UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SAM and TONY M., by Next Friend Gregory c. Elliot; CEASER S., by Next Friend Kathleen J. Collins; DAVID T., by Next Friend Mary Melvin; BRIANA, ALEXIS, CLARE and DEANNE H., by Next Friend Gregory C. Elliott; and DANNY and MICHAEL B., by Next Friend Gregory C. Elliott; for themselves and those similarly situated	:	
v.	:	**C.A. 07-241ML**
DONALD L. CARCIERI, in his official capacity as Governor of the State of Rhode Island; JANE HAYWARD, in her official capacity as Secretary of the Executive Office of Health & Human Services; and PATRICIA MARTINEZ, in her official capacity as Director of the Department of Children, Youth and Families	:	

DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(1) AND (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

I. INTRODUCTION

On October 1, 2007, Defendants Donald L. Carcieri, in his official capacity as Governor of the State of Rhode Island, Jane Hayward, in her official capacity as then Secretary of the Executive Office of Health & Human Services, and Patricia Martinez, in her official capacity as Director of the Department of Children, Youth And Families (hereinafter "State" Defendants) filed a Motion to Dismiss Plaintiffs' Amended Complaint pursuant Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and, in the alternative 12(b)(6) for failure to state a claim upon which relief

may be granted. The Defendants' sought dismissal of the Plaintiffs' Amended Complaint on the grounds that: (1) the District Court lacked of subject matter jurisdiction under the application of Younger Abstention Doctrine and/or Rooker-Feldman Abstention Doctrine; (2) the named plaintiffs' "next friends" were inappropriate and lack standing; (3) the claims of Brianna, Alexis and Clare H. were moot as the three children had been adopted; and (4) the plaintiffs did not have a private right of action under the Adoption Assistance and Child Welfare Act of 1980, as amended ("AACWA"). The claims of Brianna, Alexis and Clare H. were dismissed for mootness.

On April 29, 2009 Senior District Judge Lageuex dismissed Plaintiffs' Amended Complaint having found that the proposed Next Friends (Mary Melvin, Kathleen Collins and Gregory Elliott) did not have the "power, authority or standing to represent the minor Plaintiffs" under Fed. R.Civ. P. 17(c). Sam M. by Elliott v. Carcieri, 610 F.Supp.2d 171 (D.R.I. 2009). The Plaintiffs' appealed the dismissal on Rule 17(c) grounds to the First Circuit Court of Appeals. On June 18, 2010 the First Circuit reversed the District Judge's dismissal of the lawsuit and remanded the case with instructions to allow the Next Friends to represent the named Plaintiffs in this suit. Sam M. ex rel. Elliott v. Carcieri, 608 F.3d 77 (1st Cir. 2010). On August 4, 2010 Senior District Court Judge Lagueux recused himself.

The Defendants' file this Motion to Dismiss in accordance with this Court's September 30, 2010 instruction. The Defendants submit that Plaintiffs' Amended Complaint should be dismissed on the grounds that: (1) the District Court lacks subject matter jurisdiction under the application of Younger Abstention Doctrine and/or Rooker-Feldman Abstention Doctrine; (2) the claims of Deanna H., Caesar S., Michael B. and

Sam and Tony M. are moot as the five children have been adopted; and (3) the plaintiffs do not have a private right of action under the AACWA.

II. PLAINTIFFS' AMENDED COMPLAINT

The instant Amended Complaint [Document 12], and similar versions thereof, have been filed in various states throughout the country by Children's Rights organization and local counsel. The allegations in the amended complaint against Rhode Island are strikingly similar to those asserted against Nebraska, which were dismissed by the United States District Court for the District of Nebraska in Carson P. ex rel. Foreman v. Heineman, 240 F.R.D. 456 (D.Neb. 2007).

At the time of its filing, the Amended Complaint against Rhode Island, the ten (10) named plaintiffs[1] are minors who have purportedly filed this suit entitled "Class Action" through their "next friends" Gregory C. Elliot, Kathleen J. Collins and Mary Melvin. Amended Complaint at ¶¶ 34, 55, 69, 82 and 96. They seek declaratory and injunctive relief under 42 U.S.C. §. The Amended Complaint alleges that the named plaintiffs Sam M., Tony M., David T., Briana H., Alexis H., Clare H., Deanna H., Danny and Michael B. are children in the legal custody of DCYF due to a report or suspicion of abuse or neglect. Amended Complaint ¶¶11-12.

The named plaintiffs seek "declaratory and injunctive relief to compel Defendants … to meet the legal obligations to care for and protect Rhode Island's abused and neglected children in state custody by reforming the State's dysfunctional child welfare system." Amended Complaint ¶7. They request this Court to certify this case as a class action described as "all children who are or will be in the legal custody of the Rhode

[1] Subsequent to the filing Brianna, Alexis and Clare were dismissed.

Island Department of Children, Youth and Families due to a report or suspicion of abuse or neglect." Amended Complaint ¶ 11. In short, this case asks that the Federal Court take control of significant aspects of Rhode Island's child protective system and that it second guess past, current and future decisions of the Rhode Island Family Court. It is noteworthy that the Child Advocate to this day has never appeared before the Family Court in any of the ten individual cases and argued that any named plaintiff child was languishing in inappropriate placements, lacked necessary services or was at risk of physical, mental or emotional harm.

Plaintiffs' allege that the State (1) violated their substantive due process rights (Amended Complaint ¶¶ 219-223 (Count I) and ¶¶ 224-227 (Count II)); (2) violated their rights guaranteed under the First, Ninth and Fourteenth Amendments to the United States Constitution (Amended Complaint ¶¶228-229 (Count III)); violated the Adoption Assistance and Child Welfare Act of 1980 (Amended Complaint ¶¶ 230-231 (Count IV)); deprived them of procedural due process (Amended Complaint ¶¶ 232-235 (Count V)); and breached Rhode Island's State Plan with the federal government regarding the provision of child welfare, foster care and adoption services (Amended Complaint ¶¶ 236-238 (Count VI)).

Plaintiffs allege that Rhode Island's actions or inactions violate their substantive due process rights by:

- failing to protect "children in the legal custody of DCYF for foster care services due to reported or substantiated allegations of abuse or neglect" from physical, mental and emotional harm;
- allowing their condition to deteriorate or be harmed physically or psychologically by failing to provide safe and secure foster care placements, appropriate monitoring and supervision, appropriate planning and services directed toward ensuring a permanent placement and

adequate medical, dental, psychiatric, psychological and educational services;
- requiring them to remain in state custody longer than necessary;
- failing to provide treatment and services in accordance with accepted, reasonable professional judgment;
- failing to place them in the least restrictive placement; and
- reuniting children with their parents or placing them in placements which pose an imminent risk of harm.

Amended Complaint ¶¶223, 225, 226.

Plaintiffs also allege that the State violated certain provisions of the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. §§620-29(i), 670-679b (collectively the "Adoption Assistance Act") and regulations promulgated there under, 45 C.F.R. 1355-57. Amended Complaint ¶¶ 230-231. They claim the defendants violated these statutes and regulations by failing:

- to formulate and implement a timely case plans containing mandated elements;
- to place the child in foster homes or other settings that conform to reasonable professional standards;
- to timely file petitions to terminate parental rights, or having a documented and compelling reason for failing to do so in accordance with statutory standards.
- to provide planning and services for permanent placement of children whose permanency goal is adoption;
- to facilitate the child's return to the family home or the permanent placement of the child in an alternative permanent home;
- to provide services to protect the child's safety and health;
- to have health and education records reviewed, updated and supplied to foster parents or other foster care providers with whom the child is placed at the time of placement;
- to pay maintenance payments to foster parents in an amount that covers the actual cost of food, clothing, shelter, daily supervision, school supplies, reasonable travel to visitation with family and other expenses.

Plaintiffs allege that the State deprived them of their rights to familial association in violation of the First, Ninth, and Fourteenth Amendments to the United States

Constitution. Amended Complaint ¶ 229. Plaintiffs also claim that the State deprived them of constitutionally protected property and liberty interests in federal and state entitlements arising from the Adoption Assistance Act and R.I. Gen. Laws §42-72-4(b)(14), §42-72-10(b), §47-72-5(b)(7), §42-72-10(a) and §42-72-11, §42-72-10(c), §42-72-5(24) and §42-72-5.2, §42-72-13(a), §42-72-5(b)(22) and §42-72-15(o) and §42-72.8-1 et seq. without affording them the procedural due process requires under the Constitution. Amended Complaint ¶ 233-235. Lastly, Plaintiffs claim that they are intended third party beneficiaries of Title IV-B and IV-E of the Social Security Act and the State Plan entered into between the State and the United States Government and that they have been deprived of the services and benefits under this "contract". Amended Complaint ¶¶237-238.

Defendants deny each and every allegation and submit that the Family Court was informed of and entered orders with respect to placement, visitation and services for each of the ten Plaintiff children. Defendants ask this Honorable to abstain under the Younger and/or Rooker-Feldman doctrines and permit the Rhode Island Family Court to continue to address the needs of David T. and Danny B., the only two remaining Plaintiff children who are the legal custody of DCYF due to an allegation of abuse or neglect.

III. THE PLAINTIFF CHILDREN

This Amended Complaint [Document 12] was filed in the name of ten (10) children who are or were in the custody of the Rhode Island Department of Children, Youth and Families due to allegations of abuse or neglect.2 The children, some siblings, came into the DCYF's care based on their own specific and individual life experiences.

[2] It is asserted in the Amended Complaint that pseudonyms have been used for all minor named plaintiffs.

Only two of these children currently have an open case stemming from abuse or neglect allegations with the Rhode Island Family Court and specific hearing dates. Eight (8) of the children have been adopted, with the Family Court approval, since the filing of the original complaint and, as such, their cases at the Family Court alleging abuse or neglect are closed. Each of the remaining two (2) children have a Court Appointed Special Advocate Attorney (CASA) or a Court Appointed Guardian ad Litem representing their interests in the proceedings pending before the Family Court. (See R.I. Gen. Laws §40-11-14 - A child's right to legal representation in child abuse and neglect proceeding, which are brought before the Family Court). "Section 40-11-14 clearly provides for the appointment of a CASA guardian ad litem to represent the child's interests in court proceedings and once that appointment is made, the representation continues until the adoption petition is granted. Section 15-7-6 concerns the issue of consent to the adoption petition." In re Christina D., 525 A.2d 1306, 1307-1308 (RI 1987).

The Defendants' set forth in this memorandum of law an abbreviated summary of each child's history. A detailed history for each child is set forth in Appendix A for the Court's consideration and incorporated by reference in this memorandum as if fully set forth herein. For Purposes of this Motion to Dismiss, the Defendants will limit the history to the Rhode Island Family Court's hearings and rulings affecting the children's lives. The Defendants ask this Court to take judicial notice of the Family Court orders and decrees pertaining to the ten (1) plaintiff children and have been submitted, under seal, as exhibits.

A. Deanna H.

On April 10, 2008 Rhode Island Family Court Judge Bedrosian granted the decree of adoption for Deanna H. The Court found that having "been satisfied as to the identity and relationship of the person; that the [person] is of sufficient ability to bring up said child and furnish suitable nurture and education, having reference to the degree and condition of the parent; that it is fit and proper that such adoption should take effect; that the proposed home and child are suited to each other." As such, Deanna H. is no longer in the legal care, custody or control of the Department of Children, Youth and Families.

B. Danny and Michael

i. Michael

On June 4, 2008 the Family Court heard and approved the petition for the adoption of Michael B. The Court found that having "been satisfied as to the identity and relationship of the person; that the [person] is of sufficient ability to bring up said child and furnish suitable nurture and education, having reference to the degree and condition of the parent; that it is fit and proper that such adoption should take effect; that the proposed home and child are suited to each other." The underlying petition that brought Michael into the jurisdiction of the Family Court was closed. Michael is no longer in the legal care, custody or control of DCYF.

ii. Danny

On March 10, 2010 the Family Court convened a permanency hearing for Danny. The DCYF again submitted a written report for the Court's review and consideration, which detailed Danny's progress and behavior in the group home. DCYF informed the Court that it had been working closely with Adoption RI for Danny. The Court was

advised that a person met with Adoption RI regarding Danny and DCYF explained to the individual that given Danny's experience in the last pre-adoptive home, it would proceed slowly and with certain conditions. The Court was also given a letter authored by three (3) members of Danny's treatment team. After consideration of the foregoing, Judge Bedrosian of the Family Court approved DCYF's case plan for Danny, found a permanency plan goal of adoption of guardianship was appropriate, and that DCYF had made reasonable efforts to finalize the goals.

On August 4, 2010 the Family Court convened a review for Danny. The DCYF informed the Court that Danny had visits with the person who had been identified through Adoption RI as a prospective family; however on July 30, 2010 the pre-adoptive individual withdrew from the adoption process. DCYF informed the Court that Danny continued to have visits with his maternal grandmother, maternal uncle, his brother Michael and Michael's adoptive family. The DCYF indicated its intention to continue to work with Adoption RI to identify an appropriate adoptive home for Danny. After consideration, Judge Lipsey (retired) sitting for the Family Court approved DCYF's case plan for Danny, found a permanency plan goal of adoption of guardianship was appropriate, and that DCYF had made reasonable efforts to finalize the goals. Judge Lipsey noted that the potential adoption did not work out and that DCYF will continue to work with Adoption RI.

C. Caesar

On June 22, 2009 the Family Court heard and approved the petition for the adoption of Caesar S. The Court found that having "been satisfied as to the identity and relationship of the person; that the [person] is of sufficient ability to bring up said child

and furnish suitable nurture and education, having reference to the degree and condition of the parent; that it is fit and proper that such adoption should take effect; that the proposed home and child are suited to each other." The underlying petition that brought Caesar into the jurisdiction of the Family Court was closed. Caesar is no longer in the legal care, custody or control of DCYF.

D. Sam and Tony M.

On February 25, 2010 the Family Court heard and approved the petitions for the adoption of Sam and Tony M. The Court found that having "been satisfied as to the identity and relationship of the person; that the [person] is of sufficient ability to bring up said child and furnish suitable nurture and education, having reference to the degree and condition of the parent; that it is fit and proper that such adoption should take effect; that the proposed home and child are suited to each other." The underlying abuse and neglect petition that brought Sam and Tony into the jurisdiction of the Family Court was closed.

Prior to the February 2010, DCYF and the pre-adoptive family agreed to the filing and granting of a dependency petition.3 The purpose of proceeding with a dependency petition, as opposed to a subsidized adoption, was to provide the boys and their adoptive family not only with funds for services but in fact access to the necessary services. After the adoption, Tony resided with his adoptive parents and received counseling in order to maintain him in the home. Sam resided in a group home that could address his sexualized behavior.

[3] Children who are brought into the jurisdiction of the Family Court under a dependency petition, adjudged dependent and placed in the legal custody of DCYF as dependent do not fall within Plaintiff's definition of the proposed class of children they have filed this suit on behalf of. See Plaintiff's Amended Complaint at Paragraph 11.

E. David T.

At his permanency hearing on November 24, 2009, DCYF advised the Family Court that David's staff time outs during classes had decreased; however he could be extremely argumentative and disruptive when denied something. Academically David had improved grades in all his classes. DCYF reported that David was participating in life skills training, including counting money, how to care for clothing and daily household tasks. David continued his weekly visits with his visiting resource and regular visits, including overnights, with his brother, maternal aunt and her family. DCYF recommended that: (1) it be permitted to move towards the goal of a planned living arrangement; (2) continued visitation with David's family and the visiting resources; and (3) that David not be placed in a foster care setting at the current time. After consideration of the information presented, the Family Court approved the DCYF's case plan, found the permanency goal of planned alternative living arrangement appropriate and that DCYF had made reasonable efforts towards the goal. The Court scheduled David's permanency hearing for November 22, 2010.

IV. THE RHODE ISLAND FAMILY COURT

It is the policy of the State of Rhode Island "to protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the mandatory reporting of known or suspected child abuse and neglect, investigation of those reports by a social agency, and provision of services, where needed, to the child and family." R.I. Gen. Laws §40-11-1.

The Rhode Island Family Court and the Department of Children, Youth and Families work to accomplish this goal.

The Family Court is charged with ensuring that "…families whose unity or well-being is threatened shall be assisted and protected, and restored, if possible, as secure units of law-abiding members; that each child coming within the jurisdiction of the family court shall receive the care, guidance and control which will conduce to his or her welfare and the best interests of the state; and that when a child is removed from the control of his or her parents, the family court shall secure for him or her care as nearly as possible equivalent to that which his or her parents should have given him or her." R.I. Gen. Laws § 8-10-2. The Rhode Island Family Court has exclusive original jurisdiction in proceedings for abused or neglected children. R.I. Gen. Laws § 14-1-5.

The individual children are brought before the Family Court by DCYF through the vehicle of child protective petitions in an effort to protect the immediate health and welfare of abused and neglected children and to adequately safeguard them under our state law. "The Family Court shall, upon the filing of an ex parte petition, hereunder, immediately take any action it deems necessary or appropriate for the protection of the child, or children, suspected of being abused or neglected, including the removal of the child, or children, from the custody of the parent or parents, or other person suspected of the abuse or neglect." R.I. Gen. Laws 40-11-7.1(a). While the child's case remains open in the Family Court, considers, in addition to other relevant factors:

> (1) The appropriateness of the department's plan for service to the child and parent;
>
> (2) What services have been offered to strengthen and reunite the family;
>
> (3) Where return home of the child is not likely, what efforts have been or

> should be made to evaluate or plan for other modes of care;
>
> (4) Any further efforts which have been or will be made to promote the best interests of the child; and
>
> (5) The child's health and safety shall be the paramount concern.

R.I. Gen. Laws §40-11-12.1(d). At the conclusion, the Family Court enters, in accordance with the best interest of the child. R.I. Gen. Laws §40-11-12.1(e). The Family Court plays an integral role in the lives of abused or neglected children in this state. incorporated it by reference in this memorandum as if fully set forth herein.

Not only does the Rhode Island Family Court have exclusive original jurisdiction over abused or neglected children, but it also has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed" under the state's Uniform Declaratory Judgment Act. R.I. Gen. Laws § 9-30-1. Under this provision, there is no doubt that the Family Court has direct, statutory authority to issue a declaratory ruling and under that authority can review legal issues and enforce the orders.

Defendants' set forth an abbreviated summary of the Family Court's role in the lives of abused or neglected children. A detailed recitation of the Family Court's role and authority is set forth in Appendix B for the Court's consideration and

Plaintiffs ask this Court to certify the following class of children:

> All children who are or will be in the legal custody of the Rhode Island Department of Children, Youth and Families due to a report or suspicion of abuse or neglect.

Amended Complaint ¶11. The very definition and reference to "legal custody" necessarily invokes the authority, review and approval of the Rhode Island Family Court. The plaintiffs' allegations regarding DCYF's inadequacies in areas of placement of children, termination of parental rights, visitation with family, individual plans, etc. are

not recommendations or decisions unfettered by judicial consideration and approval. On the contrary, each such decision as was done in these cases, is subject to Family Court consideration and orders, with the benefit of an independent review by (at a minimum) a CASA attorney or guardian ad litem who represent only the best interests of the child. Moreover, the Child Advocate by statute and case law is an "appropriate person" to raise concerns to the Family Court regarding children who are alleged to be abused or neglected. R.I. Gen. Laws §42-73-7(8). See also In re: R.J.P., 445 A.2d 286 (R.I.1982). It is beyond argument that the Child Advocate had and continues to have the responsibility to raise the potential or imminent harms and issues that are alleged in this amended Complaint for Sam and Tony M., Caesar S., David T., Briana, Alexis, Clare and Deanna H. and Danny and Michael B. with the Family Court. Yet to date, the Child Advocate has never done so on behalf of any named party to this action.

V. THE OFFICE OF CHILD ADVOCATE

R.I. Gen. Laws §42-73-1 creates the Rhode Island Office of the Child Advocate. The Child Advocate has access to information, "including the right to inspect, copy and/or subpoena records held by the clerk of the family court, law enforcement, agencies, and institutions, public or private, and other agencies, or persons with whom a particular child has been either voluntarily or otherwise placed for care, or has received treatment within or without the state. R.I. Gen. Laws § 42-73-9. The Child Advocate has access to DCYF records concerning: (1) the names of all children in protective services, treatment, or other programs under the jurisdiction of DCYF, and their location if in custody; (2) all written reports of child abuse and neglect; and (3) all current records required to be maintained under the provisions of § 42-72-1 et seq. R.I. Gen. Laws § 42-73-8.

The Child Advocate has the duty to review orders of the Family Court relating to juveniles and the power to request reviews as required by the best interests of the child. R.I. Gen. Laws § 42-73-7(8). She is also considered an appropriate person under Rhode Island General Laws §§ 14-1-10 and 14-1-11, to bring information to the Family Court to initiate a preliminary investigation or file a petition alleging a child is dependent, abuse and/or neglected. In re R. J. P., 445 A.2d 286 (1982). R.I. Gen. Laws § 8-10-2.

The Rhode Island Legislature provided that certain "appropriate persons" are designated as having the authority to bring information to the Rhode Island Family Court or to file petitions alleging a child to be dependent abused and/or neglected. R.I. Gen. Laws § 14-1-10. The statute specifically provides that:

> (e)xcept in case of emergency detention, whenever any appropriate person shall give to the court information in his or her possession that a child is within the provisions of this chapter, it shall be the duty of the court to make a preliminary investigation to determine whether the interests of the public or of the child require that further action be taken, and to report its findings together with a statement of the facts to the judge. The inquiry may include a preliminary investigation of the home and environmental situation of the child, his or her previous history, and the circumstances which were the subject of the information. To avoid duplication of effort and to take full advantage of all existing facilities, the report of any public agency, or of any private social agency licensed by the department of children, youth, and families, may be accepted by the court as sufficient evidence for the filing of a petition.

R.I. Gen. Laws § 14-1-10.

In In re R. J. P, the Rhode Island Supreme Court held that although the Child Advocate is not specifically listed by designation in the statutory definition of an "appropriate person", he/she is the head of an agency that meets the requirements set forth in Rhode Island General Laws section 14-1-3(1)(5). The Statute defines "appropriate persons" to include "(a)ny duly authorized representative of any public or

duly licensed private agency or institution established for purposes similar to…" the statutory purpose contained in Rhode Island General Laws section 8-10-2.

The Child Advocate is required by statute "(t)o take all possible action …to secure and ensure the legal, civil and special rights of children…" independently of DCYF. The Rhode Island Supreme Court found that the Child Advocate has the statutory authority and duty to act as an "appropriate person" and bring information and formal legal action on behalf of children before the Rhode Island Family Court. In re R.J.P., 445 A.2d at 287, 288; R.I. Gen. Laws § 42-73-7(6).

Despite her statutory mandates, duties and broad authority to report problems and issues concerning children, the Child Advocate has failed to intervene in the pending Family Court matters for any of the children listed in her Amended Complaint. The Child Advocate has an affirmative statutory duty to intervene in their pending Family Court actions and bring to the Court's attention those facts and circumstances which supported the allegations and conclusions contained in the Amended Complaint if she believed they merited judicial intervention. The Child Advocate has never informed the Family Court of her claim that there does not exist an appropriate permanency plans for the Plaintiffs. Further the Child Advocate has failed to apprise the Family Court of her alleged concerns regarding the safety of children placed in overcrowded and unlicensed and/or unsuitable foster homes.

On July 9, 2007, DCYF Executive Legal Counsel Kevin Aucoin contacted the Child Advocate specifically instructing her to exercise her statutory authority and intervene in pending Family Court matters concerning three of the then Plaintiffs, Briana, Alexis and Clare H., who she alleged in the Amended Complaint, were in "constant

jeopardy." See Exhibit F-1. Attorney Aucoin further requested that in the alternative Ms. Alston provide DCYF with a written report that DCYF would forward to the Family Court for consideration. In correspondence dated July 9, 2007, Ms. Alston responded to Attorney Aucoin's requests and declined to act upon her statutory duties and mandates by intervening in pending Family Court matters. Ms. Alston declined to report to the Family Court serious allegations about the health and safety of children in state custody and specifically stated that:

> …the Child Advocate recognizes the Family Court's authority to make decisions in individual cases and we will not interfere with the Court's decision-making process. Based upon the information that the Department of Children, Youth and Families has access to review, the Office of the Child Advocate would assert that it is your executive duty to make appropriate decisions regarding the children's permanency and safety as well as to fully inform the court and the children's CASA attorney of the housing situation as it currently exists at the proposed placement; and any danger that may be presented by individuals living in the home of the maternal aunt as noted in the records maintained by the Department.

See Exhibit F-2.

The Child Advocate is one of the attorneys who filed this lawsuit on behalf of the ten (10) named plaintiff children. Despite making claims that each of these children have suffered abuse and reside in "constant jeopardy" or are languishing while in the care of DCYF, there is no indication or representation that Child Advocate Alston ever questioned any decision by DCYF or the Family Court related to these children or that she appeared at any of the Family Court hearings and made any concerns known to the Family Court justice presiding over any of these cases. Moreover, when asked to do so by DCYF legal counsel, she declined. It appears that Child Advocate Alston has abdicated her statutory authority to intervene in pending Family Court proceedings in these cases and is deferring to DCYF with the review and authority of the Family Court

to make decisions regarding the placement and permanency needs of these children.

VI. STATE CASE LAW

The Rhode Island Supreme Court has repeatedly recognized the Family Court's authority to issue orders in the best interest of the child.

In In re: Carlos F., 849 A.2d 364 (RI 2004) the Family Court ordered that the children should remain in their current placements rather than be placed with the maternal grandmother. DCYF became involved with children Carlos and Neisha when they were with their mother Luzcelina Feliciano ("Feliciano") was arrested and charged with possession of heroin with intent to deliver. 849 A.2d at 365. After entering a nolo contendere plea to the charge, Feliciano was sentenced to six (6) months to serve at the Adult Correctional Institution ("ACI"). Id. Carlos and Neisha were placed in the custody of DCYF. Sometime later, Feliciano informed the DCYF caseworker that she had three (3) other children who were being cared for by a friend. Id. Feliciano reclaimed these children upon her release from the ACI. Id. The Family Court ultimately removed the three (3) children from Feliciano's custody after she refused to cooperate with substance abuse treatment. Id.

Feliciano identified her mother, Mildred Vargas, as a possible caretaker of the five (5) children. Id. Before seriously entertaining the idea of placing the children with the maternal Grandmother – Vargas, a home study relative to the suitability of Vargas and the conditions of her home were necessary through the Interstate Compact on Placement of Children ("ICPC"). Id. Although the DCYF caseworker made the request of the social service agency in Puerto Rico and subsequently followed up on the status of the home study, the Puerto Rican authorities never forwarded DCYF a completed report.

Id.

The Family Court ultimately terminated Feliciano's parental rights as she failed to complete a single substance abuse treatment program and repeatedly missed scheduled visits with her children. Id. The Family Court rejected Feliciano's argument that R.I. Gen. Laws §14-1-2 and the "codified public policy of this state *** to conserve and strengthen the child's family ties wherever possible" supported the placement of the children with their Grandmother Vargas. Id. at 366. The trial court found that the evidence Feliciano presented in support of placement with Vargas was insufficient to sustain her burden of proof. Id. The Rhode Island Supreme Court ruled that [t]he trial justice acted within his discretion in determining that the best interest of the children would be served by enabling them to remain in their respective placements in the stable and familiar pre-adoptive homes in which they were residing." Id. at 366-367.

In In re: Christina V., 749 A.2d 1105, 1107 (RI 2000), the Family Court in granting the petition to terminate parental rights expressly found that DCYF had made reasonable efforts to reunite Christina with her parents. The Rhode Island Supreme Court repeatedly acknowledges in this decision the Family Court's authority to enter orders regarding placement, counseling of parents, etc. that are in the best interest of the child.

In Engelhardt v. Bergeron, 113 R.I. 50, 317 A.2d 877 (1974), the Rhode Island Supreme Court affirmed the Family Court's award of custody to the children's aunt and uncle. The children came to live with their aunt and Uncle, Eveline and Paul Engelhardt, after their mother was murdered. 113 R.I. at 52, 317 A.2d at 879. The children's father was charged with this crime but released on bail pending a trial. Id. Bergeron, the children's father, objected to the Engelhardts' petition for custody of the children

claiming that as their natural father he was entitled to full custody of the children. Id. After a hearing, the Family Court awarded custody of the children to the aunt and uncle. Bergeron claimed that the Family Court exceeded its authority in awarding custody of his children to the Engelhardts. Id.

The Rhode Island Supreme Court rejected Bergeron's arguments. 113 R.I. at 53, 317 A.2d at 880. The RI Supreme Court stated that the Family Court had authority to award custody of children determined to be abused or neglected under R.I. Gen. Laws, §14-1-32 to some appropriate agency. 113 R.I. at 54-55, 317 A.2d at 880-881. The RI Supreme Court reasoned that "[I]n such cases, the Family Court stands in loco parentis, charged by the Legislature with the responsibility of placing children who come within its protection in the custody of a person or agency qualified to provide them with the care and consideration they should have received from their parents." I113 R.I. at 55, 317 A.2d at 881.

In Carr v. Prader, 725 A.2d 291 (R.I. 1999) the Rhode Island Supreme Court ruled that the Family Court and not a probate court was the appropriate judicial body to decide a petition of guardianship that is opposed by a parent. The Carr Court explained that:

> The Family Court is likewise " a statutory tribunal possessing only such jurisdiction as was explicitly conferred upon it by the Legislature," Fox v. Fox, 115 R.I. 593, 596, 350 A.2d 602, 603 (1976), but is vested with the power to terminate parental rights, G .L.1956 § 15-7-7, and award custody of an abused, delinquent, wayward, neglected, or dependant child to any suitable person or agency. G.L.1956 § 14-1-32 and G.L.1956 §40-11-12. However, the Family Court may only terminate parental rights or custody in limited statutorily-dictated circumstances. See§ 15-7-7 (parental rights may be terminated only upon a showing of, inter alia, willful neglect, abandonment, desertion, or parental unfitness demonstrated by " cruel or abusive nature" or " chronic substance abuse"); see also§ 14-1-32 (court may place delinquent, wayward, neglected, or dependant child in custody

> of appropriate person or agency); § 40-11-12 (child may be placed in custody of the Department of Children, Youth, and Families upon a showing of abuse or neglect).
>
> The laws of Rhode Island express a preference for keeping children with their parents. " The public policy of this state is *** to strengthen the family." Section 40-11-1. The Family Court Act seeks to secure for children " such care, guidance, and control, preferably in his or her own home" and " [t]o conserve and strengthen the child's family ties wherever possible, removing him [the child] from the custody of his [or her] parents only when his or her welfare *** cannot be adequately safeguarded." Section 14-1-2.
>
> If the Family Court makes a finding of neglect or abuse, the court can either place the child back in his or her home under Department of Children, Youth, and Families (DCYF) supervision or grant custody to DCYF " until such time as it finds that the child may be returned to the parents *** under circumstances consistent with the child's safety." Section 40-11-12(b). The statute allows the court to require the parent to undergo " counseling, including psychiatric evaluation and/or treatment as a prerequisite to the return of the child to his or her custody." Id. Within twelve months after the child has been placed in DCYF's care, the court will review, inter alia," [t]he appropriateness of the department's plan for service to the child and parent" along with " [w]hat services have been offered to strengthen and reunite the family," and only " [w]here return home *** is not likely" are alternative modes of care considered. Section 40-11-12.1. Unless the court finds egregious behavior on the parent's part, " reasonable efforts shall be made to preserve and unify families." Section 40-11-12.2(c).[FN1] The Family Court may not grant a petition for guardianship unless: (1) the parents previously having custody have consented in writing, § 40-11-12(b), or (2) had their parental rights terminated, § 15-7-7. Furthermore, minimum due process requires clear and convincing evidence of unfitness before parental rights may be terminated. Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599, 617 (1982). See also§15-7-7; In re Jonathan, 415 A.2d 1036, 1039 (R.I.1980).

Id. at 293-294.

Rhode Island case law is replete with instances demonstrating that the Family Court and not DCYF or any other named Defendant in this case has the ultimate authority

to make decisions and enter orders addressing the custody, placement, treatment, etc, of children found to have been abused or neglected.

i. Termination of Parental Rights

In re: Carlos F., 849 A.2d 364 (RI 2004)(The Family Court terminated Plaintiff biological mother's parental rights and rejected her request to place the children with the maternal grandmother. The RI Supreme Court ruled that [t]he trial justice acted within his discretion in determining that the best interest of the children would be served by enabling them to remain in their respective placements in the stable and familiar pre-adoptive homes in which they were residing." Id. at 366-367.); In re: Christina V., 749 A.2d 1105, 1107 (RI 2000)(Family Court in granting the petition to terminate parental rights expressly found that DCYF had made reasonable efforts to reunite Christina with her parents. The RI Supreme Court repeatedly acknowledges in this decision the Family Court's authority to enter orders regarding placement, counseling of parents, etc. that are in the best interest of the child.)

ii. Custody

In Engelhardt v. Bergeron, 113 R.I. 50, 317 A.2d 877 (1974), the Rhode Island Supreme Court affirmed the Family Court's award of custody to the children's aunt and uncle. The children came to live with their aunt and Uncle, Eveline and Paul Engelhardt, after their mother was murdered. 113 R.I. at 52, 317 A.2d at 879. The children's father was charged with this crime but released on bail pending a trial. Id. Bergeron, the children's father, objected to the Engelhardts' petition for custody of the children claiming that as their natural father he was entitled to full custody of the children. Id. After a hearing, the Family Court awarded custody of the children to the aunt and uncle.

Bergeron claimed that the Family Court exceeded its authority in awarding custody of his children to the Engelhardts. Id.

The Rhode Island Supreme Court rejected Bergeron's and stated that the Family Court had authority to award custody of children determined to be abused or neglected under R.I. Gen. Laws, §14-1-32 to some appropriate agency. 113 R.I. at 54-55, 317 A.2d at 880-881. The RI Supreme Court reasoned that "[I]n such cases, the Family Court stands in loco parentis, charged by the Legislature with the responsibility of placing children who come within its protection in the custody of a person or agency qualified to provide them with the care and consideration they should have received from their parents." 113 R.I. at 55, 317 A.2d at 881.

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> If the Family Court makes a finding of neglect or abuse, the court can either place the child back in his or her home under Department of Children, Youth, and Families (DCYF) supervision or grant custody to DCYF " until such time as it finds that the child may be returned to the parents *** under circumstances consistent with the child's safety." Section 40-11-12(b). The statute allows the court to require the parent to undergo " counseling, including psychiatric evaluation and/or treatment as a prerequisite to the return of the child to his or her custody." Id. Within twelve months after the child has been placed in DCYF's care, the court will review, inter alia," [t]he appropriateness of the department's plan for service to the child and parent" along with " [w]hat services have been offered to strengthen and reunite the family," and only " [w]here return home *** is not likely" are alternative modes of care considered. Section 40-11-12.1. Unless the court finds egregious behavior on the parent's part, " reasonable efforts shall be made to preserve and unify families." Section 40-11-12.2(c).FN1 The Family Court may not grant a petition for guardianship unless: (1) the parents previously having custody have consented in writing, § 40-11-12(b), or (2) had their parental rights terminated, § 15-7-7. Furthermore, minimum due process requires clear and convincing evidence of unfitness before parental rights may be terminated. Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599, 617 (1982). See also §15-7-7; In re Jonathan, 415 A.2d 1036, 1039 (R.I.1980).

Id. at 293-294.

Rhode Island case law is replete with instances demonstrating that the Family Court and not DCYF or any other named Defendant in this case has the ultimate authority to make decisions and enter orders addressing the custody, placement, treatment, etc, of children found to have been abused or neglected

VII. LEGAL STANDARD

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), a Court must construe the complaint liberally, treat all well-pleaded facts as true, and indulge all reasonable inferences in favor of the Plaintiff. See Aversa v. United States, 99 F.3d 520, 522 (1St Cir. 1996). "A plaintiff, however, may not rest merely on 'unsupported conclusions or interpretations of law.' Washington Legal Found. V. Massachusetts Bar Found., 993 F.2d 962, 971 (1st Cir.1993).'[S]ubjective characterizations or conclusory descriptions of a general scenario which *could* be dominated by unpleaded facts' will not defeat a motion to dismiss. Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992)(internal quotations omitted)." Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995). "'…[I]n ruling on a Rule 12(b)(1) motion, a court is not limited to the face of the pleadings, A court may consider any evidence it deems necessary to settle the jurisdictional question.'" Morey v. State of Rhode Island, 359 F.Supp.2d 71, 74-75 (D.R.I. 2005) (citing Palazzolo v. Ruggiano, 993 F. Supp. 45, 46 (D.R.I.1998). In fact, '[t]he Court can look beyond pleadings – to affidavits and depositions – in order to determine jurisdiction." White v. Comm'r of Internal Revenue, 899 F.Supp. 767, 771 (D.Mass.1995). In considering this motion to dismiss under Rules 12(b)(1) and 12(b)(6), the Court may take judicial notice of the prior Family Court orders and decrees. Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir.1990) (" It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.") Additionally, "courts have made a narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff's claim; or for

documents sufficiently referred to in the complaint." Watterson v. Page, 987 F.2d 1, 3 (1st Cir.1993). It is the Plaintiff's burden to prove the existence of subject matter jurisdiction. Murphy v. United States, 45 F.3d at 522.

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court construes the allegations in the light most favorable to the plaintiff. Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-56 (1957). The Court must accept all well-pled factual averments as true, and draw all reasonable inferences there from in Plaintiff's favor. Gooley, 851 F.2d at 514. However,

> The court, however, is not required to credit " bald assertions, unsupportable conclusions, and opprobrious epithets." Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 16 (1st Cir. 1989)(internal quotation marks omitted) (quoting Chongris v. Bd. Of Appeals, 811 F.2d 36, 37 (1st Cir. 1987). Rule 12(b)(6) is forgiving, but it " is not entirely a toothless tiger." Campagna v. Massachusetts Dep't of Envtl. Prot., 334 F.3d 150, 155 (1st Cir. 2003) (quoting Dartmouth Review). A plaintiff must allege facts in support of " each material element necessary to sustain recovery under some actionable legal theory." Dartmouth Review v. Dartmouth Coll., 889 F.2d at 16 (quoting Gooley v. Mobile Oil Corp., 851 F.2d 513, 515 (1st Cir. 1998)).

Morey v. State of Rhode Island, 359 F.Supp.2d at 75.

VII. ARGUMENT

A. THE COURT LACKS JURISDICTION OVER FIVE PLAINTIFF CHILDREN AS THEY ARE NO LONGER IN THE LEGAL CUSTODY OF THE DCYF UNDER ALLEGATIONS OF ABUSE AND/OR NEGLECT.

The Court should dismiss the claims of Plaintiffs Sam and Tony M., Deanna H. Caesar S., and Michael B as these children do not satisfy the "case or controversy" threshold requirement of a federal court suit. These five Plaintiff children have been

adopted and are no longer in the legal custody of DCYF due to a report or suspicion of abuse or neglect.4

Article III of the Constitution restricts the jurisdiction of federal courts to the resolution of actual cases and controversies. Overseas Military Sales Corporation, Ltd. v. Giralt–Armada, 503 F.3d 12 (1st Cir. 2007). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). See also Operation Clean Government v. The Rhode Island Ethics Commission, 315 F.Supp2d 187, 193 (D.R.I. 2004). "The case or controversy requirement ensures that courts do not render advisory opinions. Put another way, 'those words limit the business of federal courts to questions presented in an adversary context.'" Giralt–Armada, 503 F.3d at 17 (citing, Flast v. Cohen, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)).

It is not dispositve that the plaintiff's claim may have been "live" at the time the complaint was filed. On the contrary, the First Circuit has held that:

> Article III considerations require that an actual case or controversy "must be extant at all stages of review, not merely at the time the complaint is filed." Steffel, 415 U.S. at 459 n.10, 94 S.Ct. 1209. When, as now, a plaintiff has initial standing to bring a particular claim, a federal court is duty bound to dismiss the claim as moot if subsequent events unfold in a manner that undermines any one of the three pillars on which constitutional standing rests: injury in fact, causation, and redressability. See Goodwin v. C.N.J., Inc., 436 F.3d 44, 46 (1st Cir.2006) ("A case

[4] Before Judge Lagueux's ruling on Defendant's original Motion to Dismiss, Brianna, Alexis and Clare H.'s claims were dismissed as the Family Court approved their adoptions on September 24, 2007. The Family Court approved Deanna H's adoption on April 10, 2008. The Family Court approved Michael B's adoption on June 4, 2008. The Family Court approved Caesar's adoption on June 22, 2009. The Family Court approved Sam and Tony M's adoption on February 25, 2010.

> becomes moot if, at some time after the institution of the action, the parties no longer have a legally cognizable stake in the outcome."); Mangual, 371 F.3d at 60. ("If events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case.").

Ramirez v. Sanchez Ramois, 438 F.3d 92, 100 (1st Cir. 2006). To demonstrate mootness, the Defendants "must show that, after the case's commencement, intervening events have blotted out the alleged injury and established that the conduct complained of cannot reasonably be expected to recur. If it is sufficiently plain that intervening events have wiped the slate clean, the case has become moot." Ramirez, 438 F.3d at 100.

The adoptions of Deanna, Michael, Caesar, Sam and Tony have "blotted out the complaints" regarding the alleged deficiencies of foster care services and placement alleged in Plaintiff's Amended Complaint and any viable interest in prospective injunctive relief. The Rhode Island Family Court approved the adoptions of these five children without objection from the Child Advocate. The underlying petitions, alleging abuse and neglect, that brought these five children under the jurisdiction of the Family Court and into DCYF's legal custody have all been closed. No live case or controversy exists between Deanna, Michael, Caesar, Sam and Tony and the State Defendants. The Amended Complaint only seeks prospective injunctive relief. Thus, Deanna, Michael, Caesar, Sam and Tony do not have a legally cognizable interest in the outcome of this lawsuit and, therefore, their claims are moot. See 31 Foster Children v. Bush, 329 F.3d 1255, 1263 (11th Cir. 2003).

The only way to avoid dismissal on mootness is for Plaintiffs to demonstrate that the claims of Deanna, Michael, Caesar, Sam and Tony are capable of repetition, yet evades review. Id. To avoid dismissal for these five plaintiff children, they must

demonstrate that: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." Id. (quoting Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).) It is the plaintiffs' burden of "establishing both that the issue is capable of repetition and that, absent relaxation of the classic mootness rule, it will evade review." Id.

There is nothing within the facts alleged by Plaintiff to satisfy either prong. It is undisputed that all five children were in DCYF's legal custody upon an allegation of abuse or neglect for over a year before their adoption. Additionally, there is no reasonable expectation that these five children who have been adopted will be the same complaining party subject to the same action."5

Moreover, in its decision, Sam M. 329 F.3d 77, 81 n.1, the First Circuit made a finding that Deanna's claim was moot. Specifically, the First Circuit stated that:

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[5] Such claim cannot be extended to Sam and Tony, even though they have been adjudged by the Family Court as "dependent"5 in order to receive the necessary funding and access to services.5 In 2010, the Family Court with the agreement of Sam and Tony's adoptive parents found each to be a "dependant child" pursuant to R.I. Gen. Laws §14-1-1, *et seq*. R.I. Gen. Laws § 14-1-3(6) defines a "dependent" child to mean: "Dependent" means any child who requires the protection and assistance of the court when his or her physical or mental health or welfare is harmed or threatened with harm due to the inability of the parent or guardian, through no fault of the parent or guardian, to provide the child with a minimum degree of care or proper supervision because of: (i) The death or illness of a parent; or (ii) The special medical, educational, or social service needs of the child which the parent is unable to provide. The terms "dependent" and "neglect or abuse" are statutorily distinct and are not legally interchangeable. It is significant to note that Plaintiff's amended complaint and proposed class is defined as "all children who are or will be in the legal custody of the Rhode Island Department of Children, Youth and Families due to a report or suspicion of abuse or neglect." Amended Complain [Document 12] at ¶11.

> The complaint initially named ten children as Plaintiffs. However, three of the children were subsequently adopted and therefore, they are not currently under DCYF custody. The district court concluded that the children's adoption rendered their claims moot and Plaintiffs have not challenged this conclusion on appeal. After the district court rendered its opinion, Plaintiff Deanna H. was adopted and thus her claims are also moot. The remaining named Plaintiffs, who are identified by pseudonyms to protect their identities, are Sam and Tony M, David T., Danny and Michael B., and Caesar S.

Based on identical grounds, i.e. adoption, the claims of Caesar, Michael, Sam and Tony are also moot. Plaintiffs claims brought on behalf of Deanna, Michael, Caesar, Sam and Tony must be dismissed based on mootness.

B. THE FEDERAL COURT SHOULD ABSTAIN FROM RENDERING A DECISION THAT WOULD INVADE THE PROVINCE OF THE RHODE ISLAND STATE COURTS OR ITS PAST AND FUTURE DECISIONS.

i. ABSTENTION BASED ON THE YOUNGER DOCTRINE

Plaintiffs allege that Defendants denied them federal statutory rights and violated their First, Ninth and Fourteenth Amendment rights and they seek undefined injunctive and declaratory relief. Without addressing the merits of the specific claims of each Plaintiff, the Defendants submit that principles of comity support this Court's abstention from interfering with the Plaintiffs' cases pending before the Rhode Island Family Court.[6]

The First Circuit has repeatedly held that under the legal principles defined in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.ed.2d 669 (1971) "a federal court must abstain from hearing a case if doing so would 'needlessly inject' the federal court into ongoing state proceedings." Coggeshall v. Massachusetts Board of Registration of

[6] At the time the Complaint was filed all ten (10) children had open and ongoing petitions stemming from allegations of abuse or neglect pending before the R.I. Family Court.

Psychologists, 604 F.3d 658, 664 (1st Cir. 2010). Among the reasons counseling against federal court interference with ongoing state court proceedings is "the notion of 'comity, that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. at 44. This principle reflects a "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Id. at 44. Recognizing that the facts of Younger dealt with federal interference into an ongoing state criminal prosecution, it is important to note that federal courts have applied the Younger principles to ongoing noncriminal state proceedings that are judicial in nature. Coggeshall, 604 F.2d at 664. See also Rossi v. Gemma. 489 F.3d 26 (1st Cir. 2007); Maymó-Meléndez v. Álvarez-Ramírez, 364 F.3d 27 (1st Cir. 2004).

The First Circuit and this Court have repeatedly applied a three (3) prong test to determine whether abstention is appropriate under the Younger framework. The "tripartite model", premised on the United States Supreme Court's decision in Middlesex County Ethics Comm. V. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), requires that "'(1) the [ongoing state] proceedings are judicial (as oppose to legislative) in nature; (2) they implicate important state interests; and (3) they provide an adequate opportunity to raise federal constitutional challenges.'" Coggeshall, 604 F.2d at 664 (citing Bettencourt v. Bd. of Regist. in Med., 904 F.2d at 772, 777 (1st

Cir. 1990)). The three prongs must be "assessed as of the date when the federal complaint is filed." Id. Where a case meets the Younger test, a district court has no discretion to provide injunctive relief and must abstain.[7] See Colorado River Water Conservation District v. United States, 424 U.S. 800, 816 fn22, 96 S.Ct. 1236,1 246 fn.22, 47 L.Ed.2d 483 (1976). See also J.B. ex rel. Valdez, 186 F.3d 1280, 1291 (10th Cir.1999)("Younger abstention is not discretionary once the above conditions are met absent extraordinary circumstances that render a state court unable to give state litigants a full and fair hearing on their federal claims.")

In this case the three prong test has been met: (1) there are or were ongoing proceedings for each of the ten children before the Rhode Island Family Court when the complaint was filed; (2) an important state interest is implicated; and (3) there is/was an adequate opportunity for the plaintiffs to advance their federal constitutional claims. Having satisfied the Younger criteria, the Defendants submit that this Court must decline exercising jurisdiction and dismiss this suit.

a. Threshold Consideration

As a threshold matter, the issue of "interference" is satisfied. Granting plaintiff's broadly phrased request for injunctive relief would: (1) necessitate a judicial finding by this Court that orders and decisions made or approved by the R.I. Family Court as to placement, services, permanency, etc. for the plaintiff children violated their

[7] A narrow exception to Younger abstention exists "if the plaintiff demonstrates 'bad faith, harassment, or any other unusual circumstance in the ongoing state proceeding.'" Brooks v. New Hampshire Supreme Court, 80 F.3d 633, 639 (1st Cir. 1996). These exceptions are "narrowly construed." Malachowski v. City of Keene, 787 F.2d 704, 709 (1st Cir. 1986). Plaintiffs have never claimed that the Family Court was a forum where it suffered bad faith, harassment, or any other unusual circumstance and, therefore, the exception does not apply in this case.

constitutional rights; (2) enjoin the Family Court from performing the duties they are charged with performing under Rhode Island law with respect to the protection of abused and/or neglected children; and (3) require this Court to oversee the Family Court in the performance of it's statutory duty to issue orders for the best interest of abused and/or neglected children. See Fernandez v. Trias Monge, 586 F.2d 848, 851 (1st Cir. 1978)("a federal finding of unconstitutionality necessarily undermines a state prosecution").

Previously Plaintiffs asked the District Court to decline a threshold finding of "interference" because (1) they have filed this suit against the state's executive branch and (2) the relief sought is from state executive action and does not implicate the Family Court. Plaintiffs also argued that the Family Court actions for these children are not "enforcement actions" and, therefore, are not appropriate state proceedings to abstain from under Younger. Plaintiffs' portrayal that the relief would only run against the state agency officials administering the child welfare system and would not effect the state family court is akin to a Trojan horse; a mere strategic characterization in order to avoid Younger abstention. See Coggeshall, 604 F.2d at 663, n5 (The First Circuit stated that Plaintiff's monetary claims against the individual board members monetary claims against the individual board members was a Trojan horse to try to avoid Younger abstention given the defense and application of judicial immunity.) An order for injunctive relief from this Court will first require that it make a finding that the past Family Court orders for these named children violated their constitutional rights and then

issue injunctive relief which will interfere with future decisions of the Family Court on placement and services for abused or neglected children[8].

1.Interference with the State Family Court

Plaintiffs previously argued to the District Court that Younger abstention was not appropriate because this lawsuit only asked the Court to "review executive actions, not to review any Family Court proceeding" and that they do not ask this Court to overturn any Family Court decisions, but instead challenge the decisions made by the executive agency regarding the children's treatment, placement, and services while in the state's custody – decisions made outside the context of the state court proceedings, either the enforcement actions or the periodic reviews." Despite Plaintiffs' desire to segregate the executive and judiciary's actions so that this lawsuit may proceed, the Rhode Island Family Court's active role in the placement and case plans of the named Plaintiffs cannot be denied.[9] DCYF's actions cannot be viewed in a vacuum as they were reviewed and approved by the Rhode Island Family Court.

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[8] Plaintiffs allege in the Amended Complaint that their constitutional rights have been violated due to inappropriate placements, lack of services, prolonged attempts at reunification, failure to timely file to terminate parental rights, etc. and that this Court should issue prospective injunctive relief. However, in order to make such a ruling and find that Plaintiff Children have been harmed by inappropriate placements or have languished in foster care due to prolonged reunification efforts or failure to terminate parental rights, would require this Court to review, reverse and dictate to the Rhode Island Family Court how it should rule on the specific cases of abused or neglected children under its original jurisdiction. Asking this Federal Court to oversee and manage the justices of the Rhode Island Family Court and their rulings or orders on specific cases, treads on the comity that Younger was so very concerned about. Contrary to Plaintiffs' claims, this case does implicate issues of comity between the State and Federal Government.

[9] Even in the "Child Advocate Handbook", it is noted that "[o]nce a report of child maltreatment leads to the filing of a juvenile petition in the Family Court, the business of protecting children is shared by DCYF, the judiciary and the professionals appointed to

When determining what constitutes "interference" under Younger, the Court must look to determine whether the relief sought would either directly or indirectly interfere in a state court proceeding. The United States Supreme Court elaborated on "direct" and "indirect" interference in O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct., 669, 38 L.Ed.2d 674 (1974). In O'Shea, the respondents alleged "that [a state prosecutor and his investigator, the police commissioner, a magistrate and judge of court] have intentionally engaged in, and are continuing to engage in, various patterns and practices of conduct in the administration of the criminal justice system in Alexander County that deprive" them of their constitutional rights. 414 U.S. at 489, 94 S.Ct. 673. The respondents sought an injunction aimed at preventing these practices. In finding that the federal court should have abstained under Younger, the United States Supreme Court explained:

> *A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable*. In concluding that injunctive relief would be available in this case because it would not interfere with prosecutions to be commenced under challenged statutes, the Court of Appeals misconceived the underlying basis for withholding federal equitable relief when the normal course of criminal proceedings in the state courts would otherwise be disrupted. The objection is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts; the object is to sustain ' (t)he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' *An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts* via resort to the federal suit for determination of the claim ab initio, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*. *Moreover, it would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class.* The Court of Appeals disclaimed any

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represent the various parties." http://www.child-advocate.ri.gov/HandbooksandBrochures/ChildAdvocateHandbook.php

> intention of requiring the District Court to sit in constant day-to-day supervision of these judicial officers, but the 'periodic reporting' system it thought might be warranted would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity

414 U.S. at 500-501, 94 S.Ct. 678-979 (citations and footnotes omitted). Emphasis Added.

In Rhode Island, upon the filing of an ex parte petition, the Family Court is statutorily authorized to ""immediately take any action *it deems necessary or appropriate* for the protection of the child, or children, suspected of being abused or neglected, including the removal of the child, or children, from the custody of the parent or parents, or other person suspected of the abuse of neglect." R.I. Gen. Laws §40-11-7.1(a). Emphasis added. At the initial hearing, the Family Court is authorized to "*make any interim orders in its discretion* respecting the rights of the child." R.I. Gen. Laws §40-11-7.1(b). Emphasis added. If the Family Court determines that the child has been abused, it enters a formal decree in which it sets forth its determination whether the child can safely be returned to their home, award the care, custody, and control of the child to the department *upon such terms as the court shall determine*, or place the custody of the child in the department *until such time as it finds* that the child may be returned to the parents or other person previously having custody or care of the child under circumstances consistent with the child's safety. R.I. Gen. Laws §40-11-12. Emphasis added. If the Court does not return the child to his/her parents' custody, "the court shall direct … [DCYF] to submit within thirty (30) days a written plan for care and treatment… .The *court shall thereupon approve or modify such plan, or shall remand the plan to …[DCYF] for further development or resubmission*." Rhode Island Family Court

Rules of Juvenile Proceedings Rule 17. Emphasis added. Upon approval of this individualized plan, *the Court shall direct DCYF to "review such plan* and report thereon to the court not later than six (6) months thereafter." Id. Emphasis added.

The service plan that is submitted to the Family Court for its review and consideration must include a statement of the needs of each child as well as the "proposed treatment and placement" for each child. R.I. Gen. Laws §42-72-10(a). The Department must ensure that the service plan is subject to review every six months for purposes of determining, "…whether the service plan is in the best interests of the child and is also cost effective." R.I. Gen. Laws §42-72-10 (a). Moreover, plans that refer to a goal of "adoption "or placement in another permanent home, must include, "…documentation of the steps the department is taking to find an adoptive family or other permanent placement, to place the child in such a family or placement, and to finalize permanency." R.I. Gen. Laws §42-72-10 (c).

At each regularly scheduled review and/or permanency hearing of any child found to be neglected and/or abused, DCYF is required to present a written reunification or permanency plan to the Family Court. R.I. Gen. Laws §40-11-12.2. The DCYF service plan shall include a statement as to, "…whether, and if applicable when, the child will be returned to the parent, placed for adoption, referred for legal guardianship, placed with a fit and willing relative, or (in cases whether the department can show the court compelling reasons why the foregoing placements or referrals would not be in the child's best interests) placed in another planned permanent living arrangement." R.I. Gen. Laws §40-11-12.2 (a).

The term "review" should not be misconstrued. The Family Court does not merely look at the service plan and sit passively by if it finds any terms or conditions not in the abused or neglected child's best interest. On the contrary, as a matter of law, the Family Court is vested with the exclusive authority to pass judgment on the plan. R.I. Gen. Laws §40-11-12.2 (a) requires that "the plan may be approved and/or modified by a justice of the family court and incorporated into the orders of the court*, at the discretion of the court.*" Emphasis added. Accordingly, if the Family Court accepts the plan, the Court is determining that the child's placement, services and reunification or permanency plan is appropriate and in the best interest of the child. If the Family Court orders the plan to be modified it is finding that some aspect of placement, services or permanency is not appropriate or is deficient and compels DCYF to alter the services or placement until accepted by the Court. By the plain face of the statute, the Family Court is reviewing decisions that DCYF may make as to the placement and services to an abused or neglected child in its custody and either accepting those arrangements as being in the best interest of the child or requiring DCYF to make alternative placements or services that are then subject to approval by the Court. Therefore, although the Plaintiffs identify court orders where the wording indicates that a child is placed in the custody of DCYF with discretion to placement, ultimately the Family Court exercises its authority to review the child protective petitions and has the authority to accept, modify or reject the DCYF plan for services; including the Department's recommendations relating to placement and permanency planning.

The Plaintiffs' lawsuit asks this Court to find that DCYF placed the Plaintiff children in unstable and inappropriate placements, failed to establish a permanency plan,

failed to timely terminate parental rights, unnecessarily placed them in institutions, etc. The Plaintiffs contend that they are not asking this Court to "review any Family Court proceeding" as the Rhode Island Family Court lacks authority regarding such issues as placement. The facts of the Plaintiff Children's cases contradict these statements.

It is clear from the Family Court orders pertaining to the Plaintiff Children that the Rhode Island Family Court did evaluate and approve of DCYF's placements, services, etc. specifically or by expressly accepting the case plans. Moreover, in some instances the Family Court ordered that the children be placed with a specifically named individual or at an institution.[10] Since Plaintiffs' Amended Complaint alleges that DCYF

[10] By way of examples: Exhibit A-16 & 17 – The Family Court approved DCYF's case plan for Brianna H. and approved a goal of reunification with her parents. The Family Court ordered that Brianna's father may supervise the visits with her mother; Exhibit A-23. The Family Court ordered that Brianna is ordered into the temporary custody of DCYF and expressly ordered placement with a specifically named relative. The Family Court further ordered no unsupervised visits; Exhibit A-28. The Family Court entered an order that Brianna, Clare and Alexis are "committed to the care custody and control of DCYF" and ordered placement of the three children with a specifically named relative and her spouse. The Court also entered a specific order regarding the time of visitation; Exhibits D- 26 and D-60 – In July of 2006, the Family Court entered an order in the case of Sam and Tony M. which approved of the DCYF case plan and specifically found that DCYF was making reasonable efforts toward achieving a permanency plan goal of adoption; Exhibits D-27 and D-61- In January of 2007, the Family Court once again approved of the DCYF case plan as it relates to Sam and Tony M. and found that DCYF was making reasonable efforts toward achieving a permanency plan goal of adoption; Exhibit C -13 In April 14, 2003, the Family Court convened a permanency hearing on behalf of the child Caesar S. At the conclusion of the hearing, the Family Court approved of the Department's case plan goal and the trial judge noted that Caesar would continue to reside in relative foster care; Exhibit C-22 and C-23: At the conclusion of a permanency hearing conducted on May 10, 2004 relating to the child, Caesar S., the Family Court entered an order approving DCYF's case plan. In addition, the Court concluded that the case plan's goal of reunification was appropriate and that DCYF had made reasonable efforts to facilitate reunification of Caesar with his parents. Additionally, the Family Court found that DCYF had documented a compelling reason to continue efforts to work toward a case plan goal of reunification. Finally, it ordered that DCYF was required to continue to make efforts to reunify Caesar with his mother until August of 2004; Exhibit C-44 In November of 2006, at the conclusion of a permanency

violated their constitutional rights by these very actions and seeks prospective relief on these same issues, any remedy would necessarily interfere with the Rhode Island Family Court and its ongoing proceedings. The Defendants submit that such action would constitute an interference that Younger seeks to avoid. Thus, applying the reasoning in O'Shea to this lawsuit, any remedy addressing Plaintiffs' complaints would require that this Court continuously supervise and oversee the Family Court's decisions on placement and services to Rhode Island children who are suspected of being neglected or abused.

2. ***NOPSI* and *Rio Grande***

Plaintiffs erroneously claim that the First Circuit's decision in Rio Grande Community Health Center v. Rullan, 397 F3d 56 (1st Cir. 2005) and the United States Supreme Court's decision in New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) preclude the

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hearing, the Family Court approved the Department's case plan as well as the permanency goal of adoption for the child, Caesar S. In addition, the Family Court made a finding that DCYF had made reasonable efforts to finalize a permanency goal of adoption or guardianship; Exhibit E-19 In the case of David T., the Family Court specifically authorized placement of David T. with a relative who resided out of state in February of 1999; Exhibit E-58 In December of 2000, the Family Court found that placement of David T. in an out of state program was necessary; Exhibits E-38 and E-39- In November of 2005, the Family Court conducted a permanency hearing on behalf of the child, David T. At the conclusion of the hearing, the Family Court entered an order in which it approved of the DCYF case plan and the goal of "long term living arrangement with other." In addition, the Family Court made a finding that DCYF had documented a reason why return home, adoption, guardianship or placement with a relative was not an appropriate permanency plan goal for David and that DCYF had made reasonable efforts to finalize a permanency plan goal of another planned alternative living arrangement. The Family Court also directed that DCYF continue to make placement referrals on behalf of David T. through the DCYF Care Management Team and the case was continued to January 9, 2006 for review.

application of Younger to their Amended Complaint. Their basis for such an assertion that Younger does not apply to this action is their claim that they seek relief from state executive action. Rio Grande and NOPSI are factually distinguishable from this case and do not defeat abstention.

In NOPSI, a utility company requested permission from the New Orleans City Council ("Council"), the local government agency responsible with ratemaking authority, to institute a rate increase. 491 U.S. at 355, 109 S.Ct. 2511. The Council denied NOPSI's request. Id. NOPSI filed an action for injunctive and declaratory relief in the Federal District Court. Id. The District Court dismissed NOPSI's lawsuit under the *Johnson Act* and indicated it would also abstain under Burford Doctrine. On appeal, the Fifth Circuit initially reversed the District Court's decision on both grounds; however, on its own motion, it vacated this decision and held that abstention was appropriate under both Burford and Younger. 491 U.S. at 355-56, 109 S.Ct. 2511. NOPSI filed two subsequent suits in the federal district court in response to two subsequent decisions by the Council. 491 U.S. at 356, 109 S.Ct. 2512. Anticipating that the District Court might again abstain, NOPSI filed a petition for review of the Council's order in the Civil District Court for the Parish of Orleans, Louisiana. 491 U.S. at 357, 109 S.Ct. 2512. As NOPSI predicted, the District Court abstained. Id.

The United States Supreme Court ruled that Younger abstention was not appropriate. It explained that "[w]hile we have expanded Younger beyond criminal proceedings, and even beyond proceedings in courts, we have never extended it to proceedings that are not 'judicial in nature.'" 491 U.S. at 369-70, 109 S.Ct. 2519. The Court "has never been suggested that Younger requires abstention in deference to a state

judicial proceedings reviewing legislative or executive action." 491 U.S. at 368, 109 S.Ct. 2518. The Supreme Court held that NOPSI's challenge was to a completely legislative action and did not represent an "interference with ongoing judicial proceedings against which Younger was directed." 491 U.S. at 372, 109 S.Ct. 2520.

The other case relied upon by Plaintiffs in their opposition to Younger abstention is the First Circuit's decision in Rio Grande. In Rio Grande, Plaintiffs, federally qualified health centers brought suit against Puerto Rico's Secretary of Health under 42 USC §1983 seeking an injunction ordering that wraparound payment monies be paid in a timely manner. 397 F.3d 56, 60. Prior to filing their federal lawsuit, the health centers sued the Secretary in state court seeking damages for past overdue payments and other relief. Id.

The First Circuit held that the ongoing state proceeding involved in Rio Grande was not the proper type of proceeding to require adherence to Younger principles." Id. at 69. The First Circuit acknowledged that Younger occurred within the context of a criminal state proceeding and, it subsequently has been extended to "some quasi-criminal (or at least 'coercive') state civil proceedings - and even administrative proceedings - brought by the state as enforcement actions against an individual." As an example of such proceedings, the First Circuit cited the United States Supreme Court's decision in Moore v. Sims, 442 U.S. 415, 423, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) where "Younger abstention [was] appropriate in context of state child removal proceedings due to allegations of child abuse." Id. Younger has also been extended to those "situations uniquely in furtherance of the fundamental workings of a state's judicial system." Id.

The First Circuit stated that it was "unclear exactly how far this second rationale extends, although it is related to the coercion/enforcement rationale." Id.

The Rio Grande Court found that neither situation was present in that case and, thus declined to abstain under Younger. Id. at 70. The First Circuit found that the state court action for payment of wraparound benefits by Puerto Rico's Secretary of Health was more appropriately characterized as "judicial review of executive action," similar to New Orleans Public Serv., Inc. (NOPSI) v. Council of City of New Orleans, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). A second reason why the First Circuit found Younger abstention inappropriate was because the federal court suit and an injunction would not stop "the state court from proceeding independently against the state Medicaid agency as well, nor is it inconsistent with any of the Commonwealth court orders." Id. at 71.

Plaintiffs' erroneously claim that the instant lawsuit is similar to NOPSI and Rio Grande and that it is only aimed at and would only effect the executive branch of state government. In order to make a finding that Plaintiff Children's constitutional rights have been violated, the Plaintiffs are not merely asking this Court to review and find error with decisions made by the DCYF on child welfare issues. The Rhode Island Family Court has issued orders addressing placement and services (areas where Plaintiffs alleged the named children have been harmed) as to Plaintiff Children and will continue to do so in the future. By its very essence, the Plaintiffs lawsuit implicates and challenges Family Court orders. Any remedy that this Court may fashion to rectify placement and service issues will directly and/or indirectly interfere with pending Family Court proceedings.

Accordingly, NOPSI and Rio Grande are inapposite as to a Younger analysis of the specific facts of this case and Rhode Island's Family Court.

3. Younger Applies to Child Welfare Cases

Both the United States Supreme Court and the First Circuit have likened state court actions surrounding allegations of abuse and neglect to "enforcement proceedings" and that ongoing family/juvenile court proceedings trigger Younger abstention.

The United States Supreme Court in Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) applied Younger abstention in the context of a state court child abuse case. The Moore Court explained that:

> The Younger doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. Samuels v. Mackell, 401 U.S. 592, 95 S.Ct. 1200, 43 L Ed.ed 688 (1971). That policy was first articulated with reference to state criminal proceedings, but as we recognized in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), the basic concern – *that threat to our federal system posed by displacement of state courts by those of the National Government – is also fully applicable to civil proceedings in which important state interests are involved*. As was the case in *Huffman*, *the State here was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is, like the public nuisance statute involved in* Huffman*, "in aid of and closely related to criminal statutes*." Id. at 604, 95 S.Ct., at 1208. The existence of these conditions, or the presence of such other vital concerns as the enforcement of contempt proceedings, *Juidice v. Vail*, 430 U.S. 327. 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977), or the vindication of "important state policies such as safeguarding the integrity of [public assistance] programs," Trainor v. Hernandez, 431 U.S. 434, 444, 97 S.Ct. 1911, 1918, 52 L.Ed.2d 486 (1977), determines the applicability of Younger-Huffman principles as a bar to the institution of a later federal action.

442 U.S. 415, 423, 99 S.Ct. 2371, 2377. Emphasis Added.

Although there are some factual distinctions in so much as the federal lawsuits were brought by the parents, the First Circuit has had the brief opportunity to apply Younger in

the aspect of a child abuse case. In McLeod v. Maine Department of Human Services, 1999 WL 33117123 (D.Me. Nov. 2, 1999)(not reported in F.Supp.2d), the United States District Court for the District of Maine, abstained under Younger and dismissed a complaint involving child welfare. As background to its decision, the District Court related:

> McLeod alleges that her three minor children were removed from her custody and placed in the custody of DHS in August 1997. Complaint (Docket No.2) at [1]. DHS purportedly failed to provide certain services mandated by state law, among them an effort to reunite McLeod and her children. *Id*. At some unspecified date DHS sought a "cease reunification" order, which was granted by the Main District Court. *Id*. at [2]. The Law Court affirmed this judgment. *Id*. DHS contends, and McLeod acknowledges, that she is in the midst of an ongoing state-court child protection proceeding in which the next step in the continuum is termination of parental rights. Defendant's Motion at 1-2; Plaintiff's Objection to Defendant's Motion to Dismiss ("Opposition") (Docket No. 4) at [2]("In this case, the pending action in state courts is to terminate Ms. McLeod's parental rights of her three children."). On the bases of the alleged violations of her rights pursuant to the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. ("ADA"), and the due process clause of the Fourteenth Amendment to the United State Constitution, McLeod asks this court to issue an injunction compelling DHS to provide reunification services and to award damages (including punitive damages), costs and fees. *See generally Complaint.*

1999 WL 33117123 at page 1. In making its determination whether to abstain based on Younger, the District Court explained:

> McLeod concedes that she is in the midst of ongoing state child-custody proceedings. She does not argue that those proceedings antedate the filing of the instant complaint. See generally Opposition.
>
> The question of child custody implicates an important, if not paramount, state interest. See, e.g., Moore v. Sims, 442 U.S. 415, 423 (1979) (recognizing applicability of Younger doctrine to cases concerning state proceedings for temporary removal of child in child-abuse context); Malachowski v. City of Keene, 787 F.2d 704, 708 (1st Cir.1986) (noting that Supreme Court had expanded applicability of Younger doctrine to many categories of civil proceedings, including state child-custody

> actions).
>
> Finally, Maine courts afford an opportunity to challenge a state-initiated child-welfare or child-custody proceeding on federal statutory or constitutional grounds. See, e.g., In re Christmas C., 721 A.2d 629, 631-32 (Me.1998) (adjudicating challenge to cease-reunification order on federal constitutional due-process grounds); In re Angel B., 659 A.2d 277, 279 (Me.1995) (adjudicating challenge to termination of parental rights on ADA grounds). See also Moore, 442 U.S. at 425 ("The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings.").
>
> * * *
>
> In sum, McLeod falls short of demonstrating a compelling reason for this court to consider intruding into pending state child-custody proceedings through the granting of either the injunctive or monetary relief she seeks. See, e.g., Bettencourt v. Board of Registration in Med., 904 F.2d 772, 777 (1st Cir.1990) (noting that injunction could immobilize and money damages embarrass pending state proceedings to revoke plaintiff's license to practice medicine).

Id. at pp.1-2. Footnote omitted. Plaintiff McLeod appealed the District Court's decision to the First Circuit, which in an unpublished opinion ruled that:

> After a thorough review of the parties submissions and of the record, we affirm. In order to establish that an exception to abstention under Younger v. Harris, 401 U.S. 37 (1971), would be appropriate, appellant must show that the "extraordinary circumstances" in question "render the state court incapable of fairly and fully adjudicating the federal issues before it."*Id.* (quoting Kugler v. Helfant, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975)). This is a "narrow exception" to the Younger abstention doctrine. See Huffman v. Pursue, Ltd., 420 U.S. 592, 611, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); see also United Books, Inc. v. Conte, 739 F.2d 30, 34 (1st Cir.1984). The irreparable injury that is threatened must be one " 'other than that incidental to every [ ] proceeding brought lawfully and in good faith.'" Younger, 401 U.S. at 47 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943)).
>
> Appellant has not alleged facts showing that the state court is somehow incapable of adjudicating this matter including the federal issues, nor has she alleged an injury that is different "than that incidental to every [child protection] proceeding brought lawfully and in good faith.' " *Id.* Appellant's argument that her federal action would not interfere with the

> state action is unsupported by detailed argument and is inherently unpersuasive; the conduct of parts of the same controversy in federal court, after a state proceeding has begun, *is* an interference with the state proceeding. Further, it appears that if the federal court were to grant the relief she requests, its judgment would conflict with the previous order of the state court to "cease reunification." Abstention is most appropriate in such circumstances.
>
> Thus, the lower court correctly abstained from this matter. See Moore v. Sims, 442 U.S. 415, 434-35, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (since state courts traditionally have addressed important matters of family relations, allegation that those relations are threatened by ongoing state proceedings is insufficient, standing alone, to justify exception to abstention doctrine).

McLeod v. Maine Department of Human Services, 229 F.3d 1133, 2000 WL 869512 (1st Cir. 2000).

Additionally, in Malachowski v. City of Keene, 787 F.2d 704(1st Cir. 1986), the First Circuit applied Younger and abstained from entertaining parents' alleged violations of constitutional rights that occurred during the context of a state court juvenile delinquency proceedings. In that case, the Malachowski's daughter Amy was placed in foster care "pursuant to a consent order entered as a result of a petition alleging abuse and/or neglect filed in Keene District Court by the New Hampshire Division of Welfare." 787 F.2d at 706. Four months later, Amy was returned to her parents' custody. Id. Four months after that Amy's mother reported to the local police that Amy had run away. Id. Amy was located by her parents and brought home, however during his investigation a police officer saw Amy strike her father. Id. Amy was taken into custody and subsequently arraigned on a juvenile delinquency petition. Id. Several hearings were held and at the "dispositional hearing" the Keene District Court ordered that Amy remain in the custody of a foster care – the Youth Services, Inc.; family counseling and scheduled a court review two months later. Id. Neither Amy, through her court

appointed attorney, or her parents appealed. Subsequently, Amy's parents filed a §1983 action in federal court seeking redress for alleged violations of their own constitutional rights. Id. Although there are some factual distinctions to the present case, the First Circuit's reasoning for abstaining under Younger is helpful. The First Circuit held that:

> There is no question that Younger principles apply to the instant action. The Supreme Court has expanded the applicability of Younger to many categories of civil proceedings, including a state child custody action. Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). Whether the Keene District Court juvenile delinquency proceedings are characterized as quasi-criminal or as child custody proceedings, therefore, the propriety of federal interference with them must be judged by *Younger* standards. Insofar as appellants seek an order returning Amy to their custody, "the fact that 'family law' is at issue here makes 'abstention' particularly appropriate." Friends of Children, Inc., supra, 766 F.2d at 37.
>
> Applying those standards, we find that the district court's abstention from asserting jurisdiction over appellants' injunctive claims was fully justified. Appellants filed the instant complaint in federal court on November 1, 1984, before the end of the 30-day period specified in N.H.R.S.A. 169-B:29 during which Amy, or perhaps appellants on Amy's behalf, could have appealed the October 11 dispositional order to the New Hampshire Superior Court. Even if appellants could not bring a direct appeal on their own behalf under that statute, they had open to them the option, with no express time limitation, of seeking a writ of certiorari from the New Hampshire Supreme Court to review the Keene District Court proceedings. N.H.R.S.A. 490:4. See In re John M. and David C., 122 N.H. 1120, 1130, 454 A.2d 887 (1982). Under these circumstances, *see* Huffman v. Pursue, Ltd., 420 U.S. 592, 607-11, 95 S.Ct. 1200, 1209-11, 43 L.Ed.2d 482 (1975), *Younger* policies counsel abstention.
>
> Furthermore, although N.H.R.S.A. 169-B:29 fixed the state district court's dispositional order as the only proper occasion for the minor's appeal as of right to the superior court for a de novo hearing-reflecting a legislative policy judgment that a right to de novo review at any other point in juvenile delinquency proceedings is unnecessary, see In re Cindy G., 124 N.H. 51, 58, 466 A.2d 943 (1983)-the district court juvenile delinquency proceedings were not finally concluded at that time. Instead, the district court retains jurisdiction and must review its disposition at least once annually. N.H.R.S.A. 169-B:31; In re Cindy G., supra, 124 N.H. at 57-58, 466 A.2d 943. In the instant case the record reveals that the Keene District Court has reviewed Amy's disposition on at least two occasions following its initial dispositional order, on December 27, 1984, and on February 13,

> 1985. Appellants' filings herein indicate that appellants have presented further requests for a return of Amy's custody, or for other relief, to the Keene District Court on numerous occasions. At the time the district court dismissed appellants' injunctive claims, therefore, the Keene District Court still remained available as a local forum where appellants could press objections to Amy's custody.

Id. at 708-709.

The Rhode Island Family Court has entered orders adjudging Plaintiff Children as abused or neglected and the Family Court is required by statute to continue to exercise jurisdiction over these cases and to conduct ongoing court hearings in each case. (See R.I.G.L 40-11-12.1, 40-11-12.2 and Rhode Island Family Court Rules of Juvenile Proceedings Rule 17). Moreover, many children in the class Plaintiffs seek to certify are the current subjects of petitions alleging abuse or neglect. The First Circuit has determined that Younger applied to a child welfare case where a finding of abuse or neglect has been entered and termination of parental rights is to follow. Based on the holdings of the United States Supreme Court and the First Circuit, the pending Family Court cases may be characterized as "enforcement" type proceedings under Younger. The Defendants have clearly satisfied any "threshold".

b. Comity

Plaintiffs' argument that abstention under Younger is not necessary as traditional notions of comity are not offended because the State of Rhode Island accepts funding under Title IV-E for its child welfare system is without merit. Plaintiffs' assert that their "Amended Complaint invades no preserved field of unfettered state sovereignty, but instead seeks prospective injunctive relief strictly over those state agency officials responsible for operating Rhode Island's child welfare system in compliance with federal

mandates." Plaintiffs direct this Court to the First Circuit's decision of Rio Grande Community Health Center, Inc. v. Rullan, 397 F.3d 56 (1st Cir. 2005) and Dwayne B. v. Granholm, No. 06-13548, 2007 WL 1140920, at *5 n.5 (E.D. Mich. Apr. 17, 2007).

The First Circuit failure to abstain under Younger in Rio Grande was not because comity would not be impacted because Puerto Rico participated in the federal-state funded Medicaid Program but, rather, the First Circuit declined to abstain only after finding that the facts of Rio Grande did not satisfy the requirements of Younger or the Middlesex test. The Plaintiffs also refer this Court to United States District Court for the Eastern District of Michigan's decision in Dwayne B. v. Granholm, No. 06-13548, 2007 WL 1140920, at *5, n.5 (E.D. Mich. Apr 17, 2007); however never performed any legal analysis. Rather, the *Dwayne B*. Court merely referred to a conclusory statement by Plaintiffs in their memorandum and did not cite any specific case law in support[11]. The Plaintiffs' claim that comity is not a concern implicated by this lawsuit is without legal support or merit.

c. The Three Prong Younger Test

1. Federal Litigation Would Interfere with Ongoing Proceedings Before the Rhode Island Family Court

a. Ongoing Family Court proceedings

The Family Court has exclusive original jurisdiction over neglected or abused children residing or being in the State. R.I. Gen. Laws, §14-1-5. At the time the

[11] The Dwayne B. Court's legal analysis to support its position is set forth at footnote 5 where it stated "Nonetheless, there are no "comity" or "federalism" concerns presented by this lawsuit because the State of Michigan has voluntarily agreed to federal oversight of its foster care system in exchange for federal funding. (*See* Plfs.' Mot. at 11-13.)"

complaint was filed in this case all plaintiff children had open cases before the Rhode Island Family Court. Currently only two (2) of the ten (10) named children have open cases that originated as abuse or neglect petitions, as the other eight plaintiff children have been adopted. At the time of adoption, the Family Court closed the underlying abuse/neglect petitions and the children were found to no longer in DCYF custody or foster care under allegations of abuse of neglect.

While in the court ordered legal custody of DCYF from abuse/neglect petitions, the plaintiff children at the very least appeared before the RI Family Court for yearly permanency hearings, R.I. Gen. Laws §40-11-12.1, and enters an order in the best interest of the child. R.I. Gen. Laws §40-11-12.1(e). The Family Court is vested with the authority to review and address DCYF's service plan for the child at a minimum of every six months. R.I. Gen. Laws §40-11-12.2. Although it is evident from state court documents produced for the name plaintiffs, the Family Court's interaction with the plaintiff children exceeded the minimum in order to address individual issues. As a matter of law, the Family Court is vested with the exclusive authority to pass judgment on the plan. In pertinent part, R.I. Gen. Laws §40-11-12.2(a) provides: "[t]he plan may be approved and/or modified by a justice of the family court and incorporated into the orders of the court, at the discretion of the court." The plaintiff children's cases before the Family Court are clearly "ongoing" for purposes of Younger analysis. See 31 Foster Children, 329 F.3d at 1275; J.B., 186 F.3d at 1291; Carson P., 240 F.R.D. at 523; Laurie Q., 304 F.Supp.2d at 1204.

b. Interference

The Defendants addressed at length the Family Court's very active role in determining the best interest for an abused or neglected child that has been placed in DCYF's legal custody when analyzing the "interference" argument. The United States District Court for the District of Nebraska, in Carson P., found that a lawsuit, strikingly similar to this one, would have the practical effect of interfering with the ongoing juvenile proceedings of the abused or neglected children named as plaintiffs. Similar to Carson P., at the very least a child in DCYF's custody in foster care is mandated by statute to have a permanency hearing every twelve (12) months. As is apparent from these cases, however, the Family Court has had more than yearly interaction with the children, as is evident by the facts relating to each of the ten (10) named plaintiff children. See also J.B. v. Valdez, 186 F.3d 1280, 1291-1292 (10th Cir 1999)(The Tenth Circuit found that the plaintiffs were in state custody were subject to "dispositional and biannual review hearings" before New Mexico's Children's Court and though "admittedly less than adversarial in nature, were judicial in nature. These hearings existed as long as the child remained in state custody. The Tenth Circuit held that "the continuing jurisdiction of the Children's Court to modify a child's disposition, … coupled with the mandatory six-month periodic review hearings, … constitutes an ongoing state juridical proceeding" for purposes of the second prong under Younger.)

The Carson P. Court also addressed the issue of whether the Federal Court action would interfere with their ongoing state proceedings for abused or neglected children in state foster care. As they did in this case, the Carson P. plaintiffs' did not request any specific or detailed injunctive relief. 240 F.R.D. at 524. Rather, "[t]he prayer for relief in

their complaint essentially request[ed] the court to enter an order requiring the defendants to cease violating the plaintiffs' constitutional rights and comply with federal statutory requirements. Under circumstances such as [that], some courts have refused to abstain under Younger because, absent a specific request for injunctive relief, they could not conclude that a federal order would necessarily interfere with ongoing state proceedings." Id. at 524-525 (citing to Olivia Y. ex rel. Johnson v. Barbour, 351 F.Supp2d 543, 570 (S.D.Miss.2004); Kenny A. ex. Rel. Winn v. Perdue, 218 F.R.D. 277, 286 fn.5. However, the Carson P. Court was not daunted by the ambiguously worded requested relief, but rather, conducted its own analysis so as to be faithful to the Supreme Court's stated purpose of Younger – to preserve the principles of comity and Federalism. The Carson P. Court held that:

> The plaintiffs' artful pleading and lack of specificity should not serve to circumvent the principles of comity protected by Younger abstention; that is, the plaintiffs' failure to identify the specific relief requested should not assist them in defeating defendants' motion to dismiss on the basis of Younger abstention. Therefore, rather than relying on the plaintiffs' prayer for relief to determine what injunctive remedy the plaintiffs may request, the court will rely on the allegations of the amended complaint, the presumption being that the plaintiffs will ultimately request an order remedying each allegedly wrongful action or inaction performed by HHS.

Given the specific allegations of the amended complaint, the District Court hypothesized as to plaintiffs requested injunction would require the State to perform. Id. at 525-526. Assuming the Plaintiffs request each of the foregoing types of relief, the question the Carson P. court turned to was "whether a federal order granting such relief will interfere with the ongoing proceedings in the Nebraska juvenile courts." Id. It found that "[t]his determination, in turn, depends on the extent to which Nebraska juvenile court judges are already vested with oversight responsibility and authority to consider the impact of the

foregoing complaints with respect to each child and enter orders for the benefit of such children under their jurisdiction." Id. The result of this legal analysis was the Court's determination:

> that injunctive orders by this court which attempt to impose parameters on HHS for determining where a child should be placed; if and how often a child should be moved to another placement; the child's length of stay in HHS custody; the methods employed and attention given to parental rights termination proceedings; the supervision of the children while in HHS custody; the level of training, experience, and workload capability of HHS caseworkers assigned to a child; the level of reporting provided to the court by HHS; the rights to visitation with family or former foster families; and the types of medical, dental, mental health, and behavioral treatment a child may need, would both directly and indirectly interfere with the plenary jurisdictional and decision-making authority of the Nebraska juvenile courts. The injunctive relief ordered would give the federal district court an oversight role over Nebraska's child welfare program, and would give it direct control over decisions currently vested in the juvenile court. J.B., 186 F.3d at 1292.
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> In this case, the plaintiffs are seeking relief that would interfere with the ongoing state dependency proceedings by placing decisions that are now in the hands of the state courts under the direction of the federal district court. The declaratory judgment and injunction that they request would interfere with the state proceedings in numerous ways. The federal and state courts could well differ, issuing conflicting orders about what is best for a particular plaintiff, such as whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an adoptive family. The federal court relief might effectively require an amendment to a child's case plan that the state court would not have approved, and state law gives its courts the responsibility for deciding upon such an amendment. .... To say the least, taking the responsibility for a state's child dependency proceedings away from state courts and putting it under federal court control constitutes " federal court oversight of state court operations, even if not framed as direct review of state court judgments" that is problematic, calling for Younger abstention.... The relief that the plaintiffs seek would interfere extensively with the ongoing state proceedings for each plaintiff.
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> 31 Foster Children, 329 F.3d at 1278-1279 (dismissing plaintiffs' substantive and procedural due process claims, constitutional claims for denial of family association, claims based on alleged violations of the AACWA and EPSDT on the basis of Younger abstention). See also J.B., 186 F.3d at 1291-92. (concluding Younger abstention was required

> because the plaintiffs' federal action would interfere with the proceedings of New Mexico's Children's Court in that the federal court would, in effect, assume an oversight role over the entire state program for children with disabilities).

Id. at 529.

Similarly, the Carson P. plaintiffs argued that its complaint was not directed at the state courts but, rather, at Nebraska's Department of Health and Human Services ("HHS")–the agency that cares for the foster children. Id. They argued further that "any federal court order would assist rather than interfere with the juvenile court by imposing higher standards on HHS". Id. The Carson P. Court disagreed, reasoning that:

> Article V, §27 of the Nebraska Constitution authorized the Nebraska legislature to "establish courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may provide." Neb. Const. Art. V., §27. Consistent with this authority, the legislature enacted Neb.Rev.Stat. §43-285 which states:
>
> When the court awards a juvenile to the care of the Department of Health and Human Services, an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.
>
> Neb.Rev.Stat. §43-285(1)(LEXIS 2005)(emphasis added). Accordingly, " [e]ven though any remedial order would run against the Department, state law makes it a duty of state courts to decide whether to approve a case plan, and to monitor the plan to ensure it is followed." 31 Foster Children, 329 F.3d at 1279. Exercising federal court oversight over HHS' conduct on behalf of a child would serve to duplicate the authority already afforded to the Nebraska juvenile court by the Nebraska legislature. Federal court injunctive orders against HHS would undermine and interfere with the Nebraska juvenile court's ability to exercise the full extent of its authority over juvenile court proceedings.

Id. at 529-530.

As the requested relief is similarly broad and sweeping in this case, the Defendants feel compelled to provide this Court with an analysis similar to Carson P. to demonstrate how this lawsuit would interfere with the plaintiff children's ongoing Family Court cases. Based on their Amended Complaint, these Plaintiffs would be asking this Court to issue an injunction requiring the State of Rhode Island to:

- Change its policies applicable to locating, relocating, and selecting placements for children; specifically,
    - Place children in licensed foster homes and expedite the licensing of kinship foster homes, (Amended Complaint ¶¶ 5, 133, 205);
    - Place siblings in same foster care (Amended Complaint ¶153);
    - Ensure renewal of licenses of foster homes (Amended Complaint ¶ 133, 205, 209);
    - Move children less frequently and to more appropriate placements, (Amended Complaint ¶5, 142, 145, 149-150);
    - Delay in reunifying children with their parents without providing services needed to ensure the children's safety, (Amended Complaint ¶5, 168);
    - Limit the use of institutional placement for children, (Amended Complaint ¶¶ 5, 137, 140);
    - Limit the placement time spent in emergency shelters and other temporary facilities, (Amended Complaint ¶¶138);
    - Adequately train, prepare, inform, support or monitor foster homes and institutions (Amended Complaint ¶¶ 133, 136, 185-186);
    - Pay foster care providers amounts which are sufficient to cover the expenses of the child's necessary care, (Amended Complaint ¶¶ 135, 216-218);
- Reduce the length of stay in state custody by developing and implementing better case plans, terminating parental rights more quickly, and recruiting prospective adoptive parents (Amended Complaint ¶5, 161-162, 166-167, 173, 178);
- Adopt policies aimed at providing better supervision of children in its care; specifically,
    - Limit HHS caseworker caseloads, and provide caseworkers with more experience and training (Amended Complaint ¶¶ 5, 144, 157, 177, 187-189, 197),
    - Monitor foster homes and supervise biological parents more closely during reunification or visitation, (Amended complaint ¶¶ 129, 164),

- Develop and implement case plans that address children's safety, medical, mental health, education and permanency needs, (Amended Complaint ¶¶ 5, 155-156, 179-181, 183);
- Afford access to visitation with family members, (Amended Complaint ¶154)
- Place children in foster homes as oppose to more costly institutions so that Rhode Island Title IV-V funding from the Federal Government (Amended Complaint ¶¶ 210-215).

Assuming this was the requested relief sought by the plaintiffs, this Court, similar to Nebraska, must determine whether a federal court order would interfere with ongoing proceedings before the Rhode Island Family Court. The Defendants submit that the answer to this question is a resounding "yes". Injunctive relief would place this Court in the position of: (1) "fundamentally changing the dispositions … of" the Rhode Island Family Court over abused or neglected children; (2) making dispositional decisions such as placement, reunification, visitation and services for abused or neglected children in this state; and (3) sitting in oversight of the R.I. Family Court. See J.B. 186 F.3d at 1291-1292[12]. See also, E.T. v. George, 681 F.Supp.2d 1151 (E.D. Calif. 2010)(United States District Court for the Eastern District of California abstained under Younger from addressing a lawsuit brought by abused and neglected children against the county

[12] The J.B. Court reasoned that:

> …plaintiffs federal action would interfere with this proceeding by fundamentally changing the dispositions and oversight of the children. The federal court would, in effect, assume an oversight role over the entire state program for children with disabilities. This places the federal court in the role of making dispositional decisions such as whether the return the child to his parents in conjunction with state assistance or whether to modify a treatment plan. These are the kind of decisions currently made by the New Mexico Children's Court through the periodic review process. The current suit would prevent the Children's Court from carrying out this function." Citations omitted.

dependency courts as the relief sought would interfere with ongoing cases)[13].

[13] Although the county court, chair of the judicial council, etc. were named Defendants in this lawsuit and allegations concerned the court's "overburdened caseload" do not render the District Court's Younger analysis and reasoning unsuitable to this lawsuit. Plaintiffs alleged in their complaint "critical dependency court systemic failures, which affect[ed] the lives of thousands of children." 681 F.Supp. 2d at 1160. Similar to this case, the E.T. plaintiffs argued that the federal court did not need to contemplate a remedy at the initial stage (motion to dismiss) but, rather, if they prevailed the federal court could issue a remedy that avoided Younger concerns. Id. at 1171. In finding that the lawsuit would interfere with ongoing state judicial proceedings, the District Court reasoned:

> The relief requested by plaintiffs in this case would necessarily interfere with their ongoing dependency court cases and those of the putative class. The requested declaratory relief calls into question the validity of every decision made in pending and future dependency court cases before the resolution of this litigation. Specifically, plaintiffs seek a finding that the number of lawyers currently provided are insufficient to perform the enumerated duties that they are required to perform under both state and federal law. Plaintiffs similarly seek a finding that they have not been granted meaningful access to the courts or appropriate consideration of their matters due to judicial caseloads. While plaintiffs contend that each individual plaintiff would still have to demonstrate prejudice in order to invalidate the decision rendered in each pending case, the court cannot overlook the practical impact of the proposed declaratory relief on the 5,100 active dependency court cases*;* this court's order would substantiate a finding of a constitutional or statutory violation in every one of those active cases. Even if not determinative in every instance, this finding would impact each of the putative class member's cases. …..
>
> ***
>
> Further, the broad and ill-defined injunctive relief requested by plaintiffs would impact the conduct of the proceeding themselves, not just the body charged with initiating the proceedings. See Joseph A., 275 F.3d at 1269. If the court finds constitutional or statutory violations based upon the amount of time or resources spent on juvenile dependency court cases, an injunction directed to remedying those violations would require the court to ensure that in each case the child was receiving certain services or procedures that the court has declared constitutional. Enforcement could not simply end with a policy directive to the Judicial Council, the AOC, or the Sacramento Superior Court, but would require monitoring of its administration.

Id. at 1172-1173. Footnote omitted.

2. The Child Welfare System Is An Important State Interest

"'Family relations are a traditional area of state concern." Moore v. Sims, 442 U.S. 415, 435, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). The state has a compelling interest in quickly and effectively removing victims of child abuse and neglect from their parents and placing them in safe and suitable homes. State conduct performed and proceedings instituted to protect children from abuse implicate sufficiently important state interests to justify Younger abstention. Moore, 442 U.S. at 435, 99 S.Ct. 2371 (applying Younger abstention to case challenging the state's temporary removal of a child from an allegedly abusive home environment).'" Carson P., 240 F.R.D. at 524. See also, Office of Child Advocate v. Lindgren, 296 F.Supp.2d 178, 193 (D.R.I.2004).

Plaintiffs have taken the position in this lawsuit that the child welfare system is not an important state interest for purposes of the second prong of Younger analysis. Contrary to Plaintiffs' position, this Court, the First Circuit and other federal courts acknowledge that a state's child welfare system is an area of important state interest for purposes of Younger and the Middlesex test. See Moore v. Sims, 442 U.S. 415, 434, 99 S.Ct. 2371, 2382, 60 L.Ed2d 994 (1979)("Family relations are a traditional area of state concern. This was recognized by the District Court when it noted the 'compelling state interest in quickly and effectively removing the victims of child abuse from their parents.'") Office of Child Advocate v. Lindgren, 296 F.Supp.2d 178, 193 (D.R.I. 2004)("This Court acknowledges the important and sensitive nature of Rhode Island's child welfare program and the Family Court's role regarding children in state care."); McLeod v. State of Maine Department of Human Services, 1999 WL 33117123 (D.Me. 1999), affirmed McLeod v. Maine Department of Human Services, 229 F.3d 1133, 2000

WL 869512 (1st Cir. 2000)(The District Court held that the "question of child custody implicates an important, if not paramount state interest."); Carson P., 240 F.R.D. 456, 524(D.Neb. 2007)("The state has a compelling interest in quickly and effectively removing the victims of child abuse and neglect from their parents and placing them in safe and suitable homes. State conduct performed and proceedings instituted to protect children from abuse implicate sufficiently important state interests to justify Younger abstention.").

Even cases repeatedly cited by Plaintiffs' in support of their position acknowledge that a child welfare system is an important state interest for the purposes of Younger. See Dwayne B. v. Granholm, 2007 WL 1140920, *5 (E.D.Mich.2007)("It is not disputed that Michigan has a strong interest in the welfare f children in its foster care system"); Kenny A. v. Perdue, 218 F.R.D. 277, 285 (N.D.Ga. 2003)("Nor is there any dispute that these proceedings implicate important state interests in the care, disposition and welfare of deprived children."). Defendants submit that the second prong of Younger has been satisfied.

3. The Plaintiffs Have An Adequate Opportunity To Advance Their Federal Constitutional Claims Before the Family Court.

This last prong of Younger requires this Court to determine whether the Rhode Island Family Court proceedings provide these federal plaintiffs the opportunity to raise their alleged federal claims. The Defendants submit that the Family Court provides each of these named plaintiffs the ability to address the various claims and, therefore, the Federal Court should abstain.

The issue before this Court is "not whether plaintiffs' claims were raised in the

pending state proceedings, but whether they could have been raised." Carson P., 240 F.R.D. at 530. It is the plaintiffs' burden to prove to this Court that their individual claims could not be adequately raised before the Rhode Island Family Court. Id. citing Moore v. Sims, 442 U.S. 415, 425, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979)("holding the district court should have abstained under Younger from considering a constitutional challenge to portions of Texas statutory scheme for investigating suspected child abuse, though not every issue, including whether its computerized system for collecting and disseminating child-abuse information was constitutional, had been raised in a state judicial proceeding.") Specifically, "[t]he plaintiffs must prove they could not have obtained a juvenile court ruling protecting them from …[DCYF's] allegedly unlawful conduct which caused them harm or the imminent risk of future harm, either because the …[Family Court] had no jurisdiction to consider the federal questions raised in this case, had no authority to award a remedy, or because the plaintiffs lacked adequate representation in that forum." Id. at 531. The plaintiffs cannot make this showing and sustain their burden.

The Carson P.Court recognized that:

> [t]he Nebraska juvenile court can exercise substantial control over HHS for the protection of a child, can issue rulings governing HHS' conduct on behalf of that child, and can modify or reject HHS's recommendations regarding a child's care and placement while in HHS custody. The plaintiffs each have a court-appointed guardian ad litem to assist in the juvenile court proceedings-an attorney and officer of the court statutorily obligated to act for the plaintiff and protect his or her interests. Neb.Rev.Stat. 43—272. (Footnote omitted).

Id. at 532. The Nebraska District Court found it of importance that each plaintiff child had a court appointed guardian ad litem to act in their best interest. Each plaintiff in this case has a court appointed guardian ad litem or CASA attorney representing their best

interests at each and every Family Court hearing. It specifically distinguished the situation in Nebraska from a case filed by Children's Rights in Georgia. In its decision, the Court noted that the right to legal representation was not available in the Georgia Children's' Rights case of Kenny A., Id. at fn 47. Additionally, the Nebraska Juvenile Court had the ability to address claims challenging the constitutionality of statutes. Id. at 531. Based on its analysis, the Carson P. Court determined that each of its individual plaintiffs could have raised the issues presented before the State's Juvenile Court. Id. at 532.

Similar to Nebraska, the Rhode Island Family Court is a court of limited jurisdiction; however, it also has "very broad power to issue rulings for the protection and welfare of children." Carson P., 240 F.R.D. at 531. See In re: Stephanie B., 826 A.2d 985, 992 (RI2003)("Generally, the Family Court is vested with broad powers over matters affecting children."); Carr v. Prader, 725 A.2d 291 (RI 1999). It is also important to note that the Rhode Island Family Court not only has exclusive original jurisdiction over abused or neglected children; but also, is vested with the authority "to declare rights, status, and other legal relations whether or not further relief is or could be claimed" under the state's Uniform Declaratory Judgment Act. R.I. Gen. Laws §9-30-1.

The Family Court has the authority to address constitutional claims that come before it. The Family Court has in the past ruled that DCYF has not made "reasonable efforts" at reunification and, based on this determination has dismissed DCYF's petition to terminate parental rights. See In re Manuel P., 889 A.2d 192 (2006)(The Family Court denied DCYF's petition to terminate parental rights of her two sons as the court found that DCYF failed to make referrals for alternative services recommended by

evaluating professionals). The Family Court is also empowered to address issues implicating constitutional dimensions. See In re: Destiny D., 922 A.2d 168 (RI 2007)(Issue of the parent's Fifth Amendment privilege raised and addressed) see also In re: Stephanie B., 826 A.2d 985 (RI2003)(The Rhode Island Supreme Court agreed with non-party that its due process rights violated by a Family Court procedure.).

As framed by the Carson P. Court, "… the precise question is not whether a … [Rhode Island Family Court] can be called upon to issue a ruling declaring that specific … [DCYF] policies violate the constitution or federal law. Rather, the plaintiffs must prove the …[family court] cannot adequately consider evidence of … [DCYF's] conduct or likely future conduct toward the individual plaintiffs, determine if such conduct violates their rights under federal constitutional or statutory law, and enter orders protecting the plaintiffs from …[DCYF's] allegedly unlawful conduct." 240 F.R.D. at 531. This Court should be mindful that:

> [a] " federal court should assume that the state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil Co., 481 U.S. at 14, 107 S.Ct. 1519. The court " will not engage any presumption ' that the state courts will not safeguard federal constitutional rights.'" Norwood, 409 F.3d at 904 (quoting Neal v. Wilson, 112 F.3d 351, 357 8th Cir.1997)(quoting Middlesex County Ethics Comm., 457 U.S. at 431, 102 S.Ct. 2515)).

Id. Like Carson P., plaintiffs lack any evidence that Rhode Island's Family Court and its judges are unaware of or unable to interpret the federal statutory or constitutional laws governing or impacting their rulings and procedures, nor to the extent a party claims federal law was violated at the juvenile court level, that appellate review is not available in the Rhode Island Supreme Court. Id. Indeed, since the Child Advocate has never intervened for any of the named plaintiffs in any Family Court proceeding, she cannot

even allege that such matters were presented to the Family Court, let alone rejected by them.

Plaintiffs claim that the Family Court cannot adjudicate or remedy systemic constitutional violations that are harming them. This is a remarkable and unsupported claim since plaintiffs' counsel have never approached the Family Court with any evidence that the Plaintiffs were in unsafe and inappropriate placements, were not receiving appropriate services or treatment despite the statutory authority and responsibilities of at least one counsel. Had such claims been brought before the Family Court during the numerous hearings and case reviews, the Family Court would have had an opportunity to address them.

The Rhode Island Family Court has the authority and opportunity to address the harms alleged by Plaintiff Children. The Family Court not only can address placement of children but, also has the final say over such placement and it has even directed a specific person with whom to place the children. The Family Court reviews each child's case plans, which detail the proposed treatment and placement for each child, addresses a permanency plan and requires documentation of the steps DCYF is taking with respect to permanent placement. R.I. Gen. Laws §42-72-10. If the Family Court disagrees, it has final say and can require that the case plan be modified. R.I. Gen. Laws §40-11-12.2. The Family Court has the authority and the procedural safeguards to address the harms Plaintiffs allege. Plaintiffs, however, never availed themselves of this resource for protection. [14]

[14] Other Federal Courts have accepted allegations that their respective state court was in insufficient venue to address systemic deficiencies and, thus, Younger did not apply. See

The Eleventh Circuit in 31 Foster Children addressed a similar argument offered by plaintiff children in an attempt to thwart abstention. The Eleventh Circuit rejected the argument, finding that the Florida state court "can remedy in a dependency proceeding the harms that a child in the defendants' custody and in that court's jurisdiction might suffer." 329 F.3d at 1279. The Eleventh Circuit found that the state court could address harms the plaintiffs had suffered by ordering that siblings be placed together in foster care, that a child be placed in a therapeutic setting and that if the state child welfare agency was not complying with the case plan it could be held in contempt. 329 F.3d at 1279-1280. The Eleventh Circuit further found that:

> …each of these plaintiffs is represented by counsel. There are no procedural constraints preventing them from presenting the claims in this case to the state courts in their dependency review hearings. They have not provided unambiguous authority establishing that the procedures available in state court dependency proceedings do not provide an adequate opportunity for them to raise their constitutional claims. At dependency review proceedings for each plaintiff in this case, the state court will consider whether the parties have complied with the child's case plan, the appropriateness of that child's current facility placement, educational placement, and any special needs the child has. Fla. Stat. §§ 39.701(7)(d), (g). If the Department is not complying with the case plan for the child, the court can hold it in contempt. Id. §§ 39.701(8)(c), (g). If the plaintiff claims that he is in an unsafe and inappropriate placement, as we have already noted, the court can order the Department to comply with the case plan by putting him in a safe and appropriate place. Id. §§ 39.601(3)(e); 39.701(8)(c). If the plaintiff claims that he has been in foster care longer than reasonably necessary, the court can require the Department to document the steps that it is taking toward permanent placement. Id. § 39.701(f). If the plaintiff has not been placed with his siblings, the court can order them be placed together or it can require visitation between them. See Div. of Family Servs. v. S.R., 328 So.2d 270, 271 (Fla. 1st DCA 1976).
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> The availability of these forms of relief and the existence of the state courts' protective order and contempt powers mean that the plaintiffs have

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Dwayne B. v. Granholm, 2007 WL 1140920 (E.D.Mich 2007); LaShawn A. v. Kelly, 990 F.2d 1319 (D.C. Cir. 1993); Kenny A. v. Perdue, 218 F.R.D. 277 ((N.D.Ga.2003).

> not carried their burden of establishing that the ongoing state court proceedings do not provide an adequate opportunity to raise and vindicate each plaintiff child's individual claims. Therefore, the third and final Middlesex factor is satisfied. The district court did not abuse its discretion in abstaining under the Younger doctrine.

329 F.3d at 1282. Footnote omitted. In its decision, the Eleventh Circuit acknowledged that the D.C. Circuit rejected Younger abstention in similar case, LaShawn A. ex rel. Moore v. Kelly, 990 F.2d 1319, 1323-24 (D.C.Cir.1993), but found that case to be distinguishable. Id. fn 12.

The United States District Court for the District of Nebraska addressed the same argument in opposition to the third prong and was not persuaded. 240 F.R.D. at 531-532. The Carson P. Court found that:

> The Nebraska juvenile court can exercise substantial control over HHS for the protection of a child, can issue rulings governing HHS' conduct on behalf of that child, and can modify or reject HHS's recommendations regarding a child's care and placement while in HHS custody. The plaintiffs each have a court-appointed guardian ad litem to assist in the juvenile court proceedings-an attorney and officer of the court statutorily obligated to act for the plaintiff and protect his or her interests.

240 F.R.D. at 532. Footnote Omitted. The Carson P. Court further found that the issues could have been raised before the juvenile court and, as such, the third prong had been satisfied and abstention appropriate.

In line with the reasoning in 31 Foster Children and Carson P., the Rhode Island Plaintiffs' claim that the state Family Court is an inappropriate forum to address its constitutional claims must fail. Plaintiffs cannot sustain their burden of proof and demonstrate an absence of evidence to support for the third prong of Younger.

Plaintiffs' further attempt to avoid Younger abstention with yet another sweeping allegation – that the Family Court is not an appropriate forum to entertain a class action

lawsuit. Plaintiffs' argument is premature and presupposes that this Court will certify a class. Moreover, the Carson P. Court rejected a similar argument that the Nebraska state juvenile court was an inappropriate forum to address a class action in an attempt to thwart the application of Younger. Id. at 531. The Carson P. Court denied the motion to certify a class, however, it went on to state that "as the court held in Joseph A. ex rel. Corrine Wolfe v. Ingram, 275 F.3d 1253, 1274 (10th Cir.2002), there is no persuasive authority holding "that a party is entitled to avoid the effects of the Younger abstention doctrine in cases where relief is available to individual litigants in ongoing state proceedings but not to represented parties in a class action." Joseph A., 275 F.3d at 1274.´" Id. Carson P. acknowledged that the federal courts in Kenny A., 218 F.R.D. at 287. Brian A. ex rel. Brooks v. Sundquist, 149 F.Supp.2d 941, 957 (M.D.Tenn.2000) were in disagreement with its ruling but found them distinguishable. *Id*. at fn 46.

Contrary to Plaintiffs' assertions, the third prong of the Younger analysis has been satisfied in this case. The Rhode Island Family Court provides the Plaintiffs an adequate opportunity to advance their constitutional claims. The fact that Plaintiffs never raised the alleged harms or constitutional claims in the numerous hearings convened before the Family Court or that the Child Advocate, who never sought to intervene in any of these cases, has proclaimed that it would be "inefficient and ineffectual to raise these claims in myriad Family Court proceedings" is insufficient to avoid Younger abstention.

The prerequisite elements for Younger abstention are present in this case. The pending Family Court proceedings are the type envisioned by Younger and its progeny. The three prong test has been satisfied. Plaintiffs sweeping assertions and assumptions of class certification are an insufficient basis to deny the application of Younger. The

Defendants pray that this Court abstain from entertaining this lawsuit and grant their Motion to Dismiss the Amended Complaint.

d. Office of Child Advocate v. Lindgren

This Younger analysis would not be complete without addressing the case of Office of Child Advocate v. Lindgren, 296 F.Supp.2d 178 (D.R.I. 2004). The Lindgren case is so factually distinguishable from this case as to be inapposite.

In Lindgren, the defendant filed a motion to vacate a consent decree (pursuant to F.R.C.P. 60(b)) that had been entered into twelve (12) years before. One of the grounds that defendant relied on in support of the motion to vacate was the Younger Doctrine. Ultimately the Lindgren Court rejected Younger abstention, however, it expressly stated that it concluded that "no federal abstention rules relate to a basis for vacating the … [consent decree] in any event." 296 F.Supp.2d at 189. Additionally, the Lindgren Court determined that the facts of its case did not warrant abstention because there was no known pending state proceeding with which the Court's judgment would interfere. Id. at 190. In Lindgren, the suit was filed in the name of the Child Advocate and not individual minor plaintiffs as is the present case. The children named in the motion to adjudge the defendant in contempt did not have a case pending before the Rhode Island Family Court and, in fact, they were no longer minors. The Lindgren Court stated that:

> Defendant has not made a showing that there is a pending state proceeding regarding any child involved in this case. That is obviously because Plaintiff has not brought the motion to adjudge in contempt on behalf of any specific child in DCYF custody. Although the question of abstention may recur when the Court hears that motion on its merits, it is not an issue now. One thing is clear. Although the Family Court retains jurisdiction over children in state custody, that Court has no present jurisdiction over any of the three children referred to in Plaintiff's Complaint because those children are presently in their thirties. All that this Court can say now in view of the present posture of this case, is that enforcing the SACD will

> not interfere with any known Family Court proceeding or decision. Since there is no known ongoing state proceeding regarding any child involved in the case at present, there is no basis for this Court to abstain under Younger v. Harris at this time.

Id. at 191.

Unlike the Lindgren case, the ten (10) named Plaintiffs have or had current and ongoing cases pending before the Rhode Island Family Court; each Plaintiff is still a minor; each Plaintiff has a CASA attorney or guardian ad litem acting in their best interest in the Family Court proceedings; the Child Advocate has a right if not a duty to intervene on behalf of each plaintiff if she believes there is a need to do so; and the federal court proceedings or a ruling thereon would interfere with the ongoing Family Court proceedings. Moreover, this case is before the Court in the procedural posture of a motion to dismiss the complaint under F.R.C.P. 12(b)(1) rather than a twelve (12) year old consent decree.

Based on the foregoing, the Lindgren decision should not be used as a sword to defeat the instant motion to dismiss this Complaint.

e. Cases from Other Jurisdictions

Defendants direct this Court to the decisions of the Tenth and Eleventh Circuits as well as the District Courts of Nebraska and California in support of Younger abstention. See 31 Foster Children, supra., JB. v. Valdez, supra., Carson P., supra., Laurie Q. v. Contra Costa County, 304 F.Supp.2d 1185, 1203-1207(N.D.Calif. 2004). Both 31 Foster Children and Carson P. involved the same class of plaintiff children, abused or neglected children in state foster care, the same defendants, the state's governor and child welfare agency and the same legal counsel for plaintiffs, Children's Rights. These federal courts acknowledged the duties and responsibilities of their individual family/juvenile courts to

abused or neglected children and explained, in practical and real terms, how the plaintiffs' lawsuit would interfere with the day to day responsibility and authority of the state court in the ongoing children's cases. The Tenth Circuit and the District Court for the Northern District of California performed similar analysis for lawsuits filed by disabled children in state custody and found that Younger precluded the lawsuit in light of the children's pending state court cases. See J.B.v. Valdez, supra. and Laurie Q., supra.

Although addressing a different group of plaintiffs, mentally and developmentally disabled children in state custody, the Tenth Circuit in J.B. v. Valdez, 186 F.3d 1280, 1291-1294 (10th Cir. 1999) abstained from entertaining a lawsuit seeking to structural reform New Mexico's system for treating children in custody who suffered from mental or developmental disabilities. The Tenth Circuit found that given the New Mexico Children's Court's review of the child's case, at a minimum biannual, and its ability to modify the child's disposition constituted an ongoing interference. The Tenth Circuit further reasoned that the federal action would interfere with the Children's Court proceedings for the children as it could fundamentally change the dispositions and have the federal court sit in a position of oversight of the state court. Id. at 1291-1292. Having found the three-part test of Younger had been satisfied, the Tenth Circuit found abstention was appropriate.

Plaintiffs previously identified federal lawsuits filed on behalf of abused or neglected children alleging systemic deficiencies in state child welfare system where federal court have declined to abstain under Younger. It was argued in these suits that Younger abstention was not appropriate because the lawsuit and requested remedy were

directed at the executive branch of state government. However, there exist factual differences between the Rhode Island Family Court and their respective state court to render the persuasive value of their decisions suspect.

In Kenny A. v. Perdue, 218 F.R.D. 277, 285 (N.D.Ga.2003), a case relied on by Plaintiffs, the District Court for the Northern District of Georgia found that the state defendants waived their right to raise Younger abstention because they removed the lawsuit from state to federal court. Despite finding waiver, the District Court went on to perform a cursory review of the doctrine and find it would not bar the federal suit proceeding. The present case is distinguishable from Kenney A. because: (1) in Georgia, "once the juvenile court grants legal custody of a child to DFCS, the Court is powerless to order DFCS to give physical custody of the child to a particular foster parent or otherwise restrict the actual placement of the child", 218 F.R.D. at 287 n.6; (2) plaintiffs alleged ineffective representation for the children due to being overburdened, Id., an issue not raised here; and (3) the District Court blindly accepted plaintiff's counsels representation that any injunctive relief would only run against the state's executive branch and would not interfere with the juvenile court's proceedings, Id. at 286. As to the issue of interference from proposed injunctive relief, the District Court noted that Plaintiff's request was "somewhat unclear", asking the Court to issue a permanent injunction "enforcing a long list of alleged constitutional and statutory rights"; however, Defendants "did not attempt to identify specific remedies that would interfere with state court proceedings." Id. at 286, fn 5. The Court held that "[g]iven the lack of specificity in both plaintiffs' prayer for relief and the State Defendants' request for abstention, the Court's analysis is necessarily limited to the general nature of the relief sought." Id.

Taking a page from the District Court in Carson P., the Defendants have attempted to provide this Court with what potential relief may look like that would interfere with the Rhode Island Family Court's authority and decisions for abused or neglected children under its jurisdiction.

Other cases relied on by plaintiffs are equally distinguishable from the facts of this case and Rhode Island's Family Court. In LaShawn A. v. Kelly, 990 F.2d 1319 (D.C.Cir. 1993), cert. denied, 510 U.S. 1044 (1994), the D.C. Circuit Court, addressed the issue of and declined to invoke Younger abstention despite it not being raised at the district court. Although it briefly reviewed the general nature of the proceedings of the Family Division of the D.C. Superior Court for abused or neglected children, the LaShawn Court did not address the claims of the individual plaintiff children. Rather, the LaShawn Court explained that abstention was not appropriate because "there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law." 990 F.2d at 1323. The Eleventh Circuit in 31 Foster Children found the LaShawn Court's reasoning unpersuasive when evaluating the third prong of the Younger analysis.[15]

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[15] The Eleventh Circuit in 31 Foster Children explained: "[i]n LaShawn A. ex rel. Moore v. Kelly, 990 F.2d 1319, 1323-24 (D.C.Cir.1993 that the District of Columbia's "juvenile review proceedings did not provide the plaintiffs an adequate opportunity to raise their constitutional challenges. The plaintiffs in that case brought a class action on behalf of children who were in foster care under the supervision of the District of Columbia Department of Human Services, alleging widespread federal constitutional and statutory violations. The D.C. Circuit affirmed the district court's decision that Younger abstention was not warranted after noting that the family court had "explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on

The District Court for the Eastern District of Michigan in Dwayne B. v. Granholm, 207 WL 1140920 (E.D.Mich.2007) and the District Court in Tennessee in Brian A. v. Sundquist, 149 F.Supp.2d 941, 957 (M.D.Tn.2000) relied on the LaShawn A. reasoning that the states' juvenile courts were not "more appropriate vehicles for adjudicating the claims raised in this putative class action" given the "multifaceted request for broad based relied". These cases do not provide a persuasive analysis nor are they relevant to this suit in light of the authority and active role of the Rhode Island Family Court on the issues of placement, services and permanency goals for abused or neglected children.

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federal law" in In re Brim, No. 489-80 (D.C.Super.Ct. July 20, 1984). In the *Brim* case the family court had denied a motion by two children for injunctive relief against the Department for its alleged mishandling of Social Security disability payments it had collected on the children's behalf and noted that the appropriate forum for such issues is federal court. LaShawn A., 990 F.2d at 1323. The D.C. Circuit therefore rejected Younger abstention because "there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law." Id.

The Eleventh Circuit went on to state: "[i]n contrast to the D.C. Circuit, however, in this circuit's Younger decisions, we have not determined whether the broad relief the plaintiffs would prefer is available but instead whether the forum itself is adequate for addressing the claims and providing a sufficient remedy to the individual plaintiffs. In the Luckey case, the plaintiffs sought broad-based injunctive relief to reform Georgia's indigent defense system. Luckey V, 976 F.2d at 676. Although we did not expressly address the third Middlesex factor in our opinion in that case, we did affirm the district court's decision to abstain under *Younger*. Id. at 679. The decision turned on the fact that the Luckey plaintiffs could have brought their challenges in their individual criminal trials, even though it is obvious that the broad-sweeping remedy they sought was unavailable there. "Equity need not intervene immediately in plaintiffs' state trials. Plaintiffs have an adequate remedy *at law* for any ineffective assistance of counsel they may actually receive. Most important, they can present objections to sixth amendment violations at their state trials and in their state appeals." Luckey v. Harris, 896 F.2d 479, 482 (11th Cir.1989) ("Luckey II ") (Edmondson, J., dissenting)."
329 F.3d at 1281.

ii. ABSTENTION BASED ON THE ROOKER-FELDMAN DOCTRINE

The Defendants submit that this Court lacks subject matter jurisdiction and, therefore, should abstain from entertaining Plaintiffs' Complaint based on the Rooker-Feldman Doctrine. The Rooker-Feldman doctrine precludes "the losing party in state court [from filing] suit in federal court after the state proceedings [have] ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." Coggeshall, 604 F.3d at 664(citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)). "Federal courts' application of the Rooker-Feldman doctrine "does not depend on what issues were actually litigated in the state court." Miller v. Nichols, 586 F.3d 53, 59 (1st Cir. 2009)(citing Maymo-Melendez v. Alvarez-Ramirez, 364 F.3d 27, 33 (1st Cir. 2004)) Footnote omitted.

Although the named children are not the traditional plaintiffs in Rooker-Feldman cases, they nonetheless are properly characterized as losing parties to a state court action based on the allegations in the Amended Complaint.[16] First, the children were represented by legal counsel, who are statutorily required to advocate for their best interest during the Family Court proceedings. As any party, the Plaintiff Children through legal counsel had the opportunity to address the Family Court and advocate for a decision believed to be in their best interest. In their Amended Complaint, it is alleged

[16] The State defendants acknowledge that the Tenth Circuit declined to apply the Rooker-Feldman Doctrine in the Carson P. case as it opined that its plaintiffs did not seek reversal of any prior juvenile court rulings. 240 F.R.D. at 522. The Carson P. Court reasoned that plaintiffs "requested injunction seeks HHS policy changes that may affect the outcome of future juvenile court review proceedings, but this requested relief will not effectively reverse past rulings" and as such was not attempting to appeal a state court judgment. *Id*. at 522-523.

that the plaintiff children were harmed and their rights violated by inappropriate placements; placements that were the subject of review and approval by the Family Court. To the extent that the Plaintiffs' claim that they suffered a constitutional violation because of these inappropriate, judicially supervised placements, it is not unreasonable to characterize Plaintiff Children in such circumstances as "losing parties" for purposes of the Rooker- Feldman Doctrine. The underlying reason for abstaining under Rooker-Feldman should not be disregarded out of hand because standard civil litigation titles do not translate to Rhode Island Family Court proceedings. There are numerous examples in this case where the plaintiffs are claiming an injury from a Family Court order and are asking this Court to find the Family Court was wrong. Although the plaintiffs frame this Amended Complaint as seeking prospective relief – in order for this Court to grant this remedy it must first find that the Family Court was wrong in its orders and plaintiffs suffered injuries as a result.

By way of example, in the case of David T., the Amended Complaint alleges that his constitutional and statutory rights were violated by failing to provide him with appropriate, least-restrictive placements and by failing to provide necessary and appropriate permanency and adoptive services." Amended Complaint ¶68. In seeking prospective relief, Plaintiffs ask this Court to make such a finding. If this Court were to take this action, however, it would be finding that the Family Court's orders approving of DCYF's placements of David and the Family Court's findings "that DCYF had documented a reason why return home, adoption or guardianship placement with a relative was not an appropriate permanency goal" were wrong and actually caused David

T. harm. This Court is precluded by the Rooker-Feldman doctrine from taking such action.

Yet another example, plaintiffs allege that Defendants violated Sam and Tony's constitutional and statutory rights by failing to provide necessary and appropriate permanency and adoptive services. Amended Complaint ¶33. In seeking prospective relief, Plaintiffs ask this Court to make such a finding. If this Court were to take this action, however, it would be finding that the Family Court's orders of July 6, 2006 and January 11, 2007 which found that DCYF was making reasonable efforts to finalize a permanency goal of adoption or guardianship for both children were wrong or resulted in harm to the brothers. This Court is precluded by the Rooker-Feldman doctrine from taking such action.

By way of another example, plaintiffs allege that Defendants have violated Danny and Michael's constitutional and statutory rights by failing to develop and implement an appropriate permanency plan in a timely manner to allow them to secure a permanent home. Amended Complaint ¶95. In seeking prospective relief, Plaintiffs ask this Court to make such a finding. If this Court were to take this action, however, it would be finding that: the Family Court's findings at November 29, 2006 and March 28, 2007 hearings that DCYF was making reasonable efforts to finalize a permanency goal of adoption or guardianship for both children were wrong or resulted in harm to the brothers. This Court is precluded by the Rooker-Feldman doctrine from taking such action.

Although the Plaintiffs have previously claimed that they do not seek to reverse any Family Court Orders, such representations are disputed by the allegations of inappropriate placements, languishing without a prospect of permanency and lack of

services set forth in the Amended Complaint and the terms of the orders and decrees of the Family Court either directly or through approval of the case plan, approving specific placements and services to Plaintiff Children. It is their own characterizations in the Amended Complaint that make the plaintiff children "losing parties" to a state court action before this Court and by requesting for a declaration that they have suffered constitutional wrongs from placements, services and lack of permanency they seek to contest state court orders. Through the allegations in the Amended Complaint and the request for declaratory relief, the plaintiff children should be precluded from pursuing his suit under the Rooker-Feldman.

Wherefore, the Defendants submit that this Court should abstain and dismiss this case based on the Rooker-Feldman Doctrine.

B. THE FEDERAL COURT SHOULD GRANT DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AS NO PRIVATE RIGHT OF ACTION EXISTS

The provisions of the AACWA cited by Plaintiffs do not create private enforceable rights and, therefore, should be dismissed under Rule 12(b)(6). Plaintiffs claim that the Defendants violated the rights conferred upon them by the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. §§621-629(i), 670-679(b) and its regulations promulgated under the Code of Federal Regulations (hereinafter referred to as "AACWA"). However, Plaintiffs mischaracterize "benefits" and "interests" as a "private right" under the AACWA in order to pursue their claims under 42 U.S.C. §1983.

i. AACWA

The federal statutory provision that plaintiffs bring their claims under is the

AACWA. The AACWA was enacted under the spending clause. "[It] .. comprises Parts B and E of Title IV of the Social Security Act and is a federal funding statute that establishes a program of payments to states for foster care and adoption assistance. 42 U.S.C. §§620-628, 670-679a." 31 Foster Children, 329 F.3d at 1270. "A State will be reimbursed by the Federal Government for certain expenses it incurs in administering foster care and adoption services, if it submits a plan for approval by the Secretary of Health and Human Services." Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 1362, 118 L.Ed.2d 1 (1992). "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." Gonzaga University v. Doe, 556 U.S. 273, 279, 122 S.Ct. 2268, 2273, 153 L.Ed.2d 309 (2002)(citing Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28, 101 S.Ct. 1531, 67 L.Ed.2w 694 (1981)). As it pertains to legislation enacted pursuant to the spending power, the United States Supreme Court has unequivocally stated that "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by §1983. Gonzaga, 556 U.S. at 279, 122 S.Ct. at 2273.

ii. Seeking to enforce the AACWA under 42 U.S.C. §1983

"Not all violations of federal law give rise to §1983: '[the] Plaintiff must the assert the violation of a federal right, not merely a violation of federal law.'" Rio Grande Community Health Center, Inc .v Rullan, 397 F.3d 56, 73 (1st Cir. 2005)(citing Blessing v. Freestone, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997)). Rather, the

right alleged must be "'unambiguously conferred' by the statutory provision." Rio Grande, 397 F.3d at 72-73.

The United States Supreme Court established a "three part test to act as guidance in determining whether a provision creates a 'right' that is enforceable under §1983." Id. at 73. The Blessing test requires a plaintiff to demonstrate "three principal factors [to] determine whether a statutory provision creates a privately enforceable right: (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State." Blessing, 520 U.S. 329, 329-330, 117 S.Ct. 1353, 1354, 137 L.Ed.2d 569 (1997). This test is a guide as congressional intent is the ultimate inquiry. Rio Grande, 397 F.3d at 73.

The United States Supreme Court "tightened up" the Blessing testing in Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Id.

iii. Evaluating the Existence of Enforceable Rights under Gonzaga.

The United States Supreme Court "did not precisely follow the Blessing test [in Gonzaga] but, rather, relied on several slightly different factors in determining whether a right existed: whether the provision contains 'rights-creating language,' whether the provision had an aggregate as opposed to an individualized focus, and the other sorts of enforcement provisions that Congress has provided for." Id.

In Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) the Supreme Court provided applied the Blessing test to determine whether a federal statutory spending provision created a private right of action. In Gonzaga, John

Doe, a former undergraduate of Gonzaga University, needed an affidavit of good moral character from a dean of the school as a prerequisite for a teaching position at a Washington public school. 536 U.S. at 277, 122 S.Ct. at 2272. Gonzaga University declined to provide this attestation and in fact contacted the Washington public school system and discussed its reasons for its position. Id. Doe filed a lawsuit alleging state tort and contract claims, but also a claim under the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Id. The Washington Court of Appeals reversed a jury verdict in favor of Doe on the FERPA claim; in so doing it found that FERPA did not create individual rights and was not enforceable under §1983. 536 U.S. at 278, 122 S.Ct. at 2272. On appeal the Washington Supreme Court disagreed and held that FERPA's nondisclosure provision provided a federal right enforceable under §1983. Id.

The United States Supreme Court explained: "Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records. The Act directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails to comply with these conditions." 536 U.S. at 278, 122 S.Ct. at 2272-2273.

> In holding that FERPA does not create a right enforceable under §1983, the Supreme Court explained that the act lacks " rights-creating" language critical to showing congressional intent to create new rights. Instead, the act speaks only to the Secretary of Education, directing him to withhold funds if the prohibited practice exists. Gonzaga, 536 U.S. at 287, 122 S.Ct. at 2277. The Court contrasted FERPA's language that " [n]o funds shall be made available," with the individually focused language of Titles VI and IX, which mandate that " [n]o person ... shall ... be subjected to discrimination," statutes that do create enforceable rights, see Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). The Court concluded in Gonzaga that the focus of FERPA is " two steps removed from the interests of individual students and parents." 536

> U.S. at 287, 122 S.Ct. at 2277. Instead of creating an enforceable duty on the part of the school, the act only imposed a duty on the part of the federal government-the duty to withhold funds.
>
> A second reason the Supreme Court gave in Gonzaga for concluding that FERPA does not create enforceable rights is that its nondisclosure provisions speak only in terms of institutional policy and practice, not about " individual instances of disclosure." Id. at 288, 122 S.Ct. at 2278. The provisions therefore have an aggregate focus, instead of a concern for " whether the needs of any particular person have been satisfied." Id. (citation omitted). Also thought significant is the fact that institutions can avoid funding termination under FERPA by substantial compliance with the act's requirements; compliance in every case is not necessary to avoid loss of funding. Id.
>
> Finally, the Supreme Court considered in Gonzaga the mechanism that Congress chose to provide for enforcing the provisions of FERPA. The act expressly authorizes the Secretary of Education to " deal with violations" of it and to establish a review board for investigating and adjudicating such violations. 20 U.S.C. §1232G(f). The Secretary's regulations create an office to act as a review board, and students can file individual written complaints with that office. This review mechanism, the Court concluded, evidences a congressional intent to avoid the multiple interpretations of FERPA that might arise if the act created enforceable individual rights. *Gonzaga*, 536 U.S. at 289-90, 122 S.Ct. at 2278-79.

31 Foster Children, 329 F.3d at 1269-1270.

In evaluating claims brought by similar plaintiff children brought under the AACWA, the Eleventh Circuit in 31 Foster Children stated that the lesson it was taking from Gonzaga was:

> … to look at the text and structure of a statute in order to determine if it unambiguously provides enforceable rights. If the text and structure " provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." Id. at 286, 122 S.Ct. at 2277. If they provide some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite " clear voice." Ambiguity precludes enforceable rights. Id. at 280, 122 S.Ct. at 2273. The first Blessing requirement, which is what Gonzaga addressed, is that Congress must have intended that the provision in question benefit the plaintiff. Factors to consider in determining if it did include whether the statute: (1) contains " rights-creating" language that is individually focused; (2)

> addresses the needs of individual persons being satisfied instead of having a systemwide or aggregate focus; and (3) lacks an enforcement mechanism through which an aggrieved individual can obtain review.

31 Foster Children, 329 F.3d at 1270. The Eleventh Circuit provided this degree of analysis to the plaintiff foster children's claim that Florida's DCF system violated their rights under §§675(5)(D) and (E) of the AACWP in 31 Foster Children. The Eleventh Circuit held that §§675(5)(D) and (E): did "have the kind of focused-on-the-individual, rights creating language required by Gonzaga" that would create a private right nor did the AACWA contain a mechanism by which aggrieved individuals could enforce its provisions. Id. at 1272.

iv. Suter , Post-Suter and Congress's Intent

Plaintiffs previously argued that Congress has clearly signaled that it intended "State Plan" provisions of the Social Security Act to be privately enforceable in an effort to pursue the claims they assert under the AACWA. In an effort to demonstrate "Congressional intent," Plaintiffs referred Judge Lagueux to the circumstances surrounding the United State Supreme Court's decision in Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992). Defendants submit that the amendments and records that Plaintiffs' referred to do not demonstrate with a clear voice that Congress intended the provisions of the AACWA to create private individual rights that are enforceable under 42 U.S.C. §1983.

In Suter, the United States Supreme Court ruled that §671(a)(15)[17] of the AACWA did not confer enforceable rights to be pursued under 42 U.S.C. §1983. 503

[17] As relevant here, §671(a)(15) provides:
" (a) Requisite features of State plan
" In order for a State to be eligible for payments under this part, it shall have a plan

U.S.347, 363, 1123 S.Ct. 1360, 1370. In so reaching, the Suter Court analyzed §671(a)(15) under Blessing to determine whether "Congress in enacting the Adoption Act unambiguously conferred upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family." Suter, 503 U.S. at 357, 112 S.Ct. 1360." The Suter Court found that § 671(a)(15) did not unambiguously confer an enforceable right on individual children within the child welfare system because only "a rather generalized duty" was imposed upon the state "to be enforced not by private individuals, but by the Secretary" in the manner set forth in the AACWA. *Id.* at 363, 112 S.Ct. 1360.

Congress amended the Social Security Act in 1994; specifically mentioning the Suter decision. This amendment, commonly referred to as the "Suter-fix," did not overrule the Supreme Court's decision, but rather "only foreclose[d] the refusal to find a federal right enforceable under § 1983 because the statutory provision may be included in a section requiring a State plan or specifying the required contents of such a plan." Charlie H. v. Whitman, 83 F.Supp2d 476, 484 (D.N.J.2000).

Defendants disagree with Plaintiffs prior argument that the legislative history of the "Suter fix" "makes it clear that Congress intended the provisions of AACWA (other

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approved by the Secretary which-

" (3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

" (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home...."

than §671(1a)(15)) and other "State plan" programs to be privately enforceable, and that the purpose of the "Suter fix" was to confirm the intent" that individuals should have the right nor to be denied any service or benefit under the AACWA. Plaintiffs failed to acknowledge that in House Report 102-631 (at 366) Congress also stated that:

> This provision is therefore intended to restore to an aggrieved party the right to enforce, as it existed prior to the Suter v. Artist M. decision, the Federal mandates of the State plan titles of the Social Security Act in the Federal courts. *This provision is not intended to expand upon enforceable rights created under the State plan titles of the Social Security Act. Nor is this provision intended to define, clarify, or establish standards for determining whether States have made "reasonable efforts" to prevent the need for foster care placement or to reunify children with their families after placement* as required by the Adoption Assistance and Child Welfare Act (Title IV-E of the Social Security Act).

Emphasis Added. The end result is that courts are left to conduct an analysis in line with the standards set forth in Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) and Blessing v. Freestone, 520 U.S. 329, 329, 117 S.Ct. 1353, 1354, 137 L.Ed.2d 569 (1997). Congress granted Plaintiffs no greater rights after the "Suter fix" amendment; any intimations by Plaintiffs to the contrary are wrong.

v. First Circuit

After Gonzaga[18], the First Circuit addressed the issue of whether a federal

[18] Prior to Blessing and Gonzaga, the First Circuit issued a decision in Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983) that ruled that an AACWA case plan provision created an enforceable right; however, the primary reason for reaching this decision was driven by the First Circuit's reasoning that there was an otherwise lack of remedy available to an individual. 719 F.2d at 509-512. Given the body of case law on the precise issue and amendments to the AACWA that have occurred since the First Circuit rendered its decision in Lynch in 1983 precedential value must be greatly questioned. Since Lynch was issued, the United States Supreme Court has issued Blessing v. Freestone, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 855 (1997), Wilder v. Virginia Hospital Ass'n., 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), Suter (although limited given the amendment to the AACWA), Gonzaga, Congress's amendment to 42 U.S.C. § 674 – to

statutory scheme created enforceable rights for a discrete group or individual in Bryson v. Shumway, 308 F.3d 79, 88 (1st Cir. 2002); Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004) and Rio Grande, supra. As summarized by the Rio Grande Court,

> In Bryson, we held that a provision, 42 U.S.C. § 1396a(a)(8), stating that state Medicaid plans must provide that medical assistance "shall be furnished with reasonable promptness to all eligible individuals" was enforceable by Medicaid recipients under § 1983. 308 F.3d at 88-89. We utilized the Blessing test and noted that the provision included the benefited class, "eligible individuals," within its terms, that the provision was not vague, and that the "shall" language was intended to bind the states. Id.
>
> On the other hand, in Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir.2004), this court held that a different provision, 42 U.S.C. § 1396a(30)(A), was not enforceable by a group of Medicaid providers suing for higher reimbursement rates under § 1983. The provision states that the state plan must provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ... as may be necessary ... to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. 42 U.S.C. §1396a(a)(30(A). The provision contained no "rights-creating language," identified no "discrete class of beneficiaries," focused on the state as a regulated entity rather than any individuals protected, and set out broad, general goals. See Ferguson, 362 F.3d at 56-57.[FN11]
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> > FN11. In the same opinion, however, the court assumed that a different provision, 42 U.S.C. § 1396a(a)(13)(A) (State plan should provide "for a public process for determination of rates of payment

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name a few. Moreover, courts have held that it is only after finding that the statutory language clearly manifests an intent to create and enforceable right does one turn to whether a remedy exists. The questionable value of the Lynch decision may be evidence by the District Court of New Hampshire's decision in Eric L. v. Bird, 848 F.Supp. 303, 312 (D.N.H. 1994), which held that the "plaintiff enjoy no enforceable rights" to "compel New Hampshire's full implementation of the programs" under 42 U.S.C. § 627(a)(2)(B), the predecessor to 42 U.S.C. § 622(b)(10)(B)(ii), because the provision "places no direct obligation on the state".

> under the plan for hospital services, nursing facility services, and services of intermediate care facilities"), was enforceable under section 1983 because it contained "rights-creating language" and was narrowly written with a discrete class of beneficiaries in mind. Ferguson, 362 F.3d at 56-57.

397 F.3d at 73.

The Rio Grande Court found that plaintiff, a federally qualified health center, had a cause of action under §1983 against Puerto Rico's Secretary of Health for wrap around payments under the Medicaid Act. Id. at 75-76. The Rio Grande Court ruled that the Medicaid provision at issue[19] satisfied Gonzaga as it spoke to a "specific, discrete beneficiary group within the statutory text", the language was mandatory and had a "clear focus on the benefited [health centers], rather than the regulated states and it spoke in individualistic rather than the aggregate terms. 307 F.3d at 74. Defendants submit hat the AAWCA provisions at issue in this case do not satisfy the same Gonzaga requirements.

[19] The Medicaid provision sought to be enforced by the health center was the wraparound requirement for FQHCs, 42 U.S.C. § 1396a(bb)(5), which reads as follows:

> (A) In general
> In the case of services furnished by a [FQHC] ... pursuant to a contract between the center or clinic and a managed care entity ..., the State plan shall provide for payment to the center or clinic by the State of a supplemental payment equal to the amount (if any) by which the amount determined under [the earlier paragraphs describing the PPS payment system] of this subsection exceeds the amount of the payments provided under the contract.
> (B) Payment schedule
> The supplemental payment required under subparagraph (A) shall be made pursuant to a payment schedule agreed to by the State and the [FQHC] ..., but in no case less frequently than every 4 months.

397 F.3d at 74.

vi. Plaintiffs' claims

The sections of the AACWA that Plaintiffs seek to enforce do not create personal rights, as defined as enforceable under 42 U.S.C. §1983. Plaintiffs previously argued that Congressional intent to provide enforceable rights can be shown in the AACWA sections they rely on can be inferred from the mere conclusion the word "child" or "children." The mere reference to the words "child" or "children" do not by themselves demonstrate an "individualized focus" under Gonzaga or Congress's intent to create a federally enforceable right. In fact, §671(a)(15) contains the word "child" in several places and the Suter Court nonetheless found that the provision did not create enforceable rights. As the Gonzaga Court held, "it is *rights,* not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section." Gonzaga, 536 U.S. 273, 283, 122 S.Ct. 2268, 2275. Plaintiffs fail to make this all-important distinction. They simply fail to focus on the phrasing of the sections – a fatal flaw in their analysis[20].

Defendants submit that, in line with the First Circuit's applications of Gonzaga, the Plaintiffs have failed to demonstrate that Congress spoke with a "clear voice" and manifested an "unambiguous" intent to confer private enforceable rights in the Sections

[20] In 31 Foster Children, the Eleventh Circuit stated that what it took from the Supreme Court's decision in Gonzaga was "… to look at the text and structure of a statute in order to determine if it unambiguously provides enforceable rights. If the text and structure " provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." Id. at 286, 122 S.Ct. at 2277. If they provide some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite " clear voice." Ambiguity precludes enforceable rights. Id. at 280, 122 S.Ct. at 2273. The first Blessing requirement, which is what Gonzaga addressed, is that Congress must have intended that the provision in question benefit the plaintiff. Factors to consider in determining if it did include whether the statute: (1) contains " rights-creating" language that is individually focused; (2) addresses the needs of individual persons being satisfied instead of having a systemwide or aggregate focus; and (3) lacks an enforcement mechanism through which an aggrieved individual can obtain review."

of the AACWA that it seeks to enforce in Count Four of the Amended Complaint.

42 U.S.C. §§ 671(a)(1), 672(a)-(c) and 675(4)(A)

Plaintiffs allege a private right of action under §671(a)(1), §672 (although in this Amended Complaint they limit it to subsections (a) – (c)) and §675(4) (also limited to subsection (A)).

> Under 42 U.S.C. §671(a)(1), the state's federally approved plan must provide " for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title." Section 672 outlines the eligibility requirements and circumstances under which the state must pay foster care maintenance payments. "The term ' foster care maintenance payments' means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation." 42 U.S.C. §675(4)(A).

Plaintiffs' Amended Complaint alleges that the Defendants' policies, patterns, practices or customs deprived them of their rights to have " foster care maintenance payments paid to the foster parents or foster care providers with whom the child is placed that cover the actual cost of (and the cost of providing) the Plaintiff child's food, clothing, shelter, daily supervision, school supplies, reasonable travel to visitation with family, and other expenses." Amended Complaint at ¶231. There is a split in authority.[21]

Analyzing "foster care maintenance payment" provision set forth in the AACWA under Gonzaga, the District Court for the Northern District of Oklahoma reasoned in DG

[21] Two District Courts have found that this provision of the AACWA does not create privately enforceable rights to foster care maintenance payments. See D.G. v. Henry, 594 F.Supp2d 1273, 1278 (N.D.Okla. 2009) and Carson P., 240 F.R.D. at 540-541.Five federal courts have found a privately enforceable right. See C.H. v. Payne, 683 F.Supp.2d 865, 877 (S.D.Ind. 2010); California Alliance of Child & Family Servs. Allenby, 459 F.Supp.2d 919 (N.D. Cal 2006); Kenny A. v. Perdue, 218 F.R.D. 277, 303-304 (N.D. Ga. 2003); and Missouri Child Care Assoc. v. Martin, 241 F.Supp.2d 1032 (W.D.Mo 2003).

v. Henry, 594 F.Supp.2d 1273, 1278 that:

> The AACWA requires that State Plans provide for foster care maintenance payments in accordance with § 672 of the act and for adoption assistance in accordance with § 673 of the act [42 U.S.C. § 671(a)(1)]. The State Plans must provide for periodic review of the amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness. [42 U.S.C. § 671(a)(11)]. The State Plans must also provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for benefits available pursuant to the statute is denied or not acted upon with reasonable promptness. [42 U.S.C. § 671(a)(12)]. Section 672 sets out the requirements for states' foster care maintenance payments programs. [42 U.S.C. §]. The term "foster care maintenance payments" is defined to cover the cost of food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance and reasonable travel to the child's home for visitation. [42 U.S.C. § 675(4)(A)]. In the case of institutional care, the term includes the reasonable costs of administration and operation of the institution as are necessarily required to provide these items. [Id.]. Definitions of "foster care maintenance payments," "foster family care," and "child care institutions" are set forth in 45 C.F.R. § 1355.20(a). Regulations also require periodic reviews by the states of the appropriateness of foster care maintenance payments. [45 C.F.R. § 1356.21(m)(1)].
>
> However, nowhere in the provisions cited by plaintiff is there language suggesting a clear Congressional intent to confer a private right of action on foster children. Instead the statutes once again set out the requirements of state plans and state foster care maintenance payment programs.

Unlike Gonzaga and Rio Grande, the Defendants submit that 42 U.S.C. §§ 671(a)(1), 672(a)-(c) and 675(4)(A) do not (1) contain " rights-creating" language that is individually focused; (2) address the needs of individual persons being satisfied instead of having a system wide or aggregate focus; and (3) lack an enforcement mechanism through which an aggrieved individual can obtain review.[22] The provision speaks in the

[22] The Carson P. Court analyzed this provision under the three part Blessing test and similarly found that 42 U.S.C. §§ 671(a)(1), 672(a)-(c) and 675(4)(A) did not create enforceable rights. The Carson P. Court reasoned that "[t]he link between increased foster care maintenance payments and the services provided to any particular child " is far too tenuous" to support the notion that Congress meant to give each and every

aggregate instead of the individualized; contrary to Rio Grande. The mere mention of the generalized word "child" does not create a private right for plaintiffs. The provision provides for the general information that is to be included in a state plan and does not enunciate a specific formula for arriving at the payment. These provisions do not manifest a Congressional intent to create privately enforceable rights.

Accordingly, Plaintiffs' claims brought under 42 U.S.C. §§ 671(a)(1), 672(a)-(c) and 675(4)(A) should be dismissed under Rule 12(b)(6).

42 U.S.C. §671(a)(10) - (11).

Plaintiffs' allegation of a private right of action under §671(a)(10)-(11) must fail under the Gonzaga analysis. Plaintiffs' Amended Complaint alleges the defendants violated and continue to violate their right "to placement in foster homes or other settings

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Nebraska juvenile in foster care a right to have foster care providers paid at a sufficient level." Id. at 539-540. It went on to hold that Plaintiffs failed to satisfy the second element of the Blessing test as "… the plaintiffs' claims were indistinguishable from the type of claims asserted in [Wilder v. Virginia Hosp. Assn., 496 U.S. 498, 110 S.Ct. 2510 (1990)]. Wilder held that under federal Medicaid statutes and regulations, health care providers had an enforceable right to reimbursement at " reasonable and adequate rates," but the statutes and regulations under consideration in Wilder included specific factors to be considered in determining the methods for calculating rates. Wilder, 496 U.S. at 519, 110 S.Ct. 2510 …Suter, decided two years later, noted that the specific statutory and regulatory methods for calculating rates in Wilder supported finding a private right of action for the health care providers. However, no private right of action existed in Suter because §671(a)(15) and its regulations provided no guidance as to how the " reasonable efforts" required under §671(a)(15) were to be measured." Id. at 540-541. Applying the Wilder and Suter reasoning to the case before it, the Carson P. Court reasoned that "[w]ith respect to " foster care maintenance payments," neither §672 nor the definition of that term in §675(4)(A) provide any language for discerning how rates should be set for paying foster care providers the " cost" of caring for a foster child, and in the case of institutional care, "' the reasonable costs of administration and operation of such institution as are necessarily required' to care for a foster child." 42 U.S.C. §675(4)(A). …. [The plaintiffs cite no specific regulations governing the calculation of foster care maintenance payments.] …. [L]ike §671(a)(15), and in accord with the analysis of Suter, the plaintiffs' asserted right to foster care maintenance payments is too " vague and amorphous" to support a federal right enforceable under §1983." Id. at 540-541.

that conform to reasonable professional standards and are subject to a uniformly applied set of standards." Amended Complaint, ¶ 231.

> 42 U.S.C. §671(a)(10) requires federally approved state plans to provide for the " establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes," and to provide that " the standards so established shall be applied by the State to any foster family home or child care institution receiving funds...." 42 U.S.C. § 671(a)(11) requires periodic review of these standards.

§671(a)(10)-(11) do not (1) contain " rights-creating" language that is individually focused; (2) address the needs of individual persons being satisfied instead of having a system wide or aggregate focus; and (3) lack an enforcement mechanism through which an aggrieved individual can obtain review. These provisions do not possess an individualized focus but, rather, speak to items to be included in a state plan and not rights of an individual. The section addresses the aggregate and in a manner that provides no precise degree of measurement to enforce. See Carson P., 240 F.R.D. at 541-542. See also, Charlie H., 83 F.Supp.2d 476, 490 (D.N.J. 2000).[23] These provisions do not manifest a Congressional intent to create privately enforceable rights.

Accordingly, Plaintiffs' claims brought under 42 U.S.C. §§ 671(a)(10)-(11) should be dismissed under Rule 12(b)(6).

42 U.S.C. §671(a)(22).

Defendants submit that §671(a)(22) does not create a privately enforceable right.

[23] In Charlie H., the District Court of New Jersey, employing the Blessing test, found that §671(a)(10) did not create a privately enforceable right as the alleged right to "placement in foster homes or facilities that conform to nationally recommended professional standards" based upon 42 U.S.C. § 671(a)(10) is too vague and amorphous under the *Blessing* test to be enforced pursuant § 1983.

> Section 671(a)(22) requires the State to develop and implement standards to ensure that children in foster care placements are provided " quality services that protect the safety and health of the children."

Carson P. 240 F.R.D. at 542. Plaintiff allege that defendants' policies and practices violate the " right of each Plaintiff child to services that protect the child's safety and health." Amended Complaint, ¶ 231.

§671(a)(22) does not (1) contain " rights-creating" language that is individually focused; (2) address the needs of individual persons being satisfied instead of having a system wide or aggregate focus; and (3) lack an enforcement mechanism through which an aggrieved individual can obtain review. The provision clearly speaks in the aggregate instead of possessing an individualized focus. Enforcement is by the Secretary and not an individual recipient. It is abstract in nature, failing to describe standards that it seeks be developed and implemented. It lacks the necessary Congressional intent to be interpreted as enforceable by a private individual or group.

> Section 671(a)(22) contains no definition or criteria for determining whether the state is providing " quality services" to the child. The language of §671(a)(10) is too vague and amorphous to support a cause of action under §1983. Whitely, 184 F.Supp.2d at 1164-65.

Id. As such, Plaintiffs' claim under §671(a)(22) should be dismissed under Rule 12(b)(6).

42 U.S.C. §§ 671(a)(16) and 675(5)(D)-(E).

The Plaintiffs allege that the Defendants policies and practices violate their rights to "timely written case plans containing mandated elements" and "have health and educational records reviewed, updated, and supplied to foster parents or foster care providers with whom the child is placed at the time of placement." Amended Complaint ¶231.

§671(a)(16) and §675(5)(D)-(E) do not state a privately enforceable right.

> 42 U.S.C. §671(a)(16) requires that all federally approved state plans provide " for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provide[ ] for a case review system which meets the requirements described in section 675(5)(B) of this title with respect to each such child." The term " case plan" means a written document which includes:
> (A) a description of the type of home or institution in which a child is to be placed and the reasons for that decision;
> (B) a plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents;
> (C) to the extent available and accessible, the health and education records of the child;
> (D) where appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living; and
> (E) in the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship.
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> ***
>
> 42 U.S.C. § 675(5)(D) requires that all case review plans include a procedure assuring that a child's health and education record is reviewed, updated, and supplied to the child's foster parent or foster care provider at the time of each placement. 42 U.S.C. § 675(5)(E) requires case review plans to include procedures which acknowledge that in the absence of a compelling reason, a relative placement, or the potential for reunification, petitions to terminate parental rights must be filed under certain circumstances and within certain time frames.

Id. at 542-543.

Section 675 is a definitional section that includes the definitions of "case plan" (§675(1)) and "case review system" (§675A). §671(a)(16) speaks to the state plan and not an individual's rights. Neither 42 U.S.C. §§ 671(a)(16) and 675(5)(D)-(E) read together or separately (1) contain " rights-creating" language that is individually focused; (2) address the needs of individual persons being satisfied instead of having a system

wide or aggregate focus; and (3) lack an enforcement mechanism through which an aggrieved individual can obtain review.

In support of their position that these sections create enforceable private rights, Plaintiffs previously highlighted every place where the term "child" was cited to demonstrate that they are intended beneficiaries. As previously stated, the mere mention of the word "child" is not sufficient to demonstrate that a private enforceable right exists. The Gonzaga Court explained:

> A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Compare Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 107-108, n. 4, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (" [A] claim based on a statutory violation is enforceable under § 1983 only when the statute creates ' rights, privileges, or immunities' in the particular plaintiff "), with Cannon, supra, at 690, n. 13, 99 S.Ct. 1946 (statute is enforceable under implied right only where Congress " explicitly conferred a right directly on a class of persons that included the plaintiff in the case"). Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries. Compare Wright, 479 U.S., at 423, 107 S.Ct. 766 (statute must be " intended to rise to the level of an enforceable right"), with Alexander v. Sandoval, supra, at 289, 121 S.Ct. 1511 (statute must evince " congressional intent to create new rights"); and California v. Sierra Club, supra, at 294, 101 S.Ct. 1775 (" The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries" (citing Cannon, supra, at 690-693, n. 13, 99 S.Ct. 1946)). Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.

536 U.S. at 285-286, 122 S.Ct. at 2276-2277. Emphasis Added. According to Gonzaga, the mere mention of the word "child" does not by itself reflect that Congress intended to grant them individual enforceable rights under §1983.

Moreover, the Eleventh Circuit's decision in 31 Foster Children, 329 F.3d 1255 (11th Cir. 2003) that held that sections of §675 did not "have the kind of focused-on-the-individual, rights creating language required by Gonzaga" that would create a private right nor did the AACWA contain a mechanism by which aggrieved individuals could enforce its provisions. 329 F.3d at 1272. Linking 42 U.S.C. §§ 671(a)(16) with the definitional section (§675) still does not create a private enforceable right by plaintiffs under §1983.

The decision of the United States District Court for the District of New Jersey in Charlie H., supra., contradicts the holding in Kenny A, is particularly instructive on this issue. In Charlie H., the District Court for New Jersey held that §§ 671(a)(16), 622(b)(10)(B)(ii), 671(a)(16) and 675(1) and (5) did not create enforceable rights to a written case plan or case review system under §1983. Specifically, the Charlie H. Court reasoned:

> 42 U.S.C. § 622(b)(10)(B)(ii) provides, in relevant part, that "[e]ach plan for child welfare services under [42 U.S.C. § 622(a)] shall-provide assurances that the State-is operating, to the satisfaction of the Secretary-a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State." 42 U.S.C. § 671(a)(16) provides, in relevant part, that "[i]n order for a State to be eligible for payments under [42 U.S.C. § 670], it shall have a plan approved by the Secretary which-provides for the development of a case plan (as defined in section 675(1) 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 section 675(5)(B) of this title with respect to each such child." Finally, 42 U.S.C. § 675(1) and (5) define, in detail, "case plan" as used in 42 U.S.C. § 671(a)(16) and "case review system" as used in 42 U.S.C. § 622(b)(10)(B)(ii).
>
> * * *
>
> Initially, as noted above and as will be repeated herein, this Court does not sit to oversee New Jersey's child welfare system to determine whether the

implementation of case plans is "appropriate" or "successful." See Blessing, 520 U.S. at 341 and 345, 117 S.Ct. 1353. This is especially true where "[w]hether a child has a plan satisfying [each] provision is as individual as each child" and "there is no way to measure the normal or average needs of a child in foster care." Del A. v. Roemer, 777 F.Supp. 1297, 1309 (E.D.La.1991). Moreover, regardless of the detailed nature of the definitions of "case plan" and "case review system," the statutory provisions relied upon by Plaintiffs in support of their alleged right "to timely written case plans that contain mandate elements and to the implementation and review of these plans" are not so unambiguous so as to confer upon Plaintiffs a right enforceable under § 1983. See Eric L. v. Bird, 848 F.Supp. 303, 312 (D.N.H.1994) (holding that "plaintiff enjoy no enforceable rights" to "compel New Hampshire's full implementation of the programs" under 42 U.S.C. § 627(a)(2)(B), the predecessor to 42 U.S.C. § 622(b)(10)(B)(ii), because the provision "places no direct obligation on the state"); Baby Neal v. Casey, 821 F.Supp. 320, 328 (E.D.Pa.1993) (holding that the language of § 627(a)(2)(B), the predecessor to 42 U.S.C. § 622(b)(10)(B)(ii), "examined in the context of the entire Adoption Act" does not "unambiguously confer an enforceable right on behalf of its beneficiaries under 42 U.S.C. § 1983"); Del A. v. Roemer, 777 F.Supp. 1297, 1308-09 (E.D.La.1991) (holding 42 U.S.C. § 627(a)(2)(B), the predecessor to 42 U.S.C. § 622(b)(10)(B)(ii), and 42 U.S.C. § 671(a)(16)"so vague and amorphous as to evade judicial enforcement" of plaintiffs' claim for "case plans that address specific issues in their placements and care" because "[t]here is no objective benchmark" against which compliance with these provisions can be measured).

Finally, as discussed below in connection with Plaintiffs' MPA claim, both parties have failed to note the important point, which hinders Plaintiffs' claim under 42 U.S.C. § 671(a)(16) with respect to case plans, that Congress specifically examined the numerous State plan elements required under 42 U.S.C. § 671 and determined that only one such required element confers a private right enforceable pursuant to § 1983. Specifically, in 1996, Congress amended 42 U.S.C. § 674 by adding subsection (d) which explicitly provides that "[a]ny individual who is aggrieved by a violation of Section 671(a)(18) of this title by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court." 42 U.S.C. § 674(d)(3)(A) (emphasis added). That Congress recently chose to amend 42 U.S.C. § 674 to include a private right of action under § 1983 for a state or other entity's failure to comply with 42 U.S.C. § 671(a)(18), but did not include the other various elements enumerated in 42 U.S.C. § 671(a) and relied upon by Plaintiffs, is strong evidence that Congress did not intend these other various State plan elements in 42 U.S.C. § 671(a) to confer rights enforceable pursuant to § 1983. See Wright v. Roanoke Redevelopment and House. Auth., 479 U.S.

> 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987)(noting that a court may look to "other specific evidence from the statute itself" to determine whether §1983 provides a remedial cause of action). Therefore, for this and the other reasons set forth herein, Plaintiffs § 1983 claim to "an enforceable written case plan and a case review system" under 42 U.S.C. § 622(b)(10)(B)(ii), 42 U.S.C. § 671(a)(16), and 42 U.S.C. § 675(1) and (5) and an "enforceable right to implementation of case plan services" is dismissed.

83 F.Supp. at 486-489. The Charlie H. Court ultimately ruled that the plaintiff children failed to demonstrate that the following sections of the AACWA created private enforceable rights: §622(b)(10)(B), 671(a)(10), 671(a)(16), 675(1)(E), and 675(5).

Additionally, similarly situated plaintiffs in the case of Olivia Y. v. Barbour, 351 F.Supp.2d 543, 562 (S.D.Miss. 2004) made the same argument that the Eleventh Circuit's decision in 31 Foster Children was distinguishable. The United States District Court for the Southern District of Mississippi rejected Plaintiffs' attempt to distinguish 31 Foster Children and ruled that the plaintiff children did not have enforceable rights under §675(A), (C), (D) or (E), alone or in conjunction with either §671(a)(16) or §622(b)(10)(B)(ii) (this section was redesignated to §622(b)(8)(A)(ii) in 2006). 351 F.Supp.2d at 562-565. The Olivia Y. Court acknowledged that other courts have reached different results on these issues but explained that:

> Although this court recognizes that there are cases-indeed numerous cases-that have interpreted the provisions under consideration in the case at bar to create rights on the part of children that are enforceable under § 1983, this court, having reviewed the cases on the issues presented, finds that the analysis and conclusions of the courts that have come to the contrary conclusion to be more persuasive, and consistent with the Supreme Court's directive that nothing short of " an unambiguously conferred right" will support a cause of action under § 1983. See Gonzaga 536 U.S. at 282-83, 122 S.Ct. at 2275.

351 F.Supp.2d at 564-565.

Accordingly, Plaintiffs' claims under 42 U.S.C.§§671(a)(16) and 675(5)(D)-(E) should be dismissed under Rule 12(b)(6).

42 U.S.C. §622(b)(8)(A)(ii)-(iii)

The plaintiffs allege a private right of action under 42 U.S.C. §622(b)(8)(A)(ii)-(iii). The Defendants disagree.

Section 622(b)(8)(A)(ii)-(iii) requires that all federally approved state plans:

> (8) provide assurances that the State –
> (A) is operating, to the satisfaction of the Secretary –
> (i) a statewide information system from which can be readily determined the status, demographic characteristics, location, and goals for the placement of every child who is (or, within the immediately preceding 12 months, as been) in foster care;
> (ii) a case review system (as defined by section 675(5) of this title) for each child receiving foster care under the supervision of the State;
> (iii) a service program designed to help children-
> (I) where safe and appropriate, return to families from which they have been removed; or
> (II) be placed for adoption, with a legal guardian, or, if adoption or legal guardianship is determined not to be appropriate for a child, in some other planned, permanent living arrangement, which may include a residential educational program.

The Plaintiffs allege that the Defendants policies and practices violate their rights to "a case review system to ensure the implementation of "case plans" and "to services to facilitate the child's return to his family home or a permanent placement of the child". Amended Complaint ¶231.

42 U.S.C. §622(b)(8)(A)(ii)-(iii) does not (1) contain " rights-creating" language that is individually focused; (2) address the needs of individual persons being satisfied

instead of having a systemwide or aggregate focus; and (3) lack an enforcement mechanism through which an aggrieved individual can obtain review. The individual to be satisfied by this provision is the Secretary, not the plaintiff children. There is no defined measurement to gage. The provision has a system wide focus.

In finding that these provisions did not create a privately enforceable right, the DG Court reasoned:

> [t]he case review systems of the State Plans [42 U.S.C. § 622(b)(8)(A)(ii)] must have a procedure assuring that, in the case of a child who has been in foster care for 15 of the most recent 22 months or has been found by a court of competent jurisdiction to be an abandoned infant, or whose parent has committed murder or voluntary manslaughter of or felony assault upon another child of the parent, or the other parent, the state will file a petition to terminate the parental rights of the child's parents and concurrently to identify, process, and approve a qualified family for an adoption or document reasons why the filing of a petition would be in the best interest of the child. [42 U.S.C. §675(5)(E)]. The procedure for determining when a petition to terminate parental rights must be filed is set forth in 45 C.F.R. § 1356.21(i).
>
> Section 675(5)(E), much like §§ 675(1) and 675(5)(A), does not manifest an unambiguous intent to confer individual rights. Rather, it is part of a listing of specific elements the State Plans are required to cover. The court finds that AACWA does not create an individual right to sue under § 1983 for a state's failure to comply with this provision.

594 F.Supp.2d at 1278-1279.

Accordingly, Plaintiffs' claims under 42 U.S.C. §622(b)(8)(A)(ii)-(iii) should be dismissed under Rule 12(b)(6).

42 U.S.C. §622(b)(15)

The plaintiffs allege a private right of action under §622(b)(15). The Defendants submit that this claim should be dismissed as they do not create an enforceable right under §1983.

Section §622(b)(15) requires that all federally approved state plans "describe how the State actively consults with and involves physicians or other appropriate medical professions in (A) assessing the health and well-being of children in foster care under the responsibility of the State; and (B) determining appropriate medical treatment for the children. The Plaintiffs allege that the Defendants policies and practices violate their rights to "services that protect the children's safety and health". Amended Complaint ¶231.

§622(b)(15) does not create an individual enforceable right. It once again speaks to the content of the state plan rather than defining a right. It is yet another "yardstick" for the Secretary to use when evaluating a state's plan that is tied to federal funding. §622(b)(15) does not speak in clear and unambiguous language or and defines the right. There is no individualized focus. The DG Court found that "these provisions set out yet another requirement of the State Plans and describe another required element of the case plans for foster children. There is no clear, unambiguous expression of Congressional intent to confer individual rights." 594 F.Supp.2d at 1279.

Thus, plaintiffs' claim under §622(b)(15) should be dismissed under Rule 12(b)(6).

42 U.S.C. §629a(a)(7)-(8)

The plaintiffs claim brought under 42 U.S.C. §629a(a)((7)-(8) should be dismissed as the section is definitional in nature and does not create a right enforceable under §1983.

Section §629a(a)(7)-(8) states:

(a) In general

As used in this subpart:

(7)Time-limited family reunification services

A. In general

The term "time-limited family reunification services" means the services and activities described in subparagraph (B) that are provided to a child that is removed from the child's home and placed in a foster family home or a child care institution and to the parents pr primary caregiver of such a child, in order to facilitate the reunification of the child safely and appropriately within a timely fashion, but only during the 15-month period that begins on the date that the child, pursuant to section 675(5)(F) of this title is considered to have entered foster care.

B. Services and activities described

The services and activities described in this subparagraph are the following:

(i) Individual, group, and family counseling.
(ii) Inpatient, residential, or outpatient substance abuse treatment services.
(iii) Mental health services.
(iv) Assistance to address domestic violence.
(v) Services designed to provide temporary child care and therapeutic services for families, including crisis nurseries.
(vi) Transportation to or from any of the services and activities described in this subparagraph.

8. Adoption promotion and support services

The term "adoption promotion and support services" means services and activities designed to encourage more adoptions out of the foster care system, when adoptions promote the best interests of children, including such activities as pre- and post-adoptive services ad activities designed to expedite the adoption process and support adoptive families.

The Plaintiffs allege that the Defendants policies and practices violate their rights to "have a petition to terminate parental rights filed, or have a compelling reason documented why such a petition has not been filed, in accordance with specified, statutory standards and time frames," "to planning and services to obtain permanent placement, including documentation of steps taken to secure permanency" and "services

to facilitate a child's return to his family home or the permanent placement of a child." Amended Complaint ¶ 231.

Section 629a(a)((7)-(8) are definitional provisions and, as such, "alone cannot and do not supply a basis for conferring rights enforceable under §1983". 31 Foster Children, 329 F.3d at 1271 (citing Gonzaga, 536 U.S. at 280, 122 S.Ct. at 2273). Applying the legal analysis set forth in Gonzaga, 31 Foster Children, Olivia Y. and Charlie H., Plaintiffs claim that the sections it is proceeding under in Count IV create privately enforceable rights must fail. Sections 675 and 629a are definitional sections that cannot by their very nature demonstrate an individualized focus or clear Congressional intent to create privately enforceable rights. Plaintiffs seek to enforce these sections through 42 U.S.C. §622(b)(8)(A)(ii) (as §622(b)(10)(B)(ii) was redesignated in 2006). However, §622(b)(8)(A)(ii) itself does not "unambiguously confer an enforceable right on behalf of its beneficiaries." Thus, Plaintiffs' claims brought under §622(b)(8)(A)(ii), §§ 675 and 629a must fail.

Additionally, Plaintiffs' claims brought under §§ 622 and 672, which detail the type of information that must be included in a state plan, do not vest Plaintiffs with privately enforceable rights. The plain language does not manifest a clear intent by Congress to create individual rights. Moreover Congress's amendment of 42 U.S.C. § 674 to include a private right of action under §1983 for a state or other entity's failure to comply with 42 U.S.C. § 671(a)(18), but did not include the other various elements enumerated in 42 U.S.C. § 671(a) and *is strong evidence* that Congress *did not intend these other various State plan elements in 42 U.S.C. § 671(a)* to confer rights enforceable pursuant to § 1983." Charlie H., 83 F.Supp. at 489. Lastly, § 672 may confer an indirect

benefit to Plaintiffs; however, the language does not manifest an unambiguous intent that Congress intended to create a private enforceable right for Plaintiff Children. Thus, contrary to Plaintiffs' assertions, §672 does not satisfy the standard set forth in Gonzaga.

Accordingly, Plaintiffs' claims under 42 U.S.C. §629a(a)((7)-(8) should be dismissed under Rule 12(b)(6).

State Plan

Based on the controlling law, including Gonzaga and Rio Grande, and for the reasons set forth above, the Plaintiffs have also failed to demonstrate that they have a privately enforceable right under Rhode Island's State Plan as third party beneficiaries. Wherefore, Defendants pray that Count VI is also dismissed.

VII. CONCLUSION

"[C]hild welfare and protection is an important state interest, the injunctive relief at issue in this case, if granted, will interfere with the ongoing jurisdiction and proceedings for each plaintiff in the … [Rhode Island Family Court], and that court provides an adequate opportunity to raise the federal claims asserted in this action." *Foreman*, 240 F.R.D. at 532. Thus, the Younger Doctrine compels abstention and a dismissal of this case. Additionally, the relief requested actually places this Court in a position of reviewing and reversing state Family Court decisions and orders addressing the named plaintiff children. Thus, the Rooker-Feldman Doctrine compels abstention and a dismissal of this case. Moreover, the claims of Deanna H., Caesar S., Michael B. and Sam and Tony M are clearly moot. The provisions of the AACWA asserted in the Amended Complaint do not confer private rights of action enforceable under 42 U.S.C. §1983.

Wherefore, the Defendants pray that this Court grant their motion to dismiss.

Respectfully submitted
DEFENDANTS
By their Attorney,

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On Behalf of PATRICIA MARTINEZ,
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CERTIFICATION

I hereby certify that I have electronically mailed the foregoing document on this 1st day of November 2010 to the attorney(s) of record listed below:

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