarly situated individuals." *Id.* Title II instead encompasses the unjustified institutionalization of the mentally disabled. *See id.* The Court reasoned that unjustified institutionalization creates "[d]issimilar treatment" because the mentally disabled must "relinquish [their ability to] participat[e] in community life" "to receive needed medical services." *Id.* at 601. "[P]ersons without mental disabilities," on the other hand, "can receive the medical services they need without similar sacrifice." *Id.* Title II thus requires public entities to provide individuals with mental disabilities community-based treatment when appropriate. [14] *Id.* at 600.

14 When determining whether community-based care is appropriate for any particular individual, the Court held that "State[s] generally may

> rely on the reasonable assessments of [their] own professionals in determining whether an individual" should be placed in a community-based setting. *Id.* at 602. "Absent such [a finding], it would be inappropriate to remove a patient from the more restrictive setting." *Id.*

The integration mandate, however, is not an immediate, unyielding command. The Court recognized that "States [may] resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs." *Id.* at 603 (some alterations in original). This "fundamental-alteration" defense, the Court said, "allow[s] ... State[s] to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable" because of prior commitments to the many other mentally disabled individuals to whom the State must provide care. *Id.* at 604. This standard would be met, for instance, if a "State [could] demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace." *Id.* at 605–06. If so, "court[s] would have no warrant" to bump "persons at the top of the community-based treatment waiting list" in favor of "individuals lower down who commenced civil actions." *Id.* at 606.

b. Analysis

***19** Plaintiffs allege Defendants have discriminated against them in two ways. First, Defendants offer "intensive mental health services" "almost exclusively in institutional settings rather than in the community." (ECF No. 1 at 78–79, ¶ 323.) This, in and of itself, Plaintiffs say is discriminatory because it results in Plaintiffs' unnecessary institutionalization. (*See id.*) Second, Plaintiffs allege Defendants do not provide sufficient mental health services and disability supports—in other words, reasonable accommodations—necessary for Plaintiffs to receive the full benefits of the foster care system. (*Id.* at 77–79, ¶ 318–27.) Defendants launch a litany of attacks at these claims. First, Defendants say they never discriminated against Plaintiffs because "shortcomings in the State's community-based mental health care system" affect everyone equally. (ECF No. 18 at 31–32.) Second, Defendants argue they are not required to "provide a certain level of benefits" or services to Plaintiffs. (*Id.*) Third, Defendants claim that the integration mandate is inapplicable here because the best-interest-of-the-child standard trumps federal law when it comes to determining Plaintiffs' placements. (*Id.* at 33.) Fourth, Defendants claim there are no unjustified placements because "each and every placement has been approved by a state circuit court as in the best interest of the child." (*Id.* at 33–34.) Fifth, and finally, Defendants say that even if the integration mandate does apply, they have a " 'comprehensive, effectively working plan' to ensure children with disabilities are placed in the least restrictive settings." (*Id.* at 34–38.) Defendants' efforts fall flat.

Olmstead rejected Defendants' first argument. Discrimination under Title II is not limited to the "uneven treatment of similarly situated individuals." *Olmstead*, 527 U.S. at 598. Instead, Title II discrimination includes the "unjustified institutional[ization]" of persons with mental disabilities. *Id.* at 600. Defendants' argument is thus beside the point: it does not matter that *everyone* in their custody is needlessly institutionalized. Title II simply requires a showing that Plaintiffs have been "unjustifi[ably] institutional[ized]" when a less restrictive placement would have been appropriate. *Id.* at 598. The Complaint is riddled with these claims.

Defendants' second argument rests on a faulty reading of *Olmstead.* Specifically, they hone in on language from a footnote where the Court said that the ADA does not require states to "provide a certain level of benefits to individuals with disabilities." (ECF No. 18 at 32–33) (quoting *Olmstead*, 527 U.S. at 603 n.14.) The very next sentence in that footnote, however, says, "that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." *Olmstead*, 527 U.S. at 603 n.14. Defendants here offer a service—the foster care system—to Plaintiffs. And when offering this service, Defendants must make reasonable modifications so that Plaintiffs can fully participate in it. Requiring Defendants to provide Plaintiffs with mental health services and disability supports is entirely consistent with this mandate—these services are necessary for Plaintiffs to participate in the foster care system, and they are not entirely new, stand-alone programs. *Compare Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), *with Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999).

Defendants' third argument is even less persuasive. Defendants claim that Plaintiffs are putting Title II and § 504 "on a collision course with" child welfare jurisprudence by asking for placements in less restrictive settings. (ECF No. 35 at 19.) This argument relies on a cherry-picked reading of the integration mandate: that "plac[ing] all children with disabilities in the 'most integrated setting' regardless of the individual circumstances of the case" would be contrary to the child's best interest. (ECF No. 18 at 33.) Defendants conveniently ignore the integration mandate's qualifying

language—"the most integrated setting *appropriate to the needs of [the] qualified individual*[ ]." 28 C.F.R. § 35.130(d) (emphasis added). Nothing in this mandate conflicts with the best-interest-of-the-child standard; the two exist in perfect harmony. The integration mandate simply requires Defendants to make available "a range of facilities for the care and treatment of persons with diverse mental disabilities." *Olmstead*, 527 U.S. at 597. From this range of placement options, state court judges select the one they determine is in the child's best interest. *See* W. Va. Code § 49-4-608(e). The integration mandate does not, as Defendants believe, force anyone to place Plaintiffs in "an inappropriate setting." *Olmstead*, 527 U.S. at 605; *see also* 28 C.F.R. 35.130(e)(1) (allowing qualified individuals to decline benefits conferred by the ADA). It merely requires Defendants to make available placements that would truly be in the child's best interest.

***20** Defendants' fourth argument fares no better. Defendants claim that Plaintiffs have not been unjustifiably institutionalized because "each and every placement has been approved by a state circuit court as in the best interest of the child." (ECF No. 18 at 33–34.) This turns a blind eye to Plaintiffs' allegations. The Complaint details a foster care system in utter disarray, where institutionalization is the default. (ECF No. 1 at 85, ¶ 352.) This is not because institutionalization is the answer to Plaintiff's problems; Defendants have simply failed to create in-home and community-based treatment settings. Thus, when placing Plaintiffs, state courts had no choice but to institutionalize them. To the extent Defendants think these placements were in any way "justified" under *Olmstead*, they are wrong.

Defendants' fifth and final argument is nothing more than a last-ditch effort to convince the Court that they have the "comprehensive, effectively working plan" that *Olmstead* demands. (ECF No. 18 at 34–38.) Maybe so, but that is a factual determination, which the Court cannot make at the pleading stage. *Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 176 (4th Cir. 2009). The Court's current task is to determine whether the Complaint states a claim for relief. Fed. R. Civ. P. 12(b)(6). The Complaint portrays a broken foster care system where children are "institutionalized and segregated from the outside world," leaving them to languish for years on end. (ECF No. 1 at 2, ¶ 2.) This is anything but a "comprehensive" and "effectively working" plan. *Olmstead*, 527 U.S. at 605. Defendants' Motion to Dismiss Counts IV and V is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss, (ECF No. 17), is **GRANTED** in part and **DENIED** in part.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

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42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Fourteenth Amendment to the United States Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.