IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CARSON P., by his next friend Crystal Foreman; DANIELLE D., by her next friend, Jodell Bruns; and JACOB P., by his next friend, Sara Jensen; BOBBI W., by her next friend, Micheline Creager; and HANNAH A., by her next friend, Vanessa Nkwocha, on their own and on behalf of all others similarly situated, Plaintiffs, v. DAVE HEINEMAN, as Governor of the State of Nebraska; CHRISTINE PETERSON, as acting Director of Services, Nebraska Department of Health and Human Services; JOANN SCHAEFER, as the Director of Regulation and Licensure, Nebraska Department of Health and Human Services; RICHARD NELSON, as the Director of Finance and Support, Nebraska Department of Health and Human Services; DENNIS LOOSE, as the Chief Deputy Director, Nebraska Department of Health and Human Services; and TODD RECKLING, as the Administrator of the Department of Health and Human Services' Office of Protection and Safety, Defendants.	)	Case No. 4:05CV3241 (RK)(DP)

BRIEF IN SUPPORT OF STATEMENT OF OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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Preliminary Statement

Abused and neglected children in foster care in Nebraska are being harmed by the very system that was designed to protect them. The class action device, and Rule 23(b)(2) class actions in particular, are intended to provide a key to the courthouse door for vulnerable populations such as these children. It is only through a class action such as this case that abused and neglected Nebraskan children can challenge, and seek a remedy for, the harmful practices of the sole agency that is their legal guardian and caretaker, the Nebraska Department of Health and Human Services ("HHS").

This case concerns abused, neglected and otherwise dependent children removed from the custody of their biological parents or other caretakers and placed into the legal custody of HHS, the executive agency responsible for the operation of Nebraska's foster care system. As state wards, these children are entirely dependent on HHS for their safety and most basic needs. Plaintiffs enter state custody for different reasons, and, as they move through different stages of foster care, they may require different types of care and services. But throughout Plaintiffs' time in foster care, it is essential that the system operated by HHS have the *capacity* to ensure that these children are not further harmed. The foster care system operated by HHS now fails – as it has for many years – to meet this basic test.

The Plaintiff children in this case allege systemic deficiencies, including a drastic shortage of foster homes and other placements for foster children; overcrowded homes and children placed wherever a bed or slot is available; the failure to pay foster care providers, including foster parents, enough to cover the cost of caring for the children placed with them; dangerously high caseloads and turnover concerning the workforce assigned to monitor children; the failure to monitor child safety, including by failing to adequately screen and license foster

homes and other placements; the failure to provide basic health screens and services; and the failure to develop an information system capable of providing current and accurate information about foster children.

These deficiencies are harming children in aggregate ways: children are frequently moved among multiple inappropriate homes and facilities; children are housed in dangerous placements; children are maltreated while in their foster homes and in other facilities; children, including infants and very young foster children, are forced to stay long periods of time in emergency shelters and other temporary placements; and children experience excessive lengths of stay in state custody. These system-wide deficiencies, and the harms caused by them, must be stopped. Plaintiffs have filed this Rule 23(b)(2) class action to do just that. Plaintiffs here seek system-wide injunctive relief, narrowly tailored to the proof established after merits discovery and trial, that will remedy the fundamental deficiencies in HHS' foster care system and ameliorate the group harms they inflict on Plaintiffs.

Magistrate Judge Piester's August 16, 2006 Report and Recommendation (the "R&R") recommends that the Court (i) deny certification of the putative Plaintiff class; (ii) decline the Court's established jurisdiction to hear the case pursuant to the extraordinary doctrine of *Younger* abstention; and (iii) determine that the Plaintiff children have no private rights of action to enforce specified provisions of the federal Adoption Assistance and Child Welfare Act (as amended). The R&R reaches this result largely through the exercise of two discretionary doctrines – class certification and abstention – only by going well beyond the limits of Plaintiffs' Amended Complaint (Filing #64; "Am. Compl.") and disregarding established legal standards. If allowed to stand, these recommendations would prohibit abused and neglected children in Nebraska from accessing this federal forum prior to any discovery on the merits, even though

they are entirely dependent on a unitary state agency (HHS) that fails to meet constitutional minimums in caring for them.

Despite Plaintiffs' detailed pleading regarding these common *system-wide* deficiencies and the group harms caused by them, the R&R recasts this case as one directed to the *individualized* circumstances of Plaintiff children. The R&R takes the unprecedented step of rejecting Plaintiffs' appropriate request for a remedy tailored to the proof at trial as "artful pleading," and substitutes its own predictions as to certain individualized relief the Court would ultimately grant. Disregarding the facts as pled in Plaintiffs' Amended Complaint, and the reasoning in cases exactly on point which certified similar classes, the R&R finds the claims and remedies too individualized to sustain commonality under Fed. R. Civ. P. 23(a)(2). However, when the allegations are viewed correctly as pled and under the appropriate standard, Plaintiffs amply satisfy commonality, and meet all other requirements for class certification under Rule 23.

The R&R also recasts Plaintiffs' claims and hypothesizes remedies that the R&R then finds bring this case within the exceptionally narrow *Younger* abstention doctrine. Because all putative class members have cases that are reviewed in the Nebraska Juvenile Courts, the R&R concludes that the Court should not exercise jurisdiction. This recommendation is based on an incorrect projection that potential class-wide remedies might somehow conflict with individual action taken by a Juvenile Court in a particular case. However, the relief that could be ordered in this case would in no way interfere with individual cases in the Juvenile Courts, but would instead enhance their functioning. Moreover, Nebraska Juvenile Courts are powerless to order system-wide prospective injunctive relief in favor of the putative class and address the systemic deficiencies and the resulting harms these children suffer. Only this Court can grant relief to address the system-wide issues raised in this action. Application of the *Younger* legal standard,

along with the powerful equitable factors underlying Plaintiffs' claims at this extremely premature pre-discovery phase of the case, strongly support the Court's exercise of its "virtually unflagging" obligation to preside over claims within its jurisdiction.

Plaintiffs here are supportive of additional efforts to improve aspects of Nebraska's failing foster care system, such as the Nebraska Supreme Court's Commission on Children and the Courts, an initiative to implement standards and training for guardians ad litem and expedite the appeal process for termination of parental rights. But these efforts will not address the system-wide problems at the executive agency and resulting harms targeted in this lawsuit. The Plaintiff children are in this federal forum because supposed efforts at reform have failed. Prior studies and "reforms" only serve to document the long history of problems and harms to children in Nebraska. This action is the means by which Nebraska's children have a voice, through the Court, in the reform of Nebraska's deficient foster care system.

Plaintiffs respectfully request that the Court properly evaluate Plaintiffs' claims[1] as pled, certify the class as proposed below, and deny Defendants' motion to dismiss in its entirety.

Standard of Review

With respect to all issues covered by Plaintiffs' objections, the R&R's proposed findings are subject to *de novo* review by the Court. *See* NECivR 72.3(a); 28 USC § 636(b)(1).[2]

[1] Plaintiffs assert claims pursuant to 42 U.S.C. § 1983, for violations of their rights under the due process clause of the Fourteenth Amendment to the U.S. Constitution; the First, Ninth and Fourteenth Amendments to the U.S. *Constitution*; 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) and 670-679(b) ("AACWA"); and the Early and Periodic Screening, Diagnosis and Treatment Program of the Medicaid Act, 42 USC §§ 1396a, 1396d(a) and (r) ("EPSDT").

[2] Plaintiffs do not intend to waive, and expressly preserve, all available appellate rights reserved to them pursuant to 28 U.S.C. § 636(b)(1) and *Francis v. Bowen*, 804 F.2d 103, 104 (8th Cir. 1986) (plaintiff has not waived his right to appeal by failing to object when the questions involved are questions of law or mixed questions of law and fact) (citation omitted).

Argument

I. THE REQUIREMENTS OF RULE 23 ARE MET AND THE DISTRICT COURT SHOULD CERTIFY THE CLASS.

Plaintiffs object to and seek *de novo* review of the R&R's recommendation that the Court deny Plaintiffs' motion for class certification and its failure to recommend the denial of that portion of Defendants' motion to dismiss addressed to the asserted lack of prudential standing.[3]

A. The R&R's Revised Class Definition Should Be Adopted, Subject to Three Revisions.

Plaintiffs ask the Court to certify a defined class of abused, neglected, and otherwise dependent children – foster children – who are in the legal custody of the Nebraska HHS. The R&R suggests a redefinition of the class as follows:

"All children who

1. have not reached the age of majority as defined under Neb. Rev. Stat. 43-245(1);

2. are or will be in the legal custody of Nebraska's Department of Health and Human Services but are not committed to its Office of Juvenile Services (*i.e.*, jail and other detention services for children who commit criminal acts);

3. have been adjudicated under Neb. Rev. Stat. 43-247(3)(a) and/or 43-247(3)(b)[4]; and

4. are not Native American."

(R&R at 91.)[5]

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[3] This brief is submitted in addition to Plaintiffs' previous Brief in Support of Motion for Class Certification (Filing #13; "Br. in Supp. Class Cert."), Memorandum Brief in Opposition to Motion to Dismiss (Filing #88; "Br. in Opp. MTD"), Reply Brief in Further Support of Motion for Class Certification (Filing # 82; "Rep. Br. Class Cert."), the Indices of Evidence submitted in connection with those motions (Filings #12; "Class Cert. Index" & Filing #83 ("Class Cert. Rep. Index")), and the Index of Supplemental Authorities submitted herewith ("Index of Supp. Auth.").

[4] HHS is legally required to provide child welfare services to children who are in state custody because they are abused, neglected, abandoned or otherwise deprived by their parent(s) or other caretaker(s) and children who are deemed wayward or uncontrollable (*see* Neb. Rev. Stat. § 43-247(3)(a), the "3(a)" children), or who have or are alleged to have committed status offenses, which are crimes, such as truancy, that are unlawful only for children (*see* Neb. Rev. Stat. § 43-247(3)(b) (the "3(b)" children)).

Plaintiffs accept the R&R's proposed redefinition, with three requested revisions: (1) Plaintiffs object to the exclusion in the class definition of children in HHS legal custody who are "alleged" to be abused, neglected, or otherwise dependent under Neb. Rev. Stat. 43-247(3)(a) but who have not yet had a formal adjudication (*see* R&R at 82); (2) Plaintiffs request the further exclusion of "status offenders" in HHS legal custody pursuant to Neb. Rev. Stat. § 43-247(3)(b) from the class definition; and (3) Plaintiffs request the exclusion of children in HHS legal custody who physically reside "in-home." These latter two exclusions are requested because none of the remaining five named Plaintiffs are currently "status offenders" or living "in-home" and in an effort to enhance the uniformity of the putative class so as to permit prompt certification.[6]

The R&R's recommendation that the "alleged" group of children be excluded from the class definition should not be adopted. Children "alleged" under Section 3(a) as abused, neglected, or otherwise dependent are in HHS legal custody and are subject to the same system-wide failures and resulting harms (and risks of harm), and have the same legal claims in this case, as children who have been formally adjudicated under Section 3(a). They are simply at the first stage of the foster care process. The reasons offered by the R&R for excluding these "alleged" children accordingly do not withstand scrutiny.

First, the R&R reasons that because the "alleged" children are typically in HHS pre-adjudicatory custody for "not even four months," they are not subject to the harm caused by Defendants' failure to move children through the foster care system to "permanency" (preferably

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[5] A federal court has significant discretion to limit or redefine a class or to use subclasses as the case proceeds. *See Schneider v. U.S.*, 197 F.R.D. 397, 401 (D. Neb. 2000) (*citing Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d. Cir. 1993); *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993); *Harris v. Gen. Dev. Corp.*, 127 F.R.D. 655, 659 (N.D. Ill. 1989)). *See also Marisol A.. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 378-79 (utilizing subclasses in child welfare class action injunctive case to manage class definition as case proceeds).

[6] Plaintiffs do not object to the R&R's determinations with respect to the mootness of the claims of named Plaintiffs Paulette V. and Cheryl H. (R&R at 112-116.)

back with their biological family but, if necessary, on to an adoptive or other permanent home). (R&R at 83-85, citing Am. Compl. ¶ 38(c).) This is incorrect. All of these children are in need of placement, as are children after they move into the adjudicated category, and many of the "alleged" children will ultimately be adjudicated under 3(a) and thus are likely to remain in state custody for some time. Moreover, as children move through different stages of the foster care system, they need different services. Thus, the very same children that initially require services to be returned home face the future risk of harm of a prolonged stay in custody as a result of HHS' systemic failure to find children alternative permanent homes. (Am. Compl. ¶ 169.)[7]

Second, the R&R reasons that the allegations in this case are not focused on system-wide failures "during the brief temporary custody phase" such as "HHS' responsiveness to allegations that a non-adjudicated child is being abused, or the initial intake and assessment procedures followed by HHS in response to a new report of child abuse or neglect." (R&R at 85-86.) This is irrelevant because *none* of Plaintiffs' claims are directed to the quality or responsiveness of HHS child abuse investigations of children before a child enters HHS custody. Rather, Plaintiffs' claims concern the harms that befall children once in HHS legal custody, whether temporarily or pursuant to a formal adjudication. HHS is constitutionally obligated to ensure the safety and welfare of all such children. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982).

Finally, the R&R reasons that as temporary custody typically lasts less than four months, children within this category are "within a very fluid subset of the plaintiffs' proposed class,"

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[7] The R&R also fails to recognize that the "alleged" children share other common issues of fact with the adjudicated children. (*See, e.g.*, Am. Compl. ¶ 38(a), requiring "safe, stable and appropriate foster care placements.") Without question, the "alleged" children share one or more common issues of fact with other members of the putative class, the relevant commonality standard under Rule 23(a)(2). *See, e.g., Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995). *See also Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:10 (4th ed. 2002).

and are therefore appropriate for exclusion. (R&R at 86.) However, four months is a long time in the life of a child who has recently suffered the trauma of being removed from his or her home, and is placed in an unsafe or overcrowded foster home or emergency shelter because of a chronic shortage of homes, or is denied a basic health screen because the system fails to provide for such screens. Excluding precisely defined children in state custody – alleged 3(a) children – from the class definition because their exposure to the same system-wide problems and harms in this case has lasted four months or less would serve no class definitional or other class certification purpose, and would only serve to prejudice these children.[8]

For these reasons, Plaintiffs submit the following class definition for class certification:

"All children who:

1. have not reached the age of majority as defined under Neb. Rev. Stat. § 43-245(a);
2. are or will be in the legal custody of Nebraska's Department of Health and Human Services but are not committed to its Office of Juvenile Services;
3. have been alleged or adjudicated under Neb. Rev. Stat. § 43-247(3)(a);
4. are not Native American; and
5. are not currently placed 'in-home.'"

As set forth in the next sections, under the revised class definition, all elements of Rule 23 are satisfied.

[8] During their first several months in custody, children are supposed to have their "needs," including their medical and mental health needs, assessed. *See* 390 Neb. Admin. Code §7-003.04 (2000) ("children in out-of-home care . . . will receive a health examination during the first 14 days of placement") (emphasis added). Further, as noted in the R&R, during this initial custody period children may be subject to excessive stays in emergency shelters. (R&R at 85.)

B. Rule 23(a)(2) Is Satisfied as There Are Numerous Issues of Fact and Law Common to the Class.

The R&R errs in not finding commonality among one or more issues of fact or law alleged in this action.[9] Factual and legal commonality is overwhelmingly established in this case, which presents a custodial class challenge to a common course of conduct by a unitary executive agency, and where putative class members are joined by constitutional and statutory claims possessed by *all* class members. *See, e.g., Baby Neal v. Casey*, 43 F.3d 48, 54 (3d Cir. 1994) (reversing denial of class certification for Rule 23(b)(2) classes consisting of "all children in Philadelphia who have been abused or neglected and are or should be known to the Philadelphia Department of Human Services," and those children in the custody of the Philadelphia Department of Human Services); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 299-301 (N.D. Ga. 2003) (certifying class defined as "[a]ll children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS," and a subclass of African-American children); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 197 F.R.D. 664, 667-68 (D.S.D. 2000) (certifying a class of "all juveniles who are now or in the future will be confined at the State Training School in Plankinton," as well as various subclasses").[10]

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[9] Courts in this Circuit have long recognized that Fed. R. Civ. P. 23(a)(2) does not require commonality of every factual and legal question at issue in a case. *See, e.g,. DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995); *Paxton v. Union National Bank*, 688 F.2d 522, 561 (8th Cir. 1982). (*See also* R&R at 95.) Rather, the requirements of Rule 23(a)(2) are met where the "legal question linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Id.*

[10] *See also Lynch v. Dukakis*, 719 F.2d 504, 506 n.1 (1st Cir. 1983), *abrogated on other grounds by Suter v. Artist M*, 503 U.S. 347, 353-54 n. 5 (1992) (affirming certification of a class consisting of "[a]ll children subject to protective intervention by agencies of the Commonwealth of Massachusetts under the foster family home care system . . . ," in lawsuit challenging systemic violations of children's rights by Massachusetts' child welfare system); *Jeanine B. ex rel. Blondis. v. Thompson*, 877 F. Supp. 1268, 1287-88 (E.D. Wis. 1995) (certifying class, with two subclasses, consisting of "(1) children who are in foster care custody in Milwaukee County and who come into foster care custody in Milwaukee County; and (2) children who are not in foster care custody in Milwaukee County, but about whom the County Department of Human Services has received reports of abuse or neglect, and

Plaintiffs allege that Defendants operate a foster care system characterized by a set of system-wide deficiencies:

- The HHS system is marked by a severe shortage of foster homes and other placements for foster children, resulting in overcrowded homes and the placement of foster children wherever a bed or slot is available and not where their needs can be met. (Am. Compl. ¶¶ 5(a), 109-125; *see also* Df.'s Evidence Index at Ex. 14, at HHS 010988-89 (2004 FCRB Report calling upon HHS to "[i]ncrease the number of placements (foster homes, group homes, other facilities) available and develop specialized placements").)

- The HHS system fails to maintain an inadequate workforce, with dangerously high caseloads and turnover for caseworkers monitoring the safety and care of foster children. (*See* Am. Compl. at ¶¶5(b), 131-137; *see also* Df.'s Evidence Index at Ex. 14, at HHS-011031-32 (2004 FCRB Report recommending that HHS address high worker turnover by making caseloads manageable, increasing support and supervision, reducing supervisor caseloads, and reviewing training that new case managers receive).)

- The HHS system fails to adequately monitor child safety, which includes the failure to adequately screen and license foster homes and other placements, and the failure to visit children in their foster placements because their workloads are too high to possible provide consistent visits. (*See* Am. Compl. at ¶¶5(c), 138-

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children who become the object of such reports," in lawsuit challenging systemic violations of children's rights by Milwaukee's child welfare system); *LaShawn A. v. Dixon*, 762 F.Supp. 959, 960-61 (D.D.C. 1991) (deciding claims of previously certified class of all children who are in foster care under the supervision of the District of Columbia Department of Human Services, and children who are known to the Department because of reported abuse, in lawsuit challenging systemic violations of children's rights by the District of Columbia's child welfare system"), *aff'd in relevant part*, 990 F.2d 1319 (D.C. Cir. 1993); *B.H. v. Johnson*, 715 F.Supp. 1387, 1389 (N.D. Ill. 1989) (deciding claim of previously certified class consisting of "all persons who are or will be in the custody of the Illinois Department of Children and Family Services and who have been or will be placed somewhere other than with their parents" in lawsuit challenging systemic violations of children's rights by Illinois' child welfare system); *L.J. ex rel. Darr v. Massinga*, 699 F.Supp. 508, 510 (D. Md. 1988) (approving class-wide settlement for class of children defined as those "who are, have been, or will be placed in foster homes by the BCDSS [Baltimore City Department of Social Services] and are or will be placed in the custody of the BCDSS through voluntary placement or court order," in case challenging practices of the Baltimore City Department of Social Services"); *G.L. ex rel. Shull v. Zumwalt*, 564 F. Supp. 1030, 1031 (W.D. Mo. 1983) (class-wide settlement on behalf of "children in the custody of the Jackson County office of the Missouri Division of Family Services," in suit challenging the systemic failures of that system); *Wilder v. Bernstein*, 499 F. Supp. 980, 992-94 (S.D.N.Y. 1980) (certifying class of "all those New York City children who are black, and who are Protestant, of other non-Catholic or non-Jewish faiths, or are of no religion, and are in need of child-care services outside their home," in case alleging system-wide racial and religious discrimination in foster care placements by New York City).

147; *see also* Df.'s Evidence Index at Ex. 14, at HHS-010983 (2004 FCRB Report noting that "[i]ntakes received by [HHS] regarding abuse/neglect allegations made against foster homes are oftentimes not acted on by an initial assessment worker, but are instead deemed a "licensing" issue and referred to resource development, where little is done to ensure the child's safety.").)

- HHS lacks the capacity to provide basic health services for foster children such as access to regular health screenings. (*See* Am. Compl. at ¶¶5(d), 148-154; *see also* Df.'s Evidence Index at Ex. 14, at HHS-011044-011046 (2004 FCRB Report noting that "many children are denied the appropriate services to treat their behavioral problems" because healthcare duties have been contracted out to an HMO without there being adequate safeguards in place).)

- HHS fails to pay per diem payments to foster care providers, including payments to foster parents of less than $8 a day, that cover the cost of caring for foster children, contributing to the shortage of foster homes and inadequate placements for children. (*See* Am. Compl. at ¶¶5(f), 125-126.)

- HHS fails to maintain an information system that includes current and accurate information necessary for the care of putative class members, contributing to poor tracking and monitoring of children's safety and needs. (*See* Am. Compl. at ¶179; *see also* Df.'s Evidence Index at Ex. 14, at HHS-011108 (2004 FCRB Report noting that "[f]rom N-FOCUS' inception [in 1997] to the present, the Board has found a continued high rate of error or omissions in key data elements . . . [T]he Board finds it must continue to verify at least 50% of the 60,000+ reports received from HHS each year due to inaccurate, conflicting, or missing data.").)

Plaintiffs also specifically allege that as a result of these system-wide problems, Plaintiffs are suffering or are at imminent risk of suffering the same or similar types of group harms, including:

- ***Harm to putative class members as a result of multiple damaging placement moves between foster homes and other facilities.*** (*See* Am. Compl. at ¶4(a), 114-

116; *see also* Df.'s Evidence Index at Ex. 14, at HHS-010976 (2004 FCRB Report reflecting that 46.9% of Nebraskan foster children in out-of-home care on December 31, 2004 had experienced four or more placement disruptions during their time in care, "a level of instability that will negatively affect nearly all children").) Additionally, as Defendants' own records establish, the five named Plaintiffs have experienced, on average, almost ten different placements while in HHS custody.[11] The named Plaintiffs' records also establish the harmful impact of these multiple moves on Plaintiffs. For example, Jacob P.'s medical records indicate the psychological damage caused by the many placements he has experienced: "[Jacob] displays symptomatology of attachment problems. [Jacob] has had numerous moves. There appear to be loss and grief issues associated with repeated moves and rejections." (*See* Class Cert Reply Index at Ex. 11, at NP 000630-631.)

- ***Harm to putative class members as a result of their placement in unsafe and insufficiently monitored foster homes and other placements, including the maltreatment of children in foster homes and other facilities.*** (*See* Am. Compl. at ¶¶4(e), 5(c), 129, 138-140; *see also* Df.'s Evidence Index at Ex. 14, at HHS-010987, HHS-011038-39 (2004 FCRB Report recommending that HHS "[b]etter screen and monitor children's placements," and noting that "serious abuse, such as severe burns, broken bones, concussions, has occurred in some contractor's placements as a result of a lack of supervision and misuse of restraints.").)

- ***Harm to putative class members, including in particular young children, by virtue of their placements for extended periods of time in emergency shelters and other short-term placements.*** (*See* Am. Compl. at ¶4(b), 120-121; *see also* Df.'s Evidence Index at Ex. 14, at HHS-010984 (2004 FCRB Report noting that 35% of children in custody under the age of six "have been moved to three or more different placements – a level of instability which experts find can cause

[11] *See* Class Cert. Rep. Index at Ex. 5, HHS-002290 – 002291 (HHS Child's Placement History reflecting 12 placements for Jacob P. during two episodes in state custody); Ex. 6, HHS-016211 – 016212 (HHS Child's Placement History for Bobbi W. reflecting 17 placements); Ex. 7, HHS-017150 – 017151 (HHS Child's Placement History for Hannah A. reflecting 12 placements); Ex. 3, HHS-008110 – 008111 (HHS Child's Placement History for Danielle D. reflecting five placements during two episodes in custody); and Ex. 1, HHS-021779 (HHS Child's Placement History for Carson P. reflecting three placements).

damage"). Moreover, Defendants' own placement logs establish the extent to which the named Plaintiffs have experienced these harms. For example, named Plaintiff Hannah A. was placed in an emergency shelter for nearly two months as a six-year-old. (*See* Class Cert. Rep. Index at Ex. 7, at HHS 017150-51.) Similarly, named Plaintiff Bobbi W., who entered HHS custody at age 9, was placed in emergency shelters five times during her first four months in care. (See id. at Ex. 6, at HHS 016211-12.)

- ***Harm to putative class members by virtue of their experience of excessive lengths of stay in state custody.*** (*See* Am. Compl. at ¶4(g), 155-174.) For example, the Defendants' own records reflect that the named Plaintiffs have spent an average of nearly four years in foster care.[12]

Plaintiffs allege that these systemic deficiencies, and the aggregate harms they inflict upon putative class members, result in ongoing violations of Plaintiffs' constitutional and statutory rights. (*See* Am. Compl. at ¶¶ 182-197.) At the core of each of these claims – and in particular Plaintiffs' substantive due process claim – is the custodial status of each and every named Plaintiff and putative class member within a unitary executive agency (HHS) and the shared fact that, as minors in state custody, they are dependent on HHS for their basic safety and well-being.

Commonality here lies not with the precise nature of the individual harms to Plaintiffs arising from HHS' systemic failures, but in the systemic failures themselves, the group harms they cause or threaten to cause, and the custodial status and identity of claims of Plaintiffs. *See DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (certification appropriate where "all members of the class are interested in a satisfactory common course of conduct in

[12] As of September 29, 2006, the lengths of the named Plaintiffs' most recent custodial episodes are as follows: Bobbi W. – 5 years, 5 months; Hannah A. – 4 years, 9 months; Danielle D. – 3 years, 2 months; Carson P. – 3 years; Jacob P. – 2 years, 7 months. (*See* Class Cert. Rep. Index at Ex. 5, at HHS-002290 – 002291 (HHS Child's Placement History); Ex. 6, at HHS-016211 – 016212 (HHS Child's Placement History); Ex. 7, at HHS-017150 – 017151 (HHS Child's Placement History); Ex. 3, at HHS-008110 – 008111 (HHS Child's Placement History); Ex. 1, at HHS-021779 (HHS Child's Placement History).)

future," despite factual disparities); *M.K.B. v. Eggleston*, No. 05 Civ. 10446 (JSR), 2006 WL 2469155 (S.D.N.Y. Aug. 29, 2006) ("There is no need for any individualized assessment regarding the need for injunctive relief" to address "systemic deficiencies.").[13]

Rather than reflecting mere pleading "monikers" (*cf. J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999)), the system-wide deficiencies, harms and legal elements are established by detailed allegations in the Amended Complaint. Plaintiffs seek a remedy, tailored to the facts established and violations proven at trial, that provides the system with the aggregate capacity to be able to then provide for the individual needs of each child in the HHS foster care system. (Am. Compl. at 198(e).)

As addressed below, the R&R's failure to find commonality is based on three errors: (1) the application of a significantly heightened commonality standard in Rule 23(b)(2) cases based on an overbroad interpretation of the Eighth Circuit's "medical monitoring" decision in *Grovatt v. St. Jude Medical, Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005); (2) the fundamental misstatement that Plaintiffs' case concerns children's individualized needs and harms and that Plaintiffs seek individualized remedies in each child's case; and (3) reliance on a few factually distinguishable cases from other jurisdictions and the rejection of the persuasive reasoning of a number of cases precisely on point.

[13] *See also Upper Valley Ass'n. for Handicapped Citizens v. Mills*, 168 F.R.D. 167, 170 (D. Vt. 1996) ("Although each member of the class may have slightly different factual issues, Defendants' efforts to develop and implement procedures under IDEA are common to all participants within the class and subclass"); *Doe v. Los Angeles Unified School Dist.*, 48 F. Supp. 2d 1233, 1241-42 (C.D. Cal. 1999) (Rule 23(b)(2) standard is met where "the class members share a general, common violation, rather than a unitary claim premised on identical facts or legal remedies."). Even where damages are sought, courts certify classes where the effects of the defendants' action or inaction among class members may be different. *See Dunn v. City of Chi.*, 231 F.R.D. 367, 372-73 (N.D.Ill. 2005) ("The fact that certain [plaintiffs] [who were seeking individual damage awards] were treated marginally better on an ad hoc basis than others does not alter plaintiffs' allegations that they were subject to the standard practice . . . ").

1. The R&R erroneously applies a significantly heightened commonality standard to this Fed. R. 23(b)(2) class action.

Rule 23(b)(2) class actions – applicable where defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" – provide an important vehicle for vindicating the civil rights of class members. *See* 7 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 23:11 (4th ed. 2002) (hereinafter "*Newberg*").[14] Rule 23(b)(2) lawsuits are especially appropriate for recipients of government benefits seeking to challenge "statutes, regulations and policies in an area where the individual claimant is unlikely to bring suit because of poverty." 7 *Newberg* §§ 23:1, 23:11 (highlighting the value of class action in suits seeking "institutional changes").

The class action device generally, and Rule 23(b)(2) in particular, afford disadvantaged children, such as Plaintiffs in this case, access to judicial redress that would, in practical terms, be otherwise entirely unavailable to them. *See Baby Neal*, 43 F.3d at 59-60 ("[R]eview of the jurisprudence in this area discloses that many very similar lawsuits challenging the provision of services to foster children have been certified despite the varieties of factual differences that characterize the plaintiffs in each case."). In fact, Newberg characterizes the claims brought in class actions on behalf of children in foster care as "precisely the kinds targeted by Rule 23(b)(2)." 2 *Newberg* at § 4:11; *see also* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure Wright & Miller* at § 1776.1 n.1 (approving use of

[14] *See also Caroline C ex rel. Carter v. Johnson.*, 174 F.R.D. 452, 467 (*quoting* 3B James W. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.02 [2.6], at 23-44 (3d ed. 1997)); *Newberg* at § 4:11) ("Rule 23(b)(2) was enacted in part for the specific purpose of assuring that the class action device would be available as a means of enforcing the civil rights statutes."); *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (holding that Rule 23(b)(2) an "especially appropriate vehicle" for civil rights actions seeking institutional reform).

class action treatment in the child welfare context seeking vindication of constitutional rights) (hereinafter, "*Wright & Miller*").

Where class certification is sought pursuant to Rule 23(b)(2) there is no requirement that common issues "predominate" as in Rule 23(b)(3) class actions. *See* Fed. R. Civ. P. 23(b)(2); *Baby Neal*, 43 F.3d at 59-60 (noting lack of predominance requirement in Rule 23(b)(2)). Rather, as the R&R acknowledges:

> Where the plaintiffs are challenging institutional conditions, policies and practices, and not their application to each individual member of the class, the fact that each member of the class may be affected differently by the policies does not necessarily preclude a finding of commonality.

(R&R at 95 (*citing Christina A.*, 197 F.R.D. at 667; *Baby Neal*, 43 F.3d at 56).) Moreover, as determined by Newberg:

> [A] ruling that an action meets the requirements of Rule 23(b)(2), that the party opposing the class has acted or refused to act on grounds generally applicable to the class, necessarily includes a finding that common questions [under Rule 23(a)(2)] are shared by class members.

1 *Newberg* at § 3:10. *See also Caroline C. ex rel. Carter v. Johnson*, 174 F.R.D. 452, 464 (D. Neb. 1996) (citing *Baby Neal*, 43 F.3d at 57) (stating that where plaintiffs do not seek individualized damage awards, "'injunctive actions' by their very nature often present common questions satisfying Rule 23(a)(2)'") (quoting *Wright & Miller* § 1763, at 201)).

Here, Defendants *admit* that Plaintiffs have asserted allegations "sufficient to satisfy the requirements of Rule 23(b)(2)" (Filing #11, Brief in Opposition to Motion for Class Certification ("Df.'s Br. in Opp. Class Cert.") at 34-35) – a concession the R&R notes but to which it ascribes no weight. (*See* R&R at 102.) In fact, rather than deferring to Defendants with respect to *their* determination as to the general application of their own alleged conduct, the R&R recommends that the Eighth Circuit's decision in *St. Jude Medical*, requires a significantly *higher* standard of commonality in Rule 23(b)(2) cases than that required even by Rule 23(b)(3). (*See* R&R at 103.)

St. Jude Medical has not relevant here. Relying on the inapplicable reasoning in *St. Jude Medical*, the R&R would in effect replace the predominance standard of Rule 23(b)(3) with an even more restrictive class "cohesiveness" standard for all Rule 23(b)(2) cases.[15] (R&R at 103-04.) This recommendation was baseless.

St. Jude Medical, a medical products mass tort litigation involving claimants from 17 states, is part of a discrete line of "medical-monitoring" cases and is thus entirely inapposite. *St. Jude Medical*, 425 F.3d at 1122 (noting that "[p]roposed medical monitoring classes suffer from cohesion difficulties, and numerous courts across the country have denied certification of such classes"). This is because, as noted in *St. Jude Medical*, "[t]he members of a (b)(2) class are generally bound together through 'preexisting or continuing legal relationships' or by some significant common trait such as race or gender." *St. Jude Medical, 425 F.3d* at 1122 (quoting *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n. 8 (11th Cir. 1983)(citation and quotation omitted)). Thus, even assuming that the concept of "cohesiveness" has any application here, Plaintiffs are plainly "cohesive" within the meaning of 23(b)(2) by virtue of their legal status as children in HHS foster care custody.

Furthermore, here, unlike in *St. Jude Medical*, cohesion in the Plaintiff class inheres in the collective nature of the relief sought. *St. Jude Medical* was a case about whether each plaintiff who received a potentially defective heart valve was entitled to future medical monitoring and treatment *given that plaintiff's particular health history and circumstances*. *Id.* at 1122. As such, the relief requested was akin to money damages, not purely injunctive relief as is sought by Plaintiffs here. As a later case found:

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[15] The R&R also applied an inappropriately heightened standard of commonality in its recommendation that the Court exclude "alleged" children from the class definition. (*See* R&R at 84-85 and pp. 5 - 8, *supra*.) In that section, the R&R incorrectly reasoned and recommended that class members have *all* issues of fact in common, not one or more issues of fact in common. *See, e.g., Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995). Indeed, substantial authority supports a finding of commonality when only a single issue of fact ***or*** law is common to all members of the class. *See, e.g., Baby Neal*, 43 F.3d at 56. *See also Newberg* at § 3:10.

> What . . . ***St. Jude Medical teach[es] is that when a class of individuals alleges a group harm, and seeks a broad, class-wide, injunctive remedy, there is an 'underlying premise' of cohesiveness that makes (b)(2) certification appropriate.*** But when that injunctive remedy must be individualized (as is the case with money damages, or with court-ordered medical monitoring), the cohesiveness is lost, and (b)(2) certification becomes inappropriate. . . . ***The so-called injunctive relief in . . . St. Jude Medical was actually money that would have to be paid for future medical procedures specific to individual members of the class.***

In re: New Motor Vehicles Canadian Export Antitrust Litigation, No. MDL 1532, 2006 WL 623591, at *9 (D. Me. Mar. 10, 2006) (emphasis added).

In contrast, Plaintiffs here allege group harms caused by a defined set of system-wide failures. Plaintiffs do not seek individualized determinations with respect to what remedial relief, if any, each Plaintiff child requires in the future in order to compensate them for a past wrong or to protect them from future harms as a result of latent disease or defects. Instead, they seek a comprehensive class-wide, injunctive remedy requiring HHS to address the system-wide deficiencies they have identified, thereby remedying the group harms to Plaintiffs that these deficiencies are causing. Thus, the presumption of "cohesiveness" that Rule 23(b)(2) contemplates applies here.

2. The R&R misconstrues Plaintiffs' claims and the scope of relief sought.

The R&R's recommendations regarding commonality are premised on the fundamental misconception that the Plaintiffs' claims and the relief available are individualized and specific to each child. The R&R suggests that the "likely reason" that Plaintiffs have not identified specifically what measures HHS should implement to address HHS' violations of their rights is that there is no relief "that will benefit all members of the highly diverse putative class." Accordingly, the R&R states, the Court could do no more than enter an order requiring HHS to "obey the law" (R&R 104-105), or issue an injunction requiring the investment of funds and the

implementation of State policies that will lead to the exercise of "reasonable professional judgment" on behalf of *each child*. (R&R at 105-106.)[16] This is simply not the case.

Plaintiffs recognize that they will have the burden at trial of establishing both ongoing violations of their federal rights and the need for, and propriety of, specific relief tailored to remedy such violations. *See* Section II, *infra*. But Plaintiffs do not seek an order that "would require this court to review [children's] unique circumstances." (R&R at 105.) To the contrary, if they prove violations of law at trial, Plaintiffs seek narrowly tailored remedies addressed solely to HHS' systemic failings, such that the HHS system can operate within constitutional minimums with the *capacity* to adequately provide for the safety and service needs of individualized children.[17]

For example, Plaintiffs intend to demonstrate at trial that, notwithstanding the Juvenile Court's role in approving the placement of individual children based on placement resources available, HHS' failure to develop and maintain a sufficient number and type of foster homes and other placements results in routine unnecessary placement moves and extended stays in shelters for Plaintiff class members, and that these placement moves and shelter stays cause pervasive harms to class members. To remedy this problem, the Court could order HHS to conduct and implement the results of a system-wide placement "needs assessment" to ensure that

[16] In discussing commonality, the R&R also states that "[t]here is no benchmark for determining when the State's policies – considered as a whole – or its allocations of funds – considered as a whole – have reached the 'reasonable professional judgment standard for the benefit of all members of the class, as opposed to the individually named plaintiffs." (R&R at 104.) However, Plaintiffs contend that the system-wide failures – *e.g.*, placement development, licensing and support; caseloads and training for front-line workers charged with overseeing the safety and well-being of class members; availability of and access to basic medical and mental health screens and services – fail to meet constitutional minimums in that they depart significantly from *any* formulation of reasonable professional standards within each of these areas. (*See* Am. Compl. ¶¶ 130, 137, 154.)

[17] The *Baby Neal* court specifically determined that it could avoid examining the individual circumstances of the plaintiffs in crafting relief because plaintiffs brought a suit seeking (1) declaratory relief and (2) to reform the defendants' *practices* to align them with the governing law, noting that "while the children will undoubtedly be affected by the district court's rulings, the court need not consider the individual children's peculiar circumstances in fashioning its order." *Baby Neal*, 43 F.3d at 61.

HHS no longer places children according to where any bed or "slot" is available, but rather in placements that have been developed to meet their long-term needs.

Other remedies that have accompanied court-ordered child welfare reform efforts and that may be available to the Court include ordering HHS to: lower caseloads for HHS workers assigned to monitor the safety and well-being of class members; provide class members with access to periodic medical, mental health and dental health examinations and treatment; and develop an information system that allows for decision-making based on accurate and current information. None of these remedies require an inquiry, much less a commonality-defeating inquiry, into individual children's cases.

As discussed in Section II.A.2., these are precisely the types of relief that are unavailable in Plaintiffs' individually-focused Nebraska Juvenile Court proceedings and, as will be demonstrated at trial, without which children in Nebraska's foster care system will continue to suffer grave harm.

3. The R&R relies on several factually distinguishable cases and ignores the reasoning of on-point authority.

Under the proper legal standard, and with their case properly characterized, Plaintiffs overwhelmingly satisfy the commonality requirement of Rule 23(a)(3). Though the R&R posits a split amongst the circuits on the relevant issues, courts have consistently found commonality in cases factually analogous to this action. *See, e.g., Baby Neal*, 43 F.3d at 60-63; *Kenny A.*, 218 F.R.D. at 299-301; *Christina A.*, 197 F.R.D. at 677-68; *Marisol A .ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376-77 (2d Cir. 1997).[18] Yet, instead of following the reasoning of these cases, in

[18] The R&R reads *Marisol A.* narrowly, but it has continued to be cited in support of certifying a class of plaintiffs challenging defendants' policies and practices – regardless of the particular individual effects of those policies on each member of the class. *See M.K.B*, 2006 WL 2469155, at **37-39 (certifying class in case challenging defendants' practices leading to improper denials and discontinuation of Medicaid and other federally funded public assistance benefits, despite the individual circumstances under which class members may have had benefits discontinued or denied).

particular the Third Circuit's decision in *Baby Neal* (which the R&R appears to acknowledge is factually on point), and others that have certified classes in virtually the same circumstances as this case (*see* Section I.B.1., *supra*), the R&R follows two inapposite and non-binding opinions: *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), and *Reinholdson v. Minnesota*, No. CIV. 02-795 ADM/AJB, 2002 WL 31026580 (D. Minn. Sept. 9, 2002).

In *J.B*, the plaintiffs sought to certify a putative class comprised of "all children who are now or in the future will be (a) in or at risk of [New Mexico] State custody and (b) determined by defendants and/or their agents to have any form of mental and/or developmental disability for which they require some kind of therapeutic services or support." *J.B.*, 186 F.3d at 1287. Plaintiffs in that case challenged the operations of not one, but several separate and distinct agencies in New Mexico, including the mental health system, the public education system, and the custodial child welfare system. *Id.* at 1289. Given the mixed non-custodial and custodial class and the diverse nature of the defendants and the developmental disability "services or support" defendants could be ordered to provide, the plaintiffs in *J.B.* were found not to have a single "statutory or constitutional claim common to all named Plaintiffs and all putative class members." *Id.* at 1290. The Tenth Circuit ultimately concluded that plaintiffs in *J.B.* could not establish commonality on factual or legal grounds, finding that "other than being disabled and having had some sort of contact with New Mexico's child welfare system, no common factual link joins plaintiffs," and rejecting the plaintiffs attempt to "broadly conflate a variety of claims" in an effort to establish legal elements in common. *Id.* at 1289.

The facts here are distinguishable from *J.B.* in a number of important respects. Each and every named Plaintiff and putative class member is factually unified by virtue of the fact that HHS exercises legal and physical custody over them (regardless of the particular facts and

circumstances surrounding how HHS gained that custody).[19] As a result, each putative class member is subject to the alleged deficient system-wide failings of a unitary executive agency. Each is suffering, or is at risk of suffering, identified harms by virtue of HHS' actions and inactions. (*See* R&R at 117-118 (finding that as a result of their ongoing custodial status, HHS' "policies present a real and continuous threat [to the named Plaintiffs] that past harm from HHS' actions or inactions will occur again.").) Moreover, all Plaintiff children are legally unified and affected by a single state agency governed by a single set of practices and procedures, as they were plainly not in *J.B.* As a result of their custodial status, all are challenging, most notably through their substantive due process claim, broad-based deficiencies and the predictable harms that flow from them, resulting in common legal issues.

Likewise, *Reinholdson* – a special education case involving nine distinct appeals by parents of individualized educational plans ("IEPs") formulated for their disabled children under the Individuals with Disabilities Education Act ("IDEA") – is inapposite. Before reaching the class certification issues in that case, the district court had already determined that "all claims by putative class members are dismissed for failure to exhaust administrative remedies." *Reinholdson*, 2002 WL 31026580, at *6. The court had also previously determined that all claims against the state education agency, as opposed to the independent school boards, should be dismissed for the reason that the claims at issue were not "systemic" within the meaning of the IDEA but were instead merely an expression of the fact that the parents "collectively are dissatisfied with the decisions made by the hearing officers" with respect to their children's individualized care. *Id.* It was therefore hardly surprising, and of no application or effect here,

[19] The *Baby Neal* court determined that, at a minimum, plaintiffs in that case had established commonality by virtue of the fact that "every plaintiff shares the essential circumstance of being in the custody or the care of DHS." *Baby Neal*, 43 F.3d at 61.

that the district court in *Reinholdson*[20] found that the plaintiffs had not satisfied the commonality prong of Rule 23 because the resolution of plaintiffs' claims depended "on highly individualized evidence." *Id.* at *8.[21]

Finally, the R&R's repeated reliance on the Eighth Circuit's decision in *Elizabeth M. v. Montanez*, 458 F.3d 779 (8th Cir. 2006), is misguided. In *Elizabeth M.*, the Eighth Circuit reversed the district court's certification of a single class to litigate claims arising from sexual and physical assaults on women residents of three separate mental health facilities, and claims for inadequate mental health treatment for residents *and* former residents of the facilities. *Elizabeth M.* does not in any way command adoption of the R&R's class certification recommendations, particularly those concerning factual and legal commonality of class claims. After disposing of the inadequate treatment claims of fourteen named plaintiffs no longer residing at any of the three facilities on standing grounds, the *Elizabeth M.* court addressed the issue of whether a class could be certified with the two remaining named plaintiffs representing a class of present and future residents of the three facilities and alleging distinct "failure to protect" and "inadequate treatment" claims. *Elizabeth M.*, 458 F.3d at 786-88. The Court expressed concern with two aspects of the case arguably encompassed within the concept of factual and legal commonality, neither of which are present here.

In *Elizabeth M.*, "the complaint and class action motion papers did not identify one or more policies or practices common to all three facilities that caused the[] alleged violations." *Id.*

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[20] For reasons discussed in detail in Section II.A.2., *infra*, plaintiffs' claims in *Laurie Q. v. Contra Costa County*, 304 F. Supp. 2d 1185, 1198-99 (N.D. Cal. 2004), were also inherently individualized.

[21] As with the "cohesiveness" analysis advanced by the R&R, reliance on *Reinholdson* is particularly misplaced in light of the compensatory, and therefore individualized, nature of the relief sought by the *Reinholdson* plaintiffs. The plaintiffs in *Reinholdson* sought "non-injunctive relief for the class in the form of 'compensatory education for any time period when IDEA was found to be violated.'" *Reinholdson*, 2002 WL 31026580, at *9. The court found that "[s]uch relief is not conducive to class treatment because it would of necessity require individualized determinations for each named Plaintiff and each member of the putative class as to whether he or she was denied educational services, the nature of the services, the time period, and the type and amount of educational services necessary to compensate for such a denial." *Id.*

at 787. "Instead, plaintiffs pleaded a laundry list of desired policy changes, alleged that their injuries are caused by the absence of these policies, and asserted that Rule 23's requirements are satisfied because all class members live in facilities where the desired policies are absent." *Id.* In contrast, Plaintiffs here have alleged in detail *both* the challenged policies and practices and the group harms endured as a result of the actions of a unitary agency.

In addition, the *Elizabeth M.* court questioned the district court's combination of "failure to protect" and "inadequate treatment" claims in a single class action on the grounds that "the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions, but not a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." *Id.* at 788 (citations omitted). Similarly, this aspect of *Elizabeth M.* has no application to the commonality inquiry before the Court. Plaintiffs here allege only the former – a substantive due process claim to reasonably safe custodial conditions when in foster care – not a broader remedy for what triggered their entry into foster care.

Ultimately, the court in *Elizabeth M.* found that, due to the combination of different legal standards, and the plaintiffs' "failure to identify the specific policies under attack and the nature of their federal statutory claims," the use of the class action vehicle was unjustified. *Elizabeth M.*, 458 F.3d at 788. In contrast, Plaintiffs here present common legal issues arising from unified claims that apply common legal standards, challenge clearly defined system-wide practices, and which in plain terms do not required individualized inquiry into class members' specific circumstances.

For all of these reasons, Plaintiffs have amply met the commonality requirements of Rule 23(a)(2), and the R&R's recommendation as to commonality should not be adopted.

C. The Named Plaintiffs' Claims Are Typical of Class Members for Purposes of Rule 23(a)(3).

Plaintiffs object to and seek *de novo* review of the R&R's recommendation that Plaintiffs' claims are not typical of the claims of the class pursuant to Fed. R. Civ. P. 23(a)(3). To be typical, a class representative "'must be part of the class and 'possess the same interest and suffer the same injury'" as the class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,156 (1982)(citations omitted). Typicality is not an onerous burden to satisfy. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982). The burden is generally met as long as other members of the class possess claims "similar to" those of the named plaintiffs. *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1977). As in the commonality analysis, "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Id.* The standard for typicality is loosened where common injunctive relief is sought and named plaintiffs do not assert individualized claims. *See Baby Neal*, 43 F.3d at 63; *DeBoer*, 64 F.3d at 1174-75 ("[The] claims are typical . . . given the injunctive relief sought . . . . This typicality is not altered by the different mortgage instruments held by class members.") (internal citations omitted).

As is plain from the detailed and specific allegations of the Amended Complaint, the claims of the named Plaintiffs and class members alike are premised on the same practices of Defendants, evidence of the same or similar harms, and the same legal theories. (*See generally* Am. Compl. ¶¶ 46-106 & 107-181.) Plaintiffs allege no individual claims and seek no relief apart from a class-wide remedy directed to systemic practices of Defendants that similarly harm – or at least raise a similar risk of harm for – *all* named Plaintiffs and absent class members. The

claims of the named Plaintiffs (which the R&R specifically notes are not contradicted by "the evidence of record," (R&R at 117)), include:

- ***Hannah A.*** – Hannah A., who is only seven years old, has already experienced over 14 different foster care placements over the course of her four years in HHS custody. Though Hannah has manifested signs of serious mental and behavioral health problems for a considerable time – including Reactive Attachment Disorder, a predictable by-product of her many placement moves – HHS failed to properly evaluate her for nearly three years, during which time a number of Hannah's more serious problems remained undiagnosed and unaddressed. As a result of this failure on HHS' part, the increasingly severe behaviors her many HHS-sponsored placement moves helped to cause, and the fact that HHS has permitted her to spend more than half of her life in foster care by failing to seek to move her to permanency, Hannah is now in danger of spending the rest of her childhood in state custody. While in foster care, HHS has repeatedly failed to oversee Hannah and has repeatedly had her placed in unsafe and otherwise inadequate foster homes, homes that have ranged from physically abusive to merely unsupported, untrained and unequipped to handle her significant needs. Hannah A. has also been placed for weeks on end, as a seven-year-old, in a shelter that hosts children and youth of both sexes, ranging up to age 18. (*See* Am. Compl. ¶¶ 99-106.)

Thus, encompassed within Hannah A.'s case are, at a minimum, (i) HHS' failure to maintain an appropriate number of placements for the benefit of class members; (ii) HHS' failure to ensure workloads for front line workers that permit oversight of the safety and well-being of class members; and (iii) HHS' failure to ensure class members' access to basic medical and mental health screens and services. Her case is also plainly typical of the group harms experienced by putative class members, including (i) damaging placement moves; (ii) unsafe and poorly monitored homes; (iii) maltreatment while in State custody; (iv) placement in emergency shelters for extended terms and at young ages; and (v) an extended length of stay in foster care.

- ***Carson P.*** **–** Now nine years old, Carson P. entered custody as a six-year-old. He is currently in his fourth foster care placement. Though Carson P. entered the system with significant medical, emotional and mental health needs, he was placed into a foster home that was provided almost no information about his needs and the circumstances under which he came into care. He received no face-to-face visits from his caseworker during his first eight months in care.[22] He has consistently been denied needed mental health screens and services despite very considerable mental health needs. The foster care maintenance per diem that HHS has paid on Carson P.'s behalf has consistently failed to cover the cost of providing care to him. (*See* Am. Compl. ¶¶ 46-57.)

Again, Carson P.'s case includes most of the core systemic claims and group harms of the lawsuit, including (i) the failure of HHS to support and train foster homes; (ii) inadequate caseworker oversight of the safety and well-being of children; (iii) insufficient placements to safely meet the needs of sexually reactive children such as Carson P.; (iv) inadequate access to medical and mental health screens and services; and (v) foster care maintenance payments that are simply inadequate to cover the cost of care.

- ***Bobbi W.*** – Bobbi W., now 15, has been in HHS custody continuously for almost six years. She has had over twenty different foster care placements, many of them shelters, group homes, and hospitals. Moreover, Bobbi W. has had at least eight different caseworkers during her time in HHS custody. Since 2004, Bobbi W. has been institutionalized in a group home where she lives with adults and sleeps on a mattress on the floor. (*See* Am. Compl. ¶¶ 90-98.)[23]

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[22] Moreover, as recently as December 2005 Carson P. was apparently left by HHS in the care of a twenty or twenty-one-year-old cousin where he is alleged to have been involved in a sexual incident with his five-year-old cousin. (*See* Class Cert. Rep. Index at Ex. 1, at HHS 021919 – 021922.) Carson P.'s guardian ad litem was very concerned that she had not been advised by Carson P.'s caseworker about these events. (*See id.* at HHS 021888-021890 (Report of Guardian ad Litem, dated February 7, 2006).)

[23] Incident reports produced by the group home's staff reflect routine, nearly daily extraordinary behaviors by Bobbi including physical assaults, runaways, sexually inappropriate acts, and suicidal statements and actions. (*See* Class Cert. Rep. Index at Ex. 6, at HHS-011803 – 011804.) In a June 30, 2005, email exchange between Bobbi's caseworker and Bobbi's developmental disabilities services coordinator. Bobbi's caseworker noted that she "doesn't know what to do with this kid." Bobbi's developmental disabilities services coordinator later expressed a similar sentiment: *"It seems that everything is moving very slowly and we really – still – aren't doing what is best for Bobbi. Whatever that is."* (*See id.* at HHS 013029 (emphasis added).)

As with the other named Plaintiffs, Bobbi W.'s case reflects core systemic deficiencies – including inadequate placements and caseworker turnover – and the resulting harms that are at the heart of this lawsuit.

A finding of typicality should have been routine in light of these well-pled allegations. However, despite the clear instruction of *Alpern* and *Deboer*, the R&R concludes that the factual differences among class members render the named Plaintiffs' claims atypical for purposes of Rule 23(a)(3). The R&R notes that "the proposed class includes children ranging in age from newborn to nineteen, who[] have entered HHS legal custody because they were abused, neglected, abandoned, homeless, destitute, unable to be cared for by their parents, or uncontrollable, wayward or truant," contrasting this with the remaining five named Plaintiffs, whom the R&R determines were "all adjudicated under 3(a), and each initially entered the child welfare system by removal from their homes for their protection." (R&R at 107.) The R&R focuses in particular upon perceived tensions among the named Plaintiffs – who by virtue of their 3(a) "abused and neglected" status and length of stay in foster care he determined to have an interest in focusing HHS resources on such things as "locating foster and adoptive homes" – and other class members, who, the R&R suggests, would have an interest in directing resources towards supporting "in-home" placements and reunification and familial visitation services. (*See* R&R at 107-108.) These differences do not preclude class certification.

The R&R's predicate factual finding is incorrect: as Plaintiffs demonstrated in their Reply Brief, named Plaintiffs Jacob P. and Bobbi W. both began their most recent placement episodes pursuant to 3(a) "dependent" (or "no fault") adjudications, a status Jacob P. apparently

retains to this day.[24] This, combined with the redefinition of the putative class to exclude children adjudicated as 3(b) "status offenders" and "in home" placements, eliminates any potential tension.

Moreover, the differences in the circumstances pursuant to which HHS gains legal custody of children is not relevant to the typicality analysis. Once in state custody *all* named Plaintiffs and class members are subject to, and harmed or put at risk of future harm by, the specific systemic acts and omissions of Defendants alleged in the Amended Complaint. *See Baby Neal*, 43 F.3d at 63.[25] As children move through different stages of the system they may need different services. For example, children that initially required services to safely and quickly reunify them with biological parents may later need services to get adopted. Children that may originally require placement in a family home may ultimately require placement in a more therapeutic environment and even, in rare cases, institutionalization. What Plaintiffs' allege is HHS' failure to develop the core building blocks of a system able to meet all of these changing needs: an adequate number and range of placements, caseworkers with manageable caseloads, a computer system capable of tracking children within the system. Given these allegations of systemic failure, differences of the type identified in the R&R do not defeat a

[24] Named Plaintiff Jacob P. began his most recent placement episode in February 2004 when his adoptive parents decided they no longer wanted custody of him and his adoptive brother. In May 2004 he was adjudicated as a Section 3(a) "dependent" (or "no fault") juvenile, and, as HHS' own Child Placement History Sheet indicates, he remains under a no fault adjudication to this day. (*See* Class Cert. Rep. Index at Ex. 5, at HHS 002938-41 and HHS 002290-91; s*ee also* Rep. Br. Class Cert. at 30.) Plaintiff Bobbi W. first entered HHS custody as a Section 3(a) "dependent" juvenile. (*See* Class Cert. Rep. Index at Ex. 6, at HHS-016211-016212 (Child Placement History Sheet indicating Bobbi W. was adjudicated no fault for her first four months in custody in 2001) and at HHS-012285-86 (reflecting that even though Bobbi W. was re-adjudicated in September 2001 as a Section 3(a) juvenile with suspected abuse and neglect issues, at least one of her later HHS caseworkers continued to make case planning decisions under the assumption that Bobbi W. was still a "no fault" juvenile); s*ee also* Rep. Br. Class Cert. at 30-31 & n. 25.)

[25] Indeed, as Defendants themselves acknowledge, "Section 3(a) juveniles with dependency issues have the same placement priority and are subject to the same regulations as those who have been abused or neglected." (*See* Df.'s Br. in Opp. Class Cert at 22 (citing Neb. Rev. Stat. §§ 43-1311 and 43-1312); s*ee also id.* at 23 (making identical concession with respect to children adjudicated pursuant to 3(b).)

finding of typicality, particularly in a case the parties concede was properly pled under Rule 23(b)(2).

Elizabeth M. does not support a contrary result. Underlying all of the Eighth Circuit's typicality findings in *Elizabeth M.* was the central fact that, though distinct policies and practices operative in three different mental health facilities were being challenged in plaintiffs' "protection from harm" claim, only one named plaintiff, subject to an assault in one facility, survived the Court's standing analysis. *Elizabeth M.*, 458 F.3d at 787.[26] As there were no named plaintiffs subject to the relevant harm (sexual assault) in the other two facilities, the Court determined that "present and future patients [at these other facilities] may not be members of th[e] failure-to-protect class." *Id.* Given the system-wide nature of the practices challenged in this case and unified legal claims of the named Plaintiffs and putative class members, this determination is not relevant.[27]

For these reasons, Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) and the Court should decline to adopt the R&R on this point.

D. The Named Plaintiffs Are Adequate Class Representatives Under Rule 23(a)(4).

Plaintiffs object to the R&R's finding that the named Plaintiffs are not adequate class representatives under Rule 23(a)(4). Rule 23(a)(4) requires that the named plaintiffs fairly and

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[26] With respect to the "inadequate treatment" claims, the *Elizabeth M.* Court found that the claims of the two remaining named plaintiffs were alleged with such imprecision that it was impossible for the Court to determine whether they were typical of the absent class members. *See Elizabeth M.*, 458 F.3d at 787. Here, there can be no doubt that Plaintiffs fully and adequately plead the both the experiences and harms befalling the named Plaintiffs and the systemic deficiencies and harms applicable to the putative class.

[27] Also underlying the *Elizabeth M.* Court's typicality finding was its determination that specific legal and factual elements of "failure to protect" substantive due process claims in the context of persons involuntarily confined in state mental health facilities differed materially for assault claims involving assaults by fellow residents (requiring proof of deliberate indifference to a known risk by on-site staff) and intentional staff assaults. *Elizabeth M.*, 458 F.3d at 787. The Court determined that because of these differences a named plaintiff claim alleging assault by a resident was not typical of a putative class member at risk of assault by a staff member. Unlike the sexual assaults at issue in *Elizabeth M.*, Plaintiffs' substantive due process claims do not turn upon the individualized actions, inactions and knowledge of workers within particular facilities, but rather the conduct of senior executive branch officials in creating and maintaining a deficient system. Accordingly, this aspect of the Eighth Circuit's decision in *Elizabeth M.* does not affect the typicality of the named Plaintiffs' claims.

adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). This test is met where there is no indication that the interests of the putative class representatives are antagonistic to the class' interests. *Paxton*, 688 F.2d at 562-63. Though the ultimate burden of establishing adequacy rests with the plaintiffs, the party opposing class certification must come forward with more than mere speculation about a potential for conflict between the interests of named plaintiffs and the class for a class representative. *Caroline C.*, 174 F.R.D. at 466. Where, as here, all class members are seeking the same injunctive relief, not individualized damages, and there are no individual claims, conflicts for purposes of Rule 23(a)(4) are particularly unlikely. *See Christina A.*, 197 F.R.D. at 670.

The R&R speculates that "[c]onflicts of interest may well exist between those named plaintiffs who primarily seek long-term permanency planning with adoption, and putative class members (or even named plaintiffs) who are focusing on access to health care, resources for reunification, or assistance with a wayward child." (R&R at 119.) In particular, the R&R perceives potential conflicts in "the priority of relief and remedies requested, and the allocation of HHS resources demanded," between and among 3(a) "abused and neglected" juveniles, 3(a) "dependency" juveniles, and 3(b) "status offender" juveniles. (*Id.*)

For the same reasons discussed in the typicality section *supra*, these alleged conflicts are either no longer relevant based on the class redefinition, or are based on incorrect factual findings. Any potential for conflict between the named Plaintiffs and "status offender" or "in home" children is obviated by the exclusion of these two groups from the proposed class redefinition. *See* pp. 5 – 8, *supra*. With respect to the supposed distinctions between 3(a) "abuse and neglect" and 3(a) "dependency" children, the R&R's finding is premised on a factual error that there is no named Plaintiff representative of 3(a) "dependency" children, when in fact Jacob

P. meets all relevant criteria. *See* pp. 28 - 29 *supra.* Moreover, as discussed above, children alleged or adjudicated as "abused and neglected" under 3(a) have been and are subject to the same acts and omissions of Defendants, and the same harms or risk of harm, as those children who are adjudicated "dependent" under 3(a). Though the permanency and service needs of individual children adjudicated "abused/neglected" and "dependent" may differ (just as the needs of an individual child are likely to differ at varying points of single case), what is sought in this action is a an order requiring HHS to put into place the core elements of a system with the structural capability of meeting all of such needs. Finally, and dispositively, here – as in *Christina A.* – all class members are seeking the same injunctive relief, not individualized damages, and there are no individual claims at issue.

E. The Next Friends Are Adequate Representatives Under Rule 23(a)(4) and Defendants' Motion to Dismiss For Lack of Standing Due to the Inadequacy of the Next Friends Should Be Denied.

Separate and apart from the R&R's determination with respect to the adequacy of the named Plaintiffs, the R&R indicates that it is "currently" unable to find that the next friends are suitable representatives of the named Plaintiffs. (R&R at 135-137.) The R&R also explicitly recommends holding that portion of Defendants' motion to dismiss based on lack of standing due to the next friends' inadequacy "in abeyance" pending an evidentiary hearing. (R&R at 139.) Plaintiffs object to and seek *de novo* review and reversal of both determinations.

1. On the record before the Court, the next friends are adequate representatives of the named Plaintiffs pursuant to Rule 23(a)(4) and Rule 17(c).

Fed. R. Civ. P. 17(c) directs that minor plaintiffs be represented in a federal action by a nominal lay "next friend" or guardian ad litem, or that they otherwise have their interests protected by the federal court once an action is filed. The Magistrate Judge refers to both the

"significant relationship" and "good faith" tests concerning the suitability of next friends.[28] However, the R&R recognizes that next friend representation is "much more difficult when applied to foster children." (R&R at 135.) As the R&R notes,

> [f]oster children likely have no "significant relationship" with any adult who can or will litigate on their behalf. Parents, adult family members, close adult friends, and general guardians often do not exist, are unmotivated to help, are irresponsible, or have a personal interest in the outcome. Where child welfare reform is the issue, caseworkers have a conflict of interest, and foster parents and HHS-compensated service providers (e.g. therapists) likely have a conflict of interest. Nebraska court-appointed guardians ad litem are not only unauthorized by the state court to pursue federal proceedings on a child's behalf, but may have a conflict of interest.
>
> Ultimately, a foster child's access to this forum may rest with private citizens who are ideologically motivated to represent such children, ***irrespective of whether they know the individual child they agree to represent.*** Where such circumstances exist, ***child advocates can be suitable next friends for a child litigant provided they convince the court that they are not solely motivated by ideological goals, . . . that the individual child's best interests have been thoroughly considered, and that those interests will remain paramount throughout the litigation***.

(R&R at 135-37) (emphasis added).[29]

In addition to the limits on foster children's access to the Court noted in the R&R, several additional factors prevent the next friends at this stage of the case from aggressively pursuing the additional factual information about the named Plaintiffs that the R&R appears to require:

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[28] (R&R at 126-34 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990), and *Ad Hoc Committee of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 30-31 (2d Cir. 1989)) (other citations in R&R omitted).) Given the correct statement of the law that "[f]oster children likely have no 'significant relationship' with any adult who can or will litigate on their behalf" (R&R at 135), the R&R's application of a heightened "significant relationship" test to the facts in this case is in error. (R&R at 130-33.)

[29] The R&R relies on *T.W. ex rel. Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997), for the proposition "that persons having only an ideological stake in the child's case are never eligible" to be next friends. *T.W.* is easily distinguished because it involved a suit seeking $120 million in damages. *T.W.* at 894. The disqualified next friend was the head of a children's organization who had only followed the plaintiff children's case through the media and had become their next friend solely to promote his philosophical opposition to the state's alleged racial matching policy in foster care placements. *Id.* at 896. In contrast, this case seeks exclusively injunctive and declaratory relief, and far from being pure self-interested child welfare "ideologues," the next friends are simply concerned citizens – an accountant, a minister, two stay-at-home mothers, and a civilian in the Army Reserve – all capable of and committed to representing the interests of both the named plaintiffs and the class members they in turn represent. (*See* Rep. Br. Class Cert. at 44-53.)

- Confidentiality laws that prevent the next friends from independently obtaining information such as the current whereabouts of the children, the identities of foster parents, attending family court proceedings, and contacting caseworkers or the Foster Care Review Board.[30]

- The potential for HHS retaliation against foster parents or private providers of placements or services for foster children.[31]

- Sensitivity to the attachment-related disorders of many children in foster care, especially before an order approving the status of next friends is issued by the Court.[32]

Ultimately, the R&R recognizes that these named Plaintiffs have extraordinarily limited options for representation in the Court. The R&R also concludes that "[t]he evidence supports a finding that each of these next friends ['] . . . primary objective appears to be changing Nebraska's child welfare system" (R&R at 133.) Thus, there is no concern here for the type of profiteering or ideological motivations present in *T.W. v. Brophy*. Moreover, contrary to the R&R's proposed findings, on the record assembled, each next friend seeks not only to aggregately improve the lives of all putative Class members but also to further the best interests of the child they represent.[33] And most of the next friends have known the named Plaintiffs in

[30] *See, e.g.*, Neb. Rev. Stat. § 43-2,108 (2) ("the medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers as they relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court); Neb. Rev. Stat. § 43-3001(1) ("[J]uvenile court records and any other pertinent information that may be in the possession of . . . the Department of Health and Human Services . . . concerning a child who is in the custody of the state may be shared with individuals and agencies who have been identified in a court order authorized by this section.").

[31] Plaintiffs' attorneys are aware of at least one occurrence, subsequent to the commencement of this lawsuit, in which Gail Steen, Legal Counsel for HHS, advised a former foster parent of Hannah A. with whom attorneys for Nebraska Appleseed had been in contact not to speak further with Plaintiffs' counsel. (*See* Class Cert. Rep. Index at Ex. 10 (Affidavit of Jennifer Carter, dated March 30, 2006).)

[32] Micheline Creager, the Next Friend for Bobbi W., for example, testified that she has not spoken on the phone with the child, who is diagnosed with Reactive Attachment Disorder, because she "felt that it really was not in her best interest to have another adult that she might become attached to and – you know, unless I could be in there for the long haul with her." (*See* Df.'s Evidence Index at Ex. 46 (Micheline Creager Dep.) at 10:20 – 11:1; *see* Class Cert. Rep. Index at Ex. 12, at HHS NP 001836-38 (noting Bobbi W.'s diagnosis with "Reactive Attachment Disorder"); *see also Diagnostic and Statistical Manual of Mental Disorders* § 313.89, Reactive Attachment Disorder of Infancy or Early Childhood (4th ed.)(2000).)

[33] *See, e.g*, Df.'s Evidence Index at Ex. 35 (Sara Jensen Dep.), at 13:17-22 (describing her role as next friend to be "someone who represents Jacob P. and his interests in the case . . . as well as representing other kids in Nebraska, foster kids.").

some context for years, and those that are not currently in contact with the children or their caretakers have articulated credible reasons for why this is so.[34]

Notwithstanding all of these acknowledged impediments and other relevant factors, the R&R erroneously recommends that the Court find that the next friends are "currently" not adequate representatives for the named Plaintiffs. Plaintiffs object to the adoption of this recommendation and submit that the adequacy of the next friends under Rule 23(a)(4) and Rule 17(c) is established by the assembled record.

2. Defendants' motion to dismiss the claims of the named Plaintiffs for lack of standing due to the inadequacy of the next friends should been denied.

The R&R also considers Defendants' argument that because the next friends are not adequate representatives, the Court should dismiss the claims of the named Plaintiffs for lack of standing, citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990). Defendants' motion to dismiss misconstrues the nature of "standing" as it relates to Rule 17(c) and should have been denied.

Normally, issues of standing implicate the Constitution's Article III case or controversy requirement, or present non-constitutional prudential concerns implicating matters of judicial self-governance that include, among other things, "the general prohibition on a litigant's raising another person's legal rights." *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).[35] In this case, the next friends' ability to bring this suit on behalf of the named Plaintiffs derives from Rule 17(c), which legislatively authorizes an exception to traditional prudential standing requirements for representatives of plaintiffs who are minors or incompetent. *See, e.g.*,

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[34] *See* Rep. Mem. Class Cert. at 45 to 53.

[35] In terms of Article III standing, as to the named Plaintiffs themselves, the Magistrate Judge appropriately determined that "[u]nder either a 'facial' or 'factual' analysis, named plaintiffs Carson P., Danielle D., Jacob P., Bobbi W., and Hannah A. have demonstrated a risk of future harm that is sufficiently real and imminent to support standing." (R&R at 117.)

Jacob v. Herff-Jones, Inc., No. Civ. 1:CV-04-1654, 2005 WL 2030449, at * 1 (M.D. Pa. Aug. 18, 2005).

As set forth in the previous section, the next friends satisfy the requirements of Rule 17(c). Moreover, as the R&R noted, even assuming, *arguendo*, that the Court had concluded that Plaintiffs' self-appointed next friends are inappropriate (a conclusion Plaintiffs strongly oppose), Rule 17(c) requires the Court to appoint another suitable next friend or otherwise ensure that Plaintiffs are not deprived of "access to the courts and justice."[36] (R&R at 138.) Accordingly, the R&R should have simply denied, not held in abeyance, Defendant's motion to dismiss the claims of the named Plaintiffs for lack of standing due to alleged inadequacy of the next friends.

II. ABSTENTION UNDER *YOUNGER V. HARRIS* IS INAPPLICABLE AND UNWARRANTED.

Notwithstanding the express grant of jurisdiction to federal courts in civil rights cases,[37] the R&R erroneously accepts Defendants' invitation to apply the extraordinary and narrow doctrine of *Younger* abstention to this case and recommends that the Court exercise its discretion to dismiss the lawsuit in its entirety prior to the conduct of any merits discovery. If adopted, the R&R's *Younger* abstention recommendation would deprive Plaintiffs – children in a mismanaged child welfare system that does not meet constitutional standards – of their only forum to mount a systemic challenge to the constitutionality of the care they are receiving from their executive branch custodians. This is precisely the type of civil rights action that the Eighth Circuit has held is the "least likely candidate[] for abstention." *Assoc. for Retarded Citizens of*

[36] In this circumstance, Plaintiffs should be granted leave to substitute next friends.

[37] Plaintiffs claim their constitutional and federal statutory rights have been violated and bring their case before the Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. (*See* Am. Compl. at ¶ 9.) With the enactments of 42 U.S.C. § 1983 (through its predecessor, Section One of the Civil Rights Act of 1871) and 28 U.S.C. § 1343, Congress created both a private right of action against persons who, under color of state law, deprive an individual of his or her federal rights, and also accorded civil rights plaintiffs access to a federal forum by vesting the district courts with jurisdiction to hear such cases. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation.").

North Dakota v. Olson, 713 F.2d 1384, 1391 (8th Cir. 1983) (citing *Moe v. Brookings County*, 659 F.2d 880 (8th Cir. 1981)). The District Court judge should review the matter *de novo* and deny Defendants' motion to dismiss pursuant to *Younger* abstention.

A. There Are No Legal Grounds For Abstaining Under the *Younger* Doctrine.

"[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred" by Congress. *New Orleans Public Service, Inc. v. Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 358 (1989). The federal courts' "obligation to adjudicate claims within their jurisdiction is 'virtually unflagging.'" *Id.* at 359 (citing *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)). However, the Supreme Court has identified certain extraordinary circumstances where, though federal jurisdiction is present, it may nevertheless be permissible for a federal court to refrain from granting certain types of relief. *NOPSI*, 491 U.S. at 359. The Supreme Court has repeatedly cautioned, however, that such abstention "remains 'the exception, not the rule'." *Id.* (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

Following these directives, a clear majority of the federal courts that have considered application of the *Younger* doctrine in the circumstances presented here – a preliminary motion to abstain from hearing the claims of foster children in an injunctive lawsuit seeking class-wide relief, in deference to the constituent class members' ongoing juvenile court review proceedings – have refused to abstain and bar plaintiff children from seeking vindication of federal rights in their chosen federal forum.[38]

[38] *See, e.g.*, *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 570 (S.D. Miss. 2004) (finding *Younger* abstention improper where plaintiffs had ongoing Mississippi family court proceedings improper because district court could not determine that all possible relief it could enter in the future would "necessarily" interfere with ongoing Mississippi youth court proceedings); *Kenny A. v. Perdue.*, 218 F.R.D. 277, 286 (N.D. Ga. 2003) (finding *Younger* abstention

A district court may only abstain pursuant to *Younger* when (i) there are ongoing state judicial proceedings implicating important state interests (prerequisites not challenged by Plaintiffs here); (ii) the grant of the relief sought in the federal litigation "unduly interferes" with such proceedings, *NOPSI*, 491 U.S. at 359; and (iii) the state proceedings at issue provide the federal plaintiffs with an adequate opportunity to raise their federal claims. (*See* R&R at 142-143.) The second and third conditions are not present in this case. Contrary to the findings in the R&R, grant of relief in this case will not unduly interfere – in fact, it would not interfere at all – with Nebraska Juvenile Courts, and those courts cannot provide Plaintiffs with an adequate forum in which to advance their federal claims.

1. This lawsuit will not "unduly interfere" with any ongoing proceedings in Nebraska's Juvenile Court.

The R&R's recommendation on *Younger* abstention centers on predictions of the relief Plaintiffs will ultimately seek and be granted at trial – relief the R&R then concludes will necessarily interfere with Plaintiffs' ongoing Juvenile Court proceedings. (*See* R&R at 147-150.) However, these predictions are premature. They reflect a fundamental abdication of the Court's power to tailor equitable relief consistent with the evidence ultimately adduced at trial and in deference to federalism and comity concerns. Most importantly, they fail to take into account

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improper because declaratory and injunctive relief sought was directed solely at executive branch officials and would not necessarily interfere with plaintiffs' ongoing review hearings in Georgia's juvenile courts); *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 957 (M.D. Tenn. 2000) (refusing to abstain pursuant to *Younger* in deference to plaintiffs' ongoing Tennessee juvenile court review proceedings); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 514 (D. N.J. 2000) (refusing to apply *Younger* to class challenge of New Jersey's child welfare system, despite extensive adjudicatory system to review individual child welfare cases); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 688-89 (S.D.N.Y. 1996) (finding *Younger* abstention inapplicable though "by definition, every child who is subject to New York's child protective system is also subject to a Family Court action in which the claims raised here can be litigated…"); *LaShawn A.. Kelly*, 990 F.2d 1319, 1322-23 (D.C. Cir. 1993) (holding *Younger* abstention inapplicable despite ongoing Washington D.C. family court neglect proceedings, review hearings, and termination proceedings); *Baby Neal v. Casey*, 821 F. Supp. 320, 331-33 (E.D. Pa. 1993), *rev'd* on other grounds, *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994) (declining to abstain pursuant to *Younger* where plaintiffs sought solely executive-focused injunctive relief); *L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) (finding *Younger* abstention unwarranted where abused and neglected minor plaintiffs were not seeking to enjoin plaintiffs' ongoing Arizona juvenile court proceedings or prohibit state officials from enforcing any state law). *But see Laurie Q. v. Contra Costa*, 304 F. Supp. 2d. 1185, 1203-5 (N.D. Cal. 2004); *31 Foster Children v. Bush*, 329 F. 3d 1255, 1278-79 (11th Cir. 2003); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1292 (10th Cir. 1999). As explained herein and in Plaintiffs' brief in opposition, these cases are distinguishable and unpersuasive. (*See* Br. in Opp. MTD at 13-28.)

numerous examples proffered by Plaintiffs of relief that would not in any way interfere with Plaintiffs' individual Juvenile Court proceedings. For these and other reasons identified, the Court should decline to adopt the predictions and the R&R's derivative finding of "undue interference."[39]

As a threshold matter, the R&R rejects Plaintiffs' contention that it is premature to bar Plaintiffs from the Court pursuant to *Younger*, chiding Plaintiffs for "artful pleading" in failing to frame the relief sought with sufficient specificity. (R&R at 147.) But there is no doctrine requiring Plaintiffs to plead such relief with particularity at the present juncture. Indeed, as merits discovery has yet to commence it would be premature for Plaintiffs to specify the contours of the systemic relief they would seek upon obtaining a finding of liability. *See, e.g.*, Moore's Federal Practice Civil § 8.05 (under Fed. R. Civ. P. 8, demand for judgment "can be stated in general terms"); *United States v. Metro Development Corp.*, 61 F.R.D. 83, 86 (N.D. Ga. 1973) ("attempts to pin the plaintiff down at the pleading stage to the scope of equitable relief ultimately available to him are . . . futile"). *See also Morton Bldgs. of Nebraska v. Morton Bldgs., Inc.*, 531 F.2d 910, 919 (8th Cir. 1976) (plaintiff is not strictly bound by the prayers for relief in the complaint; the trial court is obligated to enter judgment in favor of plaintiff for any appropriate relief mandated by the evidence adduced at trial); *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (failure to specify relief cannot be basis for motion to dismiss under Rule 12(b)(6)); *Schwan v. CNH Americ*a LLC, No. 4:04CF3384, 2006 WL 1215395, at *35 (D. Neb. May 4, 2006).[40]

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[39] Plaintiffs have sought to limit their arguments to issues at the core of their objections. The Court is respectfully referred to pages 17-26 of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss for a fuller discussion of relevant case law regarding the narrow application of the "interference" prong of the *Younger* doctrine.

[40] The inherent prematurity in making *Younger* abstention determinations at the pleading stage has been recognized by at least two district courts, both considering preliminary motions in similar injunctive institutional reform actions. *See Kenny A.*, 218 F.R.D. at 286; *Olivia Y.*, 351 F. Supp. 2d. at 570 (S.D. Miss. 2004). (*See also* Br. in Opp. MTD at 25.) Notably, following issuance of the R&R, the *Olivia Y.* court denied a renewed *Younger* abstention motion seeking the post-discovery exclusion of all "evidence relating to placements and services [for the reason that] a ruling by this court in these two areas would inevitably interfere with ongoing Youth Court proceedings." *See*

Even if it were appropriate to require the degree of remedial specification imposed by the R&R, the abstention analysis the R&R employs is flawed for several related reasons.

The R&R ignores the Court's ability to craft relief. Should Plaintiffs prove their claims at trial, the remedial relief granted would not spring from Plaintiffs' "wish list," or the type of relief hypothesized by the R&R – a formulaic grant of the broadest relief possible given the allegations of the Amended Complaint or proposed findings of fact. Rather, the Court would be called upon to craft specific relief, tailored to any violations proven, that will not interfere with the prerogatives of the Nebraska Juvenile Court or otherwise contradict traditional notions of comity and federalism. *See Clark v. Coye*, 60 F.3d 600, 603-604 (9th Cir. 1995) ("Due to concerns of comity and federalism, the scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only."); *Consumer Party v. Davis*, 778 F.2d 140, 146-47 (3d Cir. 1985) ("While a district court has wide discretion in fashioning a remedial injunction, such discretion is not without constraints . . . [prominent among them] the principle of federalism: 'federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . .'" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)).[41]

The R&R, however, simply identifies areas of overlap between (i) the individually-focused relief it assumes will be sought by Plaintiffs and granted by the Court, and (ii) the bailiwick of the Juvenile Courts, concluding summarily that

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Olivia Y. v. Barbour, No. 3:04CV251LN (S.D. Miss. Aug. 29, 2006) (copy annexed as Ex. 8 to the Index of Supp. Auth.)(the "*Olivia Y.* Aug. 29, 2006 Dec."). Under Mississippi statute, the Youth Court is called upon to direct the placement of foster children in specific homes or group facilities, Miss. Code. Ann. §§ 43-21-609(e)(i); 43-15-13(9), and is authorized to approve/monitor service plans for children, *id.* § 43-15-13(5), yet the *Olivia* court again refused to apply the *Younger* doctrine, stating simply that "the court is not persuaded that any relief this court may grant, in the event plaintiffs were to establish a constitutional violation, would necessarily impinge on the jurisdiction and prerogative of the state's Youth Courts." *See* Ex. 12, *Olivia Y.* Aug. 29, 2006 Dec., at 2.

[41] *See also Emily Q. v. Bonta*, 208 F. Supp. 2d. 1078, 1093 (C.D. Cal. 2001) (approving as consistent with comity and federalism relief granted in a class action by Medicaid eligible children claiming the California Department of Health failed to provide the full scope of mental health services required by the EPSDT provisions).

> 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.

(R&R at 156.)

In so doing, the R&R assumes an all or nothing proposition: If some of the relief Plaintiffs might seek may conceivably interfere with the relevant Juvenile Court proceedings, abstention is required and Plaintiffs must be barred from even the proper non-interfering relief to which they are entitled. *See id.* This is not the law. *See Joseph A. ex. rel. Wolfe v. Ingram*, 275 F.3d 1253, 1272 (10th Cir. 2002) ("the fact that one provision [of the decree] may not be enforceable in light of *Younger* does not necessarily warrant voiding the entire consent decree . . . or dismissing the entire action.")[42]

Moreover, at the end of the case and after appropriate discovery, ***Plaintiffs will request – and the Court will be able to grant – relief that does not even arguably interfere with the workings of the Juvenile Courts*** in each of the subject matter areas identified in the R&R (at 148-149 & 156). For example, expanding on the arguments presented by Plaintiffs in their brief below:[43]

- **Placements**: Plaintiffs allege throughout their Amended Complaint a severe shortage, and manifestly insufficient array, of appropriately screened, trained, informed, and

[42] The law also does not provide for *Younger* abstention merely where parallel federal and state court proceedings address overlapping, or even the same, subject matters. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975) ("the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism").

[43] *See* Br. in Opp. MTD at 18-19.

supported (including financially) foster homes and other types of placements for class members. (*See* Am. Compl. ¶¶ 5(a)&(c), 109-124, 138-140.) Such placements are a necessary prerequisite for the Nebraska Juvenile Court to exercise its judgment in individual proceedings. In the absence of options, the Juvenile Court's authority is illusory; it can only choose among what may be less than acceptable alternatives. Appropriately tailored injunctive relief requiring HHS to address its critical shortage and array of placements would go far towards addressing most of the placement problems identified, including multiple placement moves, limiting of time spent in emergency shelters and small children being placed in such facilities, overcrowded foster homes, and the segregation of dangerous or sexually reactive foster children from other children.

- **Supervision**: As noted below, HHS is exclusively charged with licensing and performing criminal background checks of foster homes and other placements, and HHS could clearly be ordered to alter practices in this area without running afoul of the Juvenile Court's authority. A limitation on caseworker caseloads (permitting more individualized attention and increased caseworker child visitation) and improvements in caseworker training are additional examples of remedial relief that should dramatically improve HHS practice in this critical area without even arguably impinging on the domain of the Juvenile Courts.
- **Health Services**: It is exclusively the obligation of HHS to ensure that each class member "receive a medical examination within two weeks of his or her removal from his or her home; and [] subject the child to such further diagnosis and evaluation as is necessary" (Neb. Rev. Stat. § 43-1311). As with placements, though the Juvenile Court may ultimately have the authority to ratify health services provided to individual children pursuant to their case plans, increasing all putative class members' access to medical, mental health, and dental care screening is a clear example of non-interfering relief.
- **Computerized Information System**: Relief sought in this area would clearly not interfere with the functioning of the Juvenile Courts, nor does the R&R claim to the contrary.

These are just a few of the types of the "non-interfering" relief the Court could grant to remedy constitutional and federal rights violations to Plaintiffs without even arguably entering

into territory occupied by the Juvenile Court.[44] As noted by the court in *Kenny A.*, such relief – far from interfering with these proceedings – would instead:

> . . . simply support and further the juvenile court's own mission of ensuring that children removed from their parents' custody because of abuse or neglect are not further harmed when the juvenile court orders them into the custody of the state. Thus, for example, plaintiffs seek relief to ensure that caseloads are reduced to a reasonable level. The only conceivable effect on state court proceedings that could flow from such relief would be caseworkers appearing in juvenile court who are better prepared because they have reasonable caseloads.

Kenny A. at 286-87.

As a further matter, the R&R fails to take into account that in a number of areas central to this lawsuit, it is HHS – not the Juvenile Courts – that is exclusively responsible for the care and treatment of Plaintiffs. For example, as is presented in detail at pages 4-7 of Plaintiffs' Brief in Opposition, HHS – not the Juvenile Courts (or for that matter the guardian ad litems, CASAs, county attorneys, Foster Care Review Board members, or other actors that touch the lives of children in Nebraska's foster care system) – is specifically and exclusively responsible for the following areas, in which non-interfering relief could easily be granted:

- establishing and maintaining workloads for HHS workers (Neb. Rev. Stat. § 68-1207);
- providing foster care maintenance payments to state wards and establishing foster care maintenance payment rates for children with special needs in HHS custody (Neb. Rev. Stat. § 68-1210; 479 Neb. Admin. Code § 2-001);

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[44] *Joseph A.*, 275 F. 3d at 1272, relied upon in the R&R, clarifies that the granting of this type of systemic relief would plainly not trigger "interference" necessary to support the application of *Younger*. In a contempt proceeding brought by the *Joseph A.* plaintiffs based on defendants' failure to comply with the terms of a court-ordered "exit plan" from a consent decree, the defendants moved to dismiss the case based on *Younger* abstention. *Id.* Upon appeal of the district court's ruling that abstention was required from the entire case, the Tenth Circuit ordered the district court, which it conceded was more familiar with the "complexities of the case," to conduct "a provision-by-provision *Younger* analysis . . ." *Id.* at 1272. The *Joseph A.* panel remanded the case to the district court for review, noting that at a minimum those provisions of the exit plan requiring "*training of social workers, the development of a computerized management information system, and qualifications for social workers do not appear to risk interference with state court proceedings*." *Id.* at 1273. In fact, on remand, only a single provision of the comprehensive written remedial scheme at issue was ultimately found by the district court to interfere with the plaintiffs' foster care review proceedings. *See Joseph A. v. New Mexico Dept. of Human Servs.*, No. CIV 80-623 JC/DJS (D.N.M. Jan. 16, 2003) (copy attached as Ex. 9 to the Index of Supplemental Authorities).

- licensing, training, and conducting criminal history checks of foster homes and potential foster parents (Neb. Rev. Stat. §§ 43-296, 43-701 to 43-707, 71-1901 to 71-1907);
- ensuring that any child placed in its custody "receive a medical examination within two weeks of his or her removal" (Neb. Rev. Stat. § 43-1311); and
- administering an adoption service program to, *inter alia*, recruit and train adoptive families and conduct "home studies" of potential adoptive homes (390 Neb. Admin. Code § 6-002.02, 6-002.04).

Given Defendants' exclusive responsibilities, at a minimum, the Court's grant of relief in these areas cannot impinge on the authority of the Juvenile Courts. (*See* Section II.A.2., *infra*; s*ee also* Br. in Opp. MTD at 4-7.)

Additionally, as with the R&R's analysis in the class certification context, the R&R misconstrues the type, even plane, of relief sought from HHS in this action. Instead of individualized relief, Plaintiffs require class-wide relief to remedy harms caused by the policy and practices of a unitary executive agency – more foster homes, smaller caseloads, health screens, a functional computer system. These are simply the components needed to ensure a constitutionally adequate custodial child welfare system in which children are not subjected to further harm. Nebraska Juvenile Courts, courts of limited jurisdiction under the Nebraska Constitution that exclusively adjudicate the cases of individual children and families, are simply not authorized or configured to grant such relief in the Juvenile Court proceedings to which the R&R would have the Court defer. This is yet another reason there is no possibility of conflict between relief that might be granted here and in the Juvenile Courts.

Finally, the R&R incorrectly relies on *31 Foster Children*, 329 F.3d 1255 (11th Cir. 2003), in support of the proposition that the injunctive relief ultimately ordered would give the Court "direct control over decisions currently vested with the Juvenile Court." (R&R at 156.)

Importantly, ellipsed from the R&R's extensive quotation of *31 Foster Children* is the Eleventh Circuit's determination that plaintiffs in that action sought nothing less than to

> . . . have the district court appoint a panel and give it authority to implement a systemwide plan to revamp and reform dependency proceedings in Florida, as well as the appointment of a permanent children's advocate to oversee that plan.

329 F.3d at 1279. Only after noting that plaintiffs in *31 Foster Children* desired a federal court takeover, not of the executive custodial authority at issue, but of the Florida dependency court system itself, does the Eleventh Circuit uphold the abstention.[45]

This omission is certainly important, and on its own should serve as the basis for clearly and persuasively distinguishing *31 Foster Children*,[46] but the R&R also relies on *31 Foster Children* for the proposition that even remedial orders that run exclusively to executive defendants may be problematic under *Younger* because "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." (R&R at 158 (citing *31 Foster Children* at 1279).) The R&R makes a similar claim for support from *J.B. v. Valdez*, 183 F.3d at 1292-94. (R&R at 157.) But again, reliance on these authorities simply demonstrates the extent to which the nature of the relief sought – and the extent to which the Court would be in a position to grant relief, giving due deference to comity and federalism concerns – was misconstrued in the R&R. Notably, classes were not certified in either *31 Foster Children* or *J.B.*, making patent any potential conflict between relief ordered on behalf of the

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[45] A subsequent decision from the Eleventh Circuit rejecting application of *Younger* abstention goes far to distinguish the mere possibility of inconsistent adjudications presented by parallel federal and state proceedings considering the same general subject matter from the "undue interference" heralded by the attempted "takeover" of the dependency proceedings themselves in *31 Foster Children*. *See Wexler v. Lepore*, 385 F.3d 1336, 1341 (11th Cir. 2004) ("We interpret the *Younger* doctrine as preventing federal courts from being the grand overseers of state courts and court-like administration.")

[46] *See Kenny A.*, 218 F.R.D. at 287-88 (distinguishing *31 Foster Children* on the ground that plaintiffs did not seek to have district court appoint a panel for the purposes of revamping and reforming Georgia juvenile courts and plaintiffs "do not ask the court to make individualized interpretations with respect to particular foster children"); *Office of Child Advocate v. Lindgren*, 296 F. Supp. 2d 178, 191-92 (D.R.I. 2004) (distinguishing *31 Foster Children* for similar reasons).

individual named plaintiffs in those cases and the relief granted by the relevant juvenile courts. Here, for reasons discussed in Section I. *supra*, class certification is appropriate and it is class-wide injunctive relief aiding all children that is sought – relief that can and should be narrowly tailored by the Court to target only HHS and the systemic failures, and resulting group harms, identified by Plaintiffs.

For all these reasons, the Court should decline to adopt the R&R's view that this lawsuit interferes, for *Younger* purposes, with Plaintiffs' ongoing Juvenile Court proceedings.

2. There is no opportunity whatsoever for Plaintiffs to obtain systemic reform in their individual Juvenile Court proceedings.

Plaintiffs' individually-focused, circumscribed Juvenile Court review proceedings cannot provide them with an adequate opportunity to raise and effectively prosecute their federal claims. Contrary to the R&R's findings, and with due regard to the powers and capabilities of the Nebraska Juvenile Courts, Plaintiffs are simply not in a position to "protect[] [themselves] from HHS' allegedly unlawful conduct which cause[s] them harm or the imminent risk of future harm" in their individual Juvenile Court proceedings. (*See* R&R at 160.)

Younger abstention is improper where there is "no pending judicial proceeding . . . which could have served as an adequate forum for the class of children . . . to present [a] multifaceted request for broad based injunctive relief based on the Constitution and on federal and local statutory law." *LaShawn A.*, 996 F.2d at 1323.

Importantly, Nebraska Juvenile Courts cannot hear class actions or direct HHS to make systemic changes applicable to the Plaintiff class. Article V § 27 of the Nebraska Constitution provides that "the legislature may establish courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may provide." Accordingly, Nebraska Juvenile Courts are courts of limited jurisdiction, possessing only such authority as has been conferred on them

by statute. *See State v. Arnoldo T*, 14 Neb. App. 316, 321-22 (2005). There is no Juvenile Code provision providing for class treatment of claims, or for that matter, precedent for systemic litigation of any sort. *See generally* Neb. Rev. Stat. § Ch. 43; *State v. Darren H.*, 263 Neb. 129, 134 (2002) (finding that the Juvenile Court, as a court of limited jurisdiction, was not empowered to grant partial summary judgment to moving party where "[t]here is no statute [in the Nebraska Juvenile Code] which authorizes a separate juvenile court, or a county court sitting as a juvenile court, to grant summary judgment partial or otherwise.") (*See also* Br. in Opp. MTD at 27-28.)

It may be, as claimed by Defendants below and endorsed in the R&R, that the Juvenile Court has the authority to "micromanage" certain aspects of an individual child's case.[47] But the problems this lawsuit seeks to address are not case-specific issues requiring such "micromanagement" in individual children's cases. They are instead problems relating to fundamental systemic deficiencies, many the product of years of chronic underfunding and mismanagement, in Nebraska's foster care system. Thus, while a Juvenile Court may require the reassignment of a case manager, it is powerless to order HHS to recruit, train, and retain sufficient numbers of case managers to ensure that all children in foster care receive minimally adequate care. Or, while a juvenile court may order that a child be removed from a particular placement, it cannot order HHS to develop sufficient numbers and types of foster care placements to meet the needs of the children who are before the Juvenile Court.

Indeed, the R&R concedes that the Nebraska Juvenile Courts do not have the capability to hear class-action claims, "cannot provide class-wide relief" to address Plaintiffs' federal constitutional and statutory claims and are, by definition, focused only on the individual

[47] *See* Defendants' Br. in Supp. MTD at 21-23 (citing *State v. Arnoldo T.*, 7 Neb. App. 921, 928 (1998)). *See also* R&R at 150-155.

circumstances of the child before them. Yet, the R&R fails to attribute any weight to these dispositive findings, a clear error of law. (*See* R&R at 162-63.)

With thousands of foster children in HHS custody, even in the extraordinarily unlikely event that the Juvenile Courts would order corrective individualized relief in each and every putative class member's case, such relief would be inherently inadequate precisely because of the systemic nature of the problems. At the present time and in the current foster care system, there are simply not enough foster homes for all children, not enough variety of foster homes to address children's range of needs, and not enough caseworkers to safely monitor all children. This Court, however, can direct HHS to make those systemic changes that are so crucial to the Plaintiffs' well-being while in the state's custody.

On the issue of class actions not being permitted in Juvenile Court, the R&R notes first that "a class should not be certified" in the Court, but as discussed in Section I *supra*, certification is plainly called for here. Quoting from *Joseph A.*, the R&R also contends that "there is no persuasive authority holding 'that a party is entitled to avoid the effects of the *Younger* abstention doctrine where relief is available to individual litigants in ongoing state proceedings but not to represented parties in a class action'." (R&R at 162 (citing 275 F.3d at 1274).) In fact, several of the cases Plaintiffs put before the Magistrate Judge provide this persuasive authority. *See, e.g. LaShawn A.*, 990 F.2d at 1322-24; *Kenny A.*, 218 F.R.D. at 297 (relying in part on inability of Georgia juvenile court to order "class-based relief")[48]; *People*

[48] The R&R recognizes that the *Kenny A.* court's refusal to abstain under *Younger* was based, in part, on the inability of Georgia juvenile courts to order "class-based relief." (R&R at 162, n. 46.) However, the R&R declines to accord persuasive authority to the holding because the *Kenny A.* court noted that under Georgia law, "'[e]ven in individual cases, the juvenile court cannot order DCFS to provide a particular placement for a child, develop new placements, or enter orders regarding staff training, caseloads, the creation of new resources or other issues affecting what happens to children who come before it'." In so doing, the R&R fails to acknowledge that, like the Georgia juvenile courts, the Nebraska Juvenile Courts are of limited jurisdiction and are similarly powerless to award, configure or enforce systemic relief in the individual cases. Though the Nebraska Juvenile Courts may enjoy a broader mandate with respect to individual children before them, such as placement approval authority, the courts have no greater power to order HHS to increase placements resources or enter orders regarding staff training and caseloads

United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275, 290-91 (S.D.N.Y. 2000) (finding abstention improper because state "child neglect proceedings" focused on narrow issues concerning the rights of individual children, could not adequately consider the federal class-action plaintiffs' claims, and distinguishing other cases on the grounds that they did not involve "a class-action lawsuit").

Laurie Q. v. Contra Costa, 304 F. Supp. 2d. 1185 (N.D. Cal. 2004), the only case cited in this section of the R&R that involved a certified class, explicitly makes the point as to why Plaintiffs here cannot obtain meaningful relief in their ongoing Juvenile Court proceedings, and therefore why the recommendation to abstain is in error. The R&R, however, cites *Laurie Q.* for the general proposition that, where the Nebraska Juvenile Court can "exercise substantial control over HHS for the protection of a child," (R&R at 163), and each child has a guardian ad litem appointed to act on behalf of the child and protect his or her interests, (*id.*), "the issues raised in this case could have been (or could be) adequately raised before the juvenile court," (*id.* at 164), quoting specifically:

> Unless plaintiffs can adduce specific evidence indicating that agency inaction has neutered the Juvenile Court – an act which plaintiffs' pleadings fail to accomplish – this court has no choice but to abstain under *Younger*.

(*Id.* at 164, citing *Laurie Q.*, 304 F. Supp. 2d at 1207). The *Laurie Q.* decision, however, *supports* the conclusion that abstention is unwarranted here.

In *Laurie Q.*, the plaintiffs requested that the district court, on an individualized level, "rectify through injunctive relief what they believe are the County's numerous failures to adequately provide for their welfare through the proper management of their [child specific] case plans," potentially even asking the district court "to enforce the Juvenile Court's own rules of

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requirements than do the Georgia juvenile courts. The *Kenny A.* holding regarding "class-based relief" is therefore apposite.

process and notice, as they appear to allege that [the Juvenile Court's] own efforts have been unsatisfactory." *Laurie Q.*, 304 F. Supp. 2d at 1204. Of particular note is the court in *Laurie Q.*'s contrasting of the relief sought by the *Laurie Q.* plaintiffs from the thrust of *Kenny A.*, a case very close in nature and scope to this one:

> . . . [T]he subject of the lawsuits in that case [*Kenny A.*] and the present action – and the remedies sought in each – are decisively distinct . . . In *Kenny A.*, plaintiffs' claims centered around the internal practices and procedures of executive-branch actors, including several county Departments of Family and Children Services. Plaintiffs alleged, *inter alia*, that these Departments were "(1) assigning excessive numbers of cases to inadequately trained and poorly supervised caseworkers; [and] (2) not developing a sufficient number of foster homes properly screened to ensure the plaintiff children's safety . . . " *Id.* at 286.
>
> . . . The district court [in *Kenny A.*] noted specifically that "the declaratory and injunctive relief plaintiffs seek is not directed at [plaintiffs'] review hearings, or at Georgia's juvenile courts." *Id.* at 286 . . . The same cannot be said here. When this court is asked to overturn the Juvenile Court's orders regarding the care of foster children within the County's system, it is surely not "simply supporting and furthering" the Juvenile Court's own work.

Id. at 1205, n. 13.

Moreover, it is highly relevant and persuasive that the district court in *Laurie Q.* goes to great lengths to distinguish actions, such as this one and *LaShawn A.*, which seek solely systemic, executive branch-focused injunctive relief:

> Plaintiffs' leading case to the contrary, *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), offers a clear illustration of the type of action (unlike the one at issue here) that cannot properly be litigated before a local family court and thus would defeat a request for abstention. In [LaShawn A.], [t]he children attacked a child-welfare system which they alleged is characterized by ineptness and indifference, inordinate caseloads and insufficient funds . . . . By contrast, the allegations at issue here reach to the very heart of the Juvenile Court's responsibility and core competency, viz., determining the best program of services and placement for each individual child.

Laurie Q., 304 F. Supp. 2d. at 1207 (emphasis added).

For these reasons, Plaintiffs submit that the R&R errs in recommending that the Court find that Plaintiffs' ongoing individual Juvenile Court proceedings provide an adequate opportunity, for *Younger* purposes, for Plaintiffs to vindicate their federal claims.

B. All Relevant Discretionary Factors Militate Strongly Against the Application of Younger Abstention to this Case.

The District Court is vested with considerable discretion as to whether or not it will abstain from hearing a case on the basis of *Younger*, even where the legal factors supporting abstention are established. (*See* R&R at 145, n. 41 (citing *Warmus v. Melahn*, 62 F.3d 252, 255 (8th Cir. 1995).)[49] The R&R determined that this discretion authorized the Magistrate Judge to consider certain "efforts underway" with regard to child welfare in Nebraska – "especially the Supreme Court's Commission on Children in the Courts" in determining whether a recommendation of *Younger* abstention should be made. *Id.* at 62 & 145, n. 41. In its *Younger* analysis, the R&R even looks to such divergent sources as the work and reporting since 1982 of the Nebraska Foster Care Review Board (*id.* at 57-58 & 61); child abuse and neglect investigation teams and the "Model Protocol for the Investigation of Child Abuse and Neglect Cases" developed in 1992 as an adjunct to the formation of the teams (*id.* at 58); Governor Nelson's establishment of "The Nebraska Commission for Child Protection" in 1993 (*id.* at 59); and federal oversight of HHS pursuant to AACWA and other statutes, including through the 2001 Child and Family Service Review ("CSFR") self-assessment and audit of HHS ("Self-Assessment" and "CFSR Report," respectively) (*id.* at 59-61).

[49] The Supreme Court and the Eighth Circuit have consistently held that federal civil rights laws, including Section 1983, have the purpose of providing a remedy "where state law is adequate in theory but unavailable in practice." *Monroe v. Pape*, 365 U.S. 167, 174 (1961); *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980); *Parkerson v. Carrouth* 782 F.2d 1449, 1454 (8th Cir. 1986). While Plaintiffs have established that the Juvenile Courts are powerless to grant relief in this case, this line of cases underscore a strong federal policy mandating that this court exercise its jurisdiction and reject Younger abstention, even if the *Younger* factors are found to be present.

The R&R's reliance on these sources is an invitation for the Court to conduct a preliminary inquiry into the merits of the suit before Plaintiffs have had the opportunity to conduct discovery to support their allegations that years of governmental reports, audits and reform plans have done nothing to address the ongoing systemic problems and the resulting harms – allegations that must be taken as true. (Am. Compl. at ¶ 7.) Such an approach is fundamentally unfair to Plaintiffs.

In any case, the R&R's analysis of these resources mischaracterizes the import of these supposed studies and "reform efforts." Much of what is cited to is simply outside the scope of this case, either because it is (i) directed to failures in HHS' delivery of child protective (*i.e.*, pre-custodial) services (such as the remnant of Governor Nelson's 1993 Commission the R&R indicated is "reviewing the efficacy of the Child Protective Service's intake processes," (R&R at 59), or (ii), as in the case of the Supreme Court Commission's work, it is preliminary work being done by a judicial entity that Plaintiffs in no way wish to impede, much less enjoin.[50]

Further, the R&R's apparent reliance on the federal government's oversight activities and in particular the CFSR review process is misplaced. The Eighth Circuit's immunity analysis in *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034 (8th Cir. 2002), is determinative on this point. In *Missouri Child Care* (as here, *see* p. 58, *infra*) plaintiffs sought to privately enforce 42 U.S.C. § 672's requirement that foster care maintenance payments made "on behalf of" foster children cover the actual cost of providing care to them. The precise issue before the Circuit was defendants' claim to be immune to suit pursuant to the Eleventh Amendment, and in particular whether AACWA contained a "detailed remedial scheme that manifests Congress's intent to

[50] To the contrary, Plaintiffs support the current efforts of the Supreme Court Commission to improve Nebraska's failing foster care system, particularly with respect to the implementation of standards and training for guardians ad litem and the expediting of the appeal process for termination of parental rights. (*See* R&R at 62.) These steps, however, will not address the vast majority of basic harms alleged in Plaintiffs' Amended Complaint.

preclude such suits and thus make federal jurisdiction unavailable." *Id.* at 1037 (citing *Seminole Tribe v. Florida,* 517 U.S. 44, 74-75 (1996)). The Eighth Circuit held, however, that "neither the [CFSR] review process nor the Secretary's ultimate authority to withhold funds limits the powers of the [district] court or the remedies available [therein]." *Missouri Child Care*, 294 F.3d at 1039. The Eighth Circuit refused to curtail jurisdiction pursuant to the Eleventh Amendment in deference to AACWA's administrative procedures for review of Title IV-E expenditures. Similarly, it would serve no purpose for the Court to use these same procedures as the basis for declining to exercise jurisdiction over this case pursuant to an exception to the "virtually unflagging" obligation to exercise jurisdiction granted by Congress.

Finally, with regard to the Nebraska Foster Care Review Board, the existence of a governmental body outside of the HHS structure providing periodic reporting with regard to the performance of the agency and outcomes for children in its legal and physical custody is a useful factual resource. In fact, a number of the findings of the FCRB, and for that matter some of the statistics referenced in the Self-Assessment and CFSR Report, are recited in Plaintiffs' Amended Complaint. But as is noted in detail in papers previously submitted, Plaintiffs contest the notion that the 2004 FCRB report or the other materials submitted in support of the motion to dismiss, viewed critically and in context, reflect anything approaching a systemic improvement in outcomes for class members obviating the need for this lawsuit. In any event, consideration of such contested matters at the present pre-discovery juncture is fundamentally improper and premature. (*See* Reply Br. Class Cert. at 5-9.) If there are disputed facts as to whether the Nebraska child welfare system continues to harm children – and Plaintiffs believe there is no credible dispute on this issue – it is an issue to be decided only through discovery and trial, not through averments in legal briefs.

To the extent that the District Court is nevertheless inclined, without discovery, to accept the R&R's recommendation to weigh the various child welfare "reform efforts" that have been pursued in Nebraska, consideration of such "efforts" in fact weigh heavily against foreclosing Plaintiffs' access to this forum. The fits and starts of purported child welfare reform efforts in Nebraska over the past fifteen years (and beyond) – highlighted in the R&R as efforts to "tackle this difficult problem" that are "already underway" – serve only to buttress Plaintiffs' factual allegations regarding the existence of systemic problems and the State's failure to adequately address them. Consider for example, placement shortages and caseworker caseloads:

Lack of Placements

- **FCRB Annual Reports**:[51] A lack of appropriate placements for children is identified as a critical need in every FCRB Annual Report from 1995 to 2004 (the most recent such report). Among the more relevant findings:
  - 1998 – Noting that ***"appropriate placements are not available, especially for some children with severe emotional or behavioral problems, or who are sexually acting out"*** (Index of Supp. Auth at Ex. 1, at p. 3);
  - 1999 – Finding ***"insufficient appropriate placements of every type"*** and ***"insufficient recruitment of quality foster homes"*** (*Id.* at Ex. 2, at p. 3);
  - 2002 – Noting ***"Insufficient Placements Keep Children at Risk"*** (*Id.* at Ex. 4, at p. 27); and
  - 2004 – Calling upon HHS to "[***i***]***ncrease the number of placements (foster homes, group homes, other facilities) available and develop specialized placements"*** and noting that ***"***the ***quality of children's lives is related to the recruitment, retention, and support of foster parents."*** (Df.'s Evidence Index at Ex. 14, at HHS 010988-89.)

[51] The District Court is requested to take judicial notice of the annual FCRB Reports referenced in the R&R at 58, 61 & 144, issued pursuant to Neb. Rev. Stat. § 43-1303, for years 1995 to 2003. *United States v. Tucker***,** 78 F.3d 1313, 1325 (8th Cir. 1996) (court may take judicial notice of publicly filed or disseminated documents or articles). For the convenience of the Court, relevant excerpts of the reports for years 1998, 1999, 2000, 2002 and 2003 are submitted as Exs. 1-5 to Plaintiffs' Index of Supplemental Authorities. (The 2004 FCRB Report appears at Df.'s Evidence Index at Ex. 14.) *Copies of the entire reports for years 1995 to 2003 have been served on Defendants and are available for inspection upon the Court's request.*

- **2002 CFSR – HHS Self-Assessment**: Noting the "lack of resources for special needs populations" (Df.'s Evidence Index at Ex. 18, at HHS-011330); the "inadequate pool of specialized foster care providers" (*id*.); the need "to have higher standards for foster and adoptive homes to ensure safety and quality" (*id*. at HHS-011349); the need "to implement the statewide recruitment and marketing plan" (*id*.); the need "to increase the number of diverse foster care providers statewide" (*id*.); and the need to "increase foster care support and training" (*id.* at HHS-011358).

Caseloads/Caseworker Turnover

- **FCRB Annual Reports**: Unmanageably high caseloads for caseworkers, usually linked to excessive caseworker turnover, are reported in every FCRB annual report since 1996. Among the more relevant findings:

  - 1998 – Finding "increased caseloads" a contributing factor in making the case manager's job "nearly impossible to perform" and noting a "significant increase in case manager turnover" (Index of Supp. Auth. at Ex. 1, pp. 2, 13);

  - 2000 – Noting that ***case managers may have "fifty or more families in their caseload"***; recommending that HHS "lower caseload size to a manageable workload"; and finding that ***"[t]he turnover rate of front-line case managers continues to remain high across the state," causing "a number of poor outcomes for children."*** (*Id. at* Ex. 2, pp. 9, 10, 12);

  - 2003 – Noting that many caseworkers who resigned cited "increasingly large caseloads" as a major reason why their ***jobs are "nearly impossible to perform adequately"***; finding that "[c]aseworker turnover can cause significant delays" in obtaining permanency; and determining that "***[c]hildren often pay the price of professional burnout and workforce issues when they linger in care … [and] their services needs go unmet.***" (*Id. at* Ex. 5, pp. 14, 37-39); and

  - 2004 – ***Indicating that many caseworkers who resigned cited "increasing large caseloads" as a major reason why their jobs are "nearly impossible to perform adequately"*** and recommending making caseloads manageable for both caseworkers and supervisors (Df.'s Evidence Index at Ex. 14, at HHS-011031-32); and ***recommending addressing high worker turnover by making caseloads manageable, increasing support and supervision for caseworkers, reducing supervisor caseloads, and reviewing the training that new case managers receive***. (*Id. at* HHS-011032.)

- **2002 CFSR – HHS Self-Assessment**: Recommends developing "a plan to put in place adequate numbers of well-trained staff with reasonable workloads." (*Id. at* Ex. 18, at HHS-011358.)

Defendant Governor Heineman himself recently noted, "We in Nebraska have failed by keeping children in foster care for far too long." (Index of Supp. Auth. at Ex. 6 (Leslie Reed and Martha Stoddard, *Heineman push may be key in directive*, *Omaha World-Herald*, June 21, 2006).) Moreover, in June 2006 the Governor noted that Nebraska continues to have one of the highest rates of out-of-home placement of children in the country with a record 7,803 state wards in care in the month of April 2006. Though claiming success in some areas, he also acknowledged:

> . . . continued progress is imperative. A recent evaluation by the federal government pointed out several areas where our state fell short of national performance standards. Among our shortcomings were untimely family reunifications, failing to finalize adoptions within two years, multiple child placements, reentries into foster care and incidences of child abuse or neglect.

(Index of Supp. Auth. at Ex. 7 (Governor Dave Heineman, *Making Children the Priority*, *Southwest Nebraska News*, July 27, 2006).)[52]

As the FCRB reports, HHS' own self-assessment, and even the Governor's recent statements make clear, these "reform efforts" have failed and the systemic deficiencies persist. The intractability of these problems, and the inability or unwillingness of HHS to deal with them, is precisely why access to this federal court – the only forum with the power to grant the remedial relief necessary to compel HHS to address these problems – is so necessary.

The facts of this action – including Nebraska's long history of failed child welfare reform actions – make clear that the core systemic failures and resulting harms to children cannot be remedied if the Court abstains from exercising its jurisdiction over this action. The R&R's recommendation that the Court should abstain pursuant to *Younger*, in deference to reports, initiatives, operations and statements yet unexamined by both parties, is in error. The Court

[52] The Court is respectfully requested to take judicial notice of Governor Heineman's statements. *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996).

should reject the R&R's recommendation with respect to *Younger* abstention and deny Defendants' motion to dismiss on the basis of *Younger* abstention.

III. PLAINTIFFS PROPERLY ALLEGE PRIVATELY ENFORCEABLE RIGHTS TO FOSTER CARE MAINTENANCE PAYMENTS UNDER THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT.

Plaintiffs object to and seek the Court's *de novo* review of the R&R's rejection of an enforceable private right of action under AACWA. A statute authorizes a private right of action if: (1) Congress intended the statutory provision at issue to benefit the plaintiff; (2) the right asserted is not so "vague or amorphous as to be beyond the competence of the judiciary to enforce," and (3) the statue imposes "a binding obligation on the state." *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Services*, 293 F. 3d 472, 477 (8th Cir. 2002) ("*Pediatric I*"), citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). The first prong of the inquiry is further informed by whether the provision at issue contains "rights-creating" language, is "phrased in terms of the person[s] benefited," and has an "*unmistakable focus* on the benefited class." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) (clarifying the *Blessing* test and citing *Cannon v. University. of Chicago*, 441 U.S. 677, 690-92 n.13 (1979)) (emphasis in *Gonzaga*).[53]

The R&R erroneously determines that Sections 671(a)(1), 672, and 675(4) fail to satisfy the first prong of the *Blessing* test. Yet the plain language of the statute makes clear that these provisions were intended to benefit the Plaintiffs. The statute is phrased in terms of the persons

[53] As properly noted in the R&R, *Gonzaga* constituted a clarification, not an abrogation, of the *Blessing* test. (R&R at 171, citing *Lankford v. Sherman*, 451 F.3d 496, 508 (8th Cir. 2006).) *See, also, ASW v. Oregon*, 424 F.3d 970, 975 n. 7 (9th Cir. 2005) (employing the *Blessing* test and noting that *Gonzaga* merely clarified the first prong thereof); *Masterman v. Goodno*, No. Civ. 03-2939 (JRT), 2004 U.S. Dist. LEXIS 354 at *20-24 (D. Minn. Jan. 8, 2004) ("*Gonzaga* did not overrule the *Blessing* test, or the Court's other § 1983 cases, rather the Court set out to clarify the appropriate method for lower courts to determine whether a particular statute creates a 'right' . . ."); *Kenny A.*, 218 F.R.D. at 292 ("In Gonzaga . . . the Court clarified the first requirement [of the Blessing test] stating that only an 'unambiguously conferred right' as distinguished from mere benefits or interests, would support a cause of action under § 1983.").

benefited – the payments are made *"on behalf of **each child**"* (emphasis added); and there is an "*unmistakable focus* on the benefited class" – the payments are made to satisfy the most basic needs of children in foster care.

The fact that the payments are technically delivered to the adult provider of foster care for the child does not alter the child's status as intended beneficiary. The R&R erroneously rejects Plaintiffs' reliance on *Missouri Child Care Ass'n v. Martin*, 241 F.Supp 2d. 1032 (W.D. Mo. 2003), in which the court found that the foster care providers could enforce the same provisions at issue here, even though the ultimate beneficiaries of AACWA were the foster children themselves. However, the Eighth Circuit recently held that enforceable rights can vest in more than one group. *See Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services*, 443 F.3d 1005, 1015-16 (8th Cir. 2006) ("*Pediatric III*") (holding that *both* Medicaid recipients and health care providers were vested with a private right of action to enforce section 1396d(a)(B) of the Medicaid Act).[54]

The R&R also erroneously finds that these provisions are too vague and amorphous to enforce.[55] Specifically, it rejects the *Missouri Child Care* court's assessment that the determination of foster care maintenance payments is no different than the determination of Medicaid reimbursement rates, which the Supreme Court found privately enforceable, under *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). (R&R at 182-84 (citing *Missouri Child Care*, 241 F. Supp. 2d at 1040-42).) In *Wilder*, when calculating reasonable rates, the state had

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[54] *Pediatric III* involved section 1396d(a)(13) of the Medicaid Act which defines "medical assistance" as payment for various services including diagnostic, screening, preventative and rehabilitative services that are recommended for "the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level." 42 U.S.C. § 1396d(a)(13). The Eighth Circuit found that the intended beneficiaries are, "*obviously*, the needy child, and by corollary . . ." the providers. *Pediatric Specialty Care*, 443 F.3d at 1015 (emphasis added).

[55] The language of the statute is in fact clear. Foster care maintenance payments are based on the actual cost of "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).

to consider (1) the "unique financial situation" of the hospital serving low-income patients; (2) the statutory requirements for care; and (3) the "special situation" of hospitals providing in-patient care when the patient would otherwise be in a long-term care facility. (R&R at 183 (citing *Wilder*, 496 U.S. at 520 n. 17).) The *Wilder* court recognized that "[w]hile there might be a range of reasonable rates" and that "some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates, *such an inquiry is well within the competence of the Judiciary*." *Wilder*, 496 U.S. at 519-20 (emphasis added).[56] If the Supreme Court found reasonable rates could be determined under the statutory language in *Wilder*, the Court is clearly capable of determining and enforcing the reasonableness of foster care maintenance payments under the definite and specific guidelines of statutory provisions here. The payment provisions at issue thus satisfy the second prong of the private right test as well.

Accordingly, the Court should recognize private rights of action under Sections 671(a)(1), 672, and 675(4) of the AACWA, concerning children's right to adequate foster care maintenance payments.

Conclusion

For the foregoing reasons, Plaintiffs request that the Court reverse the Report and Recommendation's determinations with respect to class certification, prudential standing, *Younger* abstention, and the existence of a private right of action to foster care maintenance payments under defined provisions of AACWA; grant Plaintiffs' Motion for Class Certification;

[56] Similarly, in *Pediatric III*, the Eighth Circuit found that the determination of payments for certain medical services that are recommended for "the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level" are not too vague or amorphous to be enforceable. *Pediatric III*, 443 F.3d at 1015. Notably, the Medicaid statute does not include any standards to measure whether the services will result in the reduction of the particular disability or how to measure whether those services will bring the individual to "the best possible functional level."

deny Defendants' Motion to Dismiss in its entirety; and grant such other and further relief as seems just and proper.

Dated: September 29, 2006

Respectfully submitted,

By: /s/ Marnie A. Jensen

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CERTIFICATE OF SERVICE

I certify that on September 29, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of the filing to the following:

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