IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CARSON P., by his next friend Crystal Foreman; PAULETTE V., by her next friend Sherri Wheeler; DANIELLE D., by her next friend, Jodell Bruns; CHERYL H., by her next friend, Susan Nowak; 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; NANCY MONTANEZ, as 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

MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFFS' STATEMENT OF OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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INTRODUCTION

On August 16, 2006, United States Magistrate Judge David L. Piester entered his Report and Recommendation (the "Magistrate's Report and Recommendation"). Based upon a thorough review of the extensive briefs and evidence submitted by the parties, Magistrate Judge Piester recommended that: (1) Plaintiffs' Motion for Class Certification be denied; (2) the claims of Paulette V. and Cheryl H. be dismissed as moot; (3) Defendants' Motion to Dismiss the entire case on the basis of ***Younger*** abstention be granted; (4) Defendants' Motion to Dismiss the entire case on the basis of ***Rooker-Feldman*** abstention be denied; (5) Defendants' Motion to Dismiss the claims of Carson P., Danielle D., Jacob P., Bobbi W., and Hannah A. on the basis of lack of Article III standing be denied; (6) Defendants' Motion to Dismiss the claims of Carson P., Danielle D., Jacob P., Bobbi W., and Hannah A. on the basis of lack of prudential standing because the minor Plaintiffs' "self-appointed next friends" are not capable and adequate next friends be held in abeyance pending a final ruling on the remainder of Defendants' Motion to Dismiss; (7) Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' claims based on the federal AACWA be granted; and (8) Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' claims based on the federal EPSDT be denied. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 194-195).

On September 29, 2006, Plaintiffs, seven Nebraska foster children and their purported next friends, filed their Statement of Objections to Magistrate Judge's Report and Recommendation and their supporting Memorandum Brief ("Plaintiffs' Objection Brief"). Ignoring the fact that Magistrate Piester engaged in an exhaustive review of a substantial record and wrote a scholarly, 195-page, Report and Recommendation, encompassing numerous, complex legal issues, Plaintiffs have again, regrettably, stooped to name-calling.[1] Plaintiffs accuse the Magistrate of "disregarding established

[1] Before the Magistrate, Plaintiffs accused Defendants of being "wrong-headed," "draconian," "specious," "half-baked," "brazen[]," "strident" and "circular." (Pl. Br., pp. 4, 16, 31, 36, 40 and 59).

legal standards," disregarding "the facts" and "reasoning in cases exactly on point," engaging in "fundamental misstatement," and taking action which is "baseless," "misguided," "speculat[ive]," a "fundamental abdication" of his judicial responsibility and "fundamentally unfair." (Pl. Obj. Br., pp. 2, 3, 14, 17, 23, 31, 38 and 52).

Equally regrettable is the continued lack of respect for the Nebraska juvenile courts by Plaintiffs and their counsel. (***See***, Pl. Obj. Br. at 42, 46 [referring to juvenile court proceedings as "circumscribed" and to the juvenile court's authority as "illusory"]).[2] Contrary to what Plaintiffs' counsel apparently believe, Nebraska's juvenile court judges make placement decisions in the best interests of each juvenile, on the basis of the law as it exists and the facts that are presented to them.

While Plaintiffs do not want to talk about the "individual" situations of each minor Plaintiff, Defendants believe it is important for the Court to know their current "individual" circumstances. Nebraska juvenile courts have judicially determined ***each named Plaintiff is in an appropriate placement and their needs for safety, health and well-being are being met***. (Ex. 1, Bates Nos. HHS-000027 to HHS-000034, HHS-000072 to 000074; Ex. 2, Bates Nos. HHS-000549 to HHS-000550; Ex. 3, Bates Nos. HHS-001018 to HHS-001022; Ex. 4, Bates Nos. HHS-001492 to HHS-001496; Ex. 5, Bates Nos. HHS-002160 to HHS-002161, HHS-002212 to HHS-002223; Ex. 36, ¶¶ 10, 32-34 and 36; Ex. 48, Bates Nos. HHS-013009 to HHS-013012; Ex. 49, Bates No. HHS-018155, HHS-019616 to HHS-019625).

Of course, the above descriptions do not quote the entire orders. However, the exact language quoted from the orders shows that the juvenile courts have decided that these children's needs are being met. Thus, by bringing this action, Plaintiffs are claiming that they are being injured

[2] Before the Magistrate, Plaintiffs referred to juvenile court orders in each individual Plaintiff's juvenile cases, which are included in the evidence submitted by Defendants, as merely "routine orders" which were only entered "as a condition of accepting Title IV-E monies pursuant to AACWA." (Pl. Br. at 31).

by the very situations which the Nebraska juvenile courts, who have continuing jurisdiction over them, have already determined are appropriate placements for each child Plaintiff.

In resolving the ***Younger*** abstention issues, Magistrate Piester engaged in a thorough, painstaking analysis and applied ***Younger*** abstention principals to the facts. Based upon this analysis, Magistrate Piester correctly "conclude[d] the court should abstain under Younger from exercising jurisdiction over the plaintiffs' claims." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 143).

With respect to Plaintiffs' proposed class and FED. R. CIV. P. 23, District Courts have broad discretion in determining whether to certify a class under Rule 23. Where, as here, Magistrate Piester conducted an exhaustive review of the pertinent facts and law, it cannot be reasonably claimed that the Magistrate abused his discretion in determining that Plaintiffs' proposed class fails to meet the requirements of Rule 23. Magistrate Piester's application of the Eighth Circuit's recent decision in ***Elizabeth M. v. Montenez,*** 458 F.2d 779 (8th Cir. 2006) reinforces that his recommendation rests on binding, well-reasoned authority.

Relevant facts and supporting evidence will be set forth where necessary in the argument below. For the reasons discussed in detail below, the Court should adopt the Magistrate's Report and Recommendation, particularly the Magistrate's conclusion that this case should be dismissed, in its entirety, on the basis of ***Younger*** abstention, and that a class should not be certified in this case. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 64-120; 142-164).

ARGUMENT

I. MAGISTRATE PIESTER CORRECTLY RECOMMENDED THAT THIS COURT DISMISS THIS CASE PURSUANT TO THE *YOUNGER* ABSTENTION DOCTRINE.

The ***Younger v. Harris***, 401 U.S. 37 (1971) case, "and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." ***Middlesex County Ethics Comm. v. Garden State Bar Ass'n***, 457 U.S. 423, 431

(1982) ("***Middlesex***").[3] Indeed, the very existence of the ***Younger*** Abstention Doctrine demonstrates that "the federal courts' 'virtually unflagging' duty to exercise jurisdiction 'does not eliminate…the federal courts' discretion in determining whether to grant certain types of relief.'" ***Night Clubs, Inc. v. City of Fort Smith, Ark.***, 163 F.3d 475, 478 (8th Cir. 1998), ***quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans***, 491 U.S. 350 (1989). Thus, where, as here, "vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" ***Middlesex***, 457 U.S. at 423 (1982), ***quoting Moore v. Sims***, 442 U.S. 415, 426 (1979). ***See also, 31 Foster Children v. Bush***, 329 F.3d 1255, 1274 (11th Cir. 2003) ("federal courts may and should withhold equitable relief to avoid interference with state proceedings").

In ***Younger***, the Supreme Court articulated the strong policy considerations that counsel against the exercise of jurisdiction in the face of ongoing state proceedings:

> "[T]he concept [of federalism] represent[s]…a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious as though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that ***will not unduly interfere with the legitimate activities of the States.***"

Younger, 401 U.S. at 44 (emphasis added). ***See also, Kowalski v. Tesmer***, 543 U.S. 125, 133 (2004) ("'federal and state courts are complimentary systems for administering justice in our nation" and "[c]ooperation and comity, not competition and conflict, are essential to the federal design'"),

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[3] The "strong federal policy" of non-interference with ongoing state court proceedings developed by ***Younger*** and its progeny fully answers Plaintiffs' claim that theirs "is precisely the type of civil rights action that the Eighth Circuit has held is the 'least likely candidate[] for abstention.'" (Pl. Obj. Br., p. 36). Plaintiffs cite two cases, neither of which involved any ***Younger*** issue. ***Association for Retarded Citizens of North Dakota v. Olson***, 713 F.2d 1384 (8th Cir. 1983) (analyzing ***Burford*** abstention, which may apply where "[c]onflicts in the ***interpretation of state law***, dangerous to the success of state policies are almost certain to result from the intervention of the lower federal courts") (emphasis added); and ***Moe v. Brookings County***, 659 F.2d 880 (8th Cir. 1981) (analyzing ***Burford*** and ***Pullman*** abstention which requires a federal court to abstain "when the case involves ***a potentially controlling issue of state*** law that is unclear, the decision of the issue by the state courts could avoid or materially alter the need for a decision on federal constitutional grounds") (emphasis added). Federal civil rights suits are obviously "unlikely candidates" for ***Pullman*** and ***Burford*** abstention because these doctrines focus on state law, whereas ***Younger*** abstention presupposes that there is a "federal question presented." ***Middlesex***, 457 U.S. at 432.

quoting, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999); and ***Night Clubs, Inc.***, 163 F.3d at 477 (under ***Younger***, federal court should abstain in cases where granting equitable relief would interfere with pending state proceedings "in such a way as to offend principles of comity and federalism").

In assessing the applicability of ***Younger***, there are four factors for determining whether a federal court should abstain under the ***Younger*** Abstention Doctrine:

(1) the existence of an ongoing state judicial proceeding;

(2) the state judicial proceeding implicates important state interests;

(3) the federal litigation will interfere with the state proceedings; and

(4) the state proceeding affords an adequate opportunity to raise the federal questions presented.

Middlesex, 457 U.S. at 432. ***See also, Norwood v. Dickey***, 409 F.3d 901, 903 (8th Cir. 2005).

In assessing Plaintiffs' objections to Magistrate Piester's recommendation that this case should be dismissed pursuant to ***Younger*** abstention, it may be helpful to first identify those issues which are undisputed. In their Objection Brief, Plaintiffs have conceded that the continuing jurisdiction of the Nebraska juvenile courts to modify a child's disposition, coupled with the mandatory six-month periodic review hearings, constitute ongoing state judicial proceedings which implicate important state interests. (Pl. Obj. Br., p. 38). Therefore, since the first two ***Middlesex*** factors are unquestionably satisfied in this case, Defendants' arguments will focus on the third and fourth ***Middlesex*** factors.

A. <u>The Granting of Any Relief Requested by Plaintiffs Would Interfere with Ongoing Nebraska Juvenile Court Proceedings</u>.

In evaluating whether this federal proceeding would interfere with the state juvenile court proceedings, the Court must look to the relief requested and the effect it would have on the state

proceedings. ***O'Shea v. Littleton***, 414 U.S. 488, 499-502 (1974). Abstention is required even where an injunction would "***indirectly*** accomplish the kind of interference that ***Younger***…and related cases sought to prevent." ***Id.*** at 500 (emphasis added).

In ***O'Shea***, the plaintiffs sought a federal court injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of ***future*** criminal trials, not an injunction directly enjoining any pending prosecutions. The ***O'Shea*** Court found that the injunction "would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio." ***O'Shea***, 414 U.S. at 501. Therefore, even an ***indirect interference*** with a state proceeding is sufficient to invoke ***Younger*** abstention. ***31 Foster Children***, 329 F.3d at 1276. ***See also, Joseph A. ex. rel. Wolfe v. Ingram***, 275 F.3d 1253, 1272 (10th Cir. 2002) ("***Younger*** governs whenever the requested relief would interfere with the state court's ability to conduct proceedings, regardless of whether the relief targets the conduct of a proceeding directly").

In ***31 Foster Children***, the Eleventh Circuit applied ***O'Shea*** in affirming the district court's decision to abstain from asserting jurisdiction over the claims of the foster children plaintiffs, who were represented by Plaintiffs' counsel. The plaintiffs in ***31 Foster Children*** sought an injunction to redress the following claims:

(1) The state violated the plaintiffs' substantive due process rights by engaging in a pattern and practice of failing to satisfy basic needs (food, clothing, shelter, medical, and education) of the plaintiffs;

(2) The state knowingly placed and retained the plaintiffs in dangerous, abusive, neglectful, overcrowded and inappropriate placements, and the state further ignored complaints and other information regarding such placements;

(3) The state violated the plaintiffs' procedural due process rights by failing to establish a review process for denial of benefits;

(4) The state violated the plaintiffs' First, Ninth and Fourteenth Amendment rights by engaging in a pattern and practice of unnecessarily separating siblings and denying sibling visitation;

(5) The state had violated rights granted under the federal Adoption Act by failing to initiate proceedings for termination of parental rights to children in their custody as required by the Adoption Act.

31 Foster Children, 329 F.3d at 1264-1265.

The claims asserted by Plaintiffs in this case are virtually ***identical*** to the claims asserted on behalf of the plaintiffs in ***31 Foster Children***. (***See,*** AMENDED COMP., ¶¶ 182-185 and 189-194). The ***31 Foster Children*** court's abstention analysis was grounded in the nature of Florida's ongoing state dependency hearings:

> The state trial level courts of Florida play a critically important role in dependency hearings from the outset of a child's case. After the Department files a petition for dependency, the court holds an ***adjudicatory hearing*** as soon as practicable. Fla. Stat. § 39.507. If the facts alleged in the dependency petition are proven in the adjudicatory hearing and the child is determined to be dependent, the state court conducts a ***disposition hearing***. Id. §§ 39.507(7); 39.521(1). The Department must prepare a written ***case plan*** and a predisposition study and file these items with the court no later than 72 hours before the disposition hearing. Id. § 39.521(1)(a).
>
> The case plan is a document that "follows the child from the provision of voluntary services through any dependency, foster care, or termination of parental rights proceeding or related activity or process." Id. § 39.01(11). It must include, among other items, a description of the ***permanency goal*** for the child, a description of the type of ***home or institution*** in which the child is to be placed, a discussion of the ***safety and appropriateness of the child's placement***, the ***services*** that the child needs and will receive, a description of the ***visitation rights*** of the parents, and a description of the efforts to be undertaken to maintain the stability of the child's education. Id. § 39.601(3)(a)-(I).
>
> The case plan ***must be approved by the court***. Id. §§ 39.601(2), (3); 39.603. It may be amended if all the parties agree and the court approves, or after a hearing it may be amended by the court on its own motion or that of a party, based on competent evidence that demonstrates the need for an amendment. Id. § 39.601(9)(f). If at the hearing on the case plan, which occurs in conjunction with the disposition hearing, the court determines that any of the elements required in the plan are not present, it can ***order the Department to amend the plan*** to include what is necessary. Id. § 39.603(2).
>
> The state court has ***continuing jurisdiction*** over a dependency case and reviews the child's status at least ***every six months***. Id. § 39.701(1)(a). Prior to the review hearing, the Department must furnish to the court a written report that includes, among other items, a description of the placement of the child, its appropriateness, the safety of the child, the number of placements, documentation of the efforts of all parties to comply with the case plan, the number of times the child's educational placement has been changed, and copies

> of all medical and psychological records that support the terms of the case plan. Id. § 39.701(6)(a). ***At the review hearing, the court considers*** the child's situation, including whether there has been compliance with the case plan, ***the appropriateness of the child's current placement***, and whether the child is in a setting that is family-like and consistent with the child's best interests and special needs. Id. § 39.701(7)(d), (g). No later than ***12 months*** after the date that the child is placed in shelter care, the court must conduct a judicial review to plan for the child's ***permanent placement***. Id. § 39.701(8)(f). If the child is not returned to his parents, the case plan must document steps the Department is taking to find an adoptive parent or other permanent living arrangement for the child. Id.
>
> If the Department has not complied with the case plan, the court may find it in contempt. Id. § 39.701(8)(c). The court can also issue protective orders. Id. § 39.701(8)(g). A protective order can require a person or agency to make periodic reports to the court containing such information as the court prescribes. Id. The court can issue a protective order in support of, or as a condition to, any other order it may make. Id.

31 Foster Children, 329 F.3d at 1277-1278 (emphasis added).

Florida's foster care system is very similar to Nebraska's in many key respects. Like Florida, Nebraska employs adjudication and disposition procedures which rely upon the juvenile courts to make determinations regarding dependency, placement, termination of parental rights, permanency plans and adoption or modification of the Department's case plan. ***See, e.g.,*** NEB. REV. STAT. §§ 43-247, 43-278, 43-284, 43-285(1) and (2), 43-292.02, and 43-1312(3). Like Florida, Nebraska law requires juvenile courts to conduct initial adjudication and disposition hearings and review hearings on the case plan every six months and on the permanency plan every twelve months.

After analyzing Florida's dependency hearings, the Eleventh Circuit concluded that "the plaintiffs are seeking relief that would ***interfere with the ongoing state dependency proceedings*** by placing decisions that are now in the hands of the state courts under the direction of the federal district court." ***31 Foster Children***, 329 F.3d at 1278 (emphasis added). In comparing the plaintiffs' requested relief with Florida's existing foster care system, the court found that ***any*** federal order would interfere with Florida's state court proceedings in numerous ways. ***Id.*** For example, the "federal and state courts could well differ, issuing conflicting orders about what is best for a

particular plaintiff, such as whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an adoptive family." ***Id.*** Also, the "federal court relief might effectively require an amendment to a child's case plan that the state court would not have approved" under its authority. ***Id.*** "Even though any remedial order would ***run against the Department***, state law makes it a ***duty of state courts*** to decide whether to ***approve a case plan***, and to monitor the plan to ***ensure it is followed***." ***Id.*** (emphasis added).

Based upon its careful analysis, the ***31 Foster Children*** court held that ***Younger*** abstention applied, for reasons which, as the Magistrate correctly concluded, are compelling in this case:

> To say the least, taking the responsibility for a states's child dependency proceedings away from state courts and putting it under federal court control constitutes '***federal court oversight of state court operations, even if not framed as direct review of state court judgments***' that is problematic calling for ***Younger*** abstention.
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> * * * *
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> The plaintiffs' argue that the requested relief would not interfere because it is directed solely at the Department of Children and Families and not the state courts. We previously rejected essentially that same argument in ***Lucky V***, and we reject it again here.…'[A] case ***cannot be decided in a vacuum***'…and the federal court relief the plaintiff's seek would ***interfere with ongoing state dependency hearings, even if it were directed against the Department and state officers***, instead of state courts and judges.

31 Foster Children, 329 F.3d at 1279 and n.11 (citations omitted) (emphasis added). (***See also***, MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 156-157 [relying on ***31 Foster Children*** and ***J.B. Ex Rel. Hart v. Valdez***, 186 F.3d 1280, 1291-1292 (10th Cir. 1999) ("***J.B.***")]).

Magistrate Piester also properly relied upon the decision in the factually similar ***J.B.*** case, in which the Tenth Circuit held that ***Younger*** abstention was proper because the plaintiffs' federal court proceedings would interfere with state court proceedings by "fundamentally changing the dispositions and oversight of the children." ***J.B.***, 186 F.3d at 1291. In ***J.B.***, the plaintiff foster

children alleged the State of New Mexico had failed to provide them with services, benefits and protections guaranteed by federal statutory and constitutional law.

Significantly, the ***J.B.*** court recognized that, if the requested relief were granted, "the federal court would, in effect, ***assume an oversight role*** over the entire state program," and "prevent the Children's Court from carrying out [the periodic review process]." ***Id.*** at 1291-1292. ***See also, Laurie Q. v. Contra Costa County***, 304 F. Supp.2d 1185, 1204-1205 (N.D. Cal. 2004) (determining to abstain under ***Younger*** because "plaintiff's request for an injunction–whether styled to run against a County agency, the County itself, or even the Juvenile Court–amounts to an entreaty for this court to oversee the Juvenile Court's performance, for it is that body that ultimately must pass upon the efficacy and propriety of the case plans at issue").

The Nebraska foster care system is similar in material respects to the Florida and New Mexico systems at issue in ***31 Foster Children*** and ***J.B.***, respectively. Like the Florida and New Mexico systems, the Nebraska system has the following attributes:

(1) adjudication/disposition of the wards vested in state courts;

(2) biannual dispositional review by state courts;

(3) treatment/placement plans reviewed and approved (with modifications, if necessary) by state courts; and

(4) permanency plans reviewed and approved by state courts every twelve (12) months.

NEB. REV. STAT. §§ 43-278, 43-284, 43-285(1) and (2) and 43-1312(3).

The claims alleged in the Florida and New Mexico cases (*i.e.,* the states failed to provide the plaintiffs with services, benefits and protections guaranteed by federal statutory and constitutional law) and the relief sought (*i.e.*, declaratory and injunctive relief) are virtually identical to the claims raised and relief sought by Plaintiffs in this case. In deciding to recommend that this Court dismiss this case pursuant to ***Younger*** abstention, Magistrate Piester properly applied the persuasive rationale

of the Eleventh Circuit in ***31 Foster Children*** and the Tenth Circuit in ***J.B.*** (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 156-158).

Engaging in a no-holds-barred attack on Magistrate Piester's ***Younger*** abstention recommendation, Plaintiffs accuse the Magistrate of intentionally omitting language from an extensive quotation of the Eleventh Circuit's opinion in the ***31 Foster Children*** case. (Pl. Obj. Br., p. 45). This language, that the plaintiffs in ***31 Foster Children*** were seeking "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 a permanent children's advocate to oversee that plan," ***31 Foster Children***, 329 F.3d at 1239, is immaterial to the ***Younger*** "interference" analysis and was well known to both the Magistrate and the parties before the Report and Recommendation was entered. In fact, Defendants quoted this very "omitted language," verbatim, at page 2 of their Reply Brief in Support of Defendants' Motion to Dismiss, to point out that Plaintiffs' counsel certainly knew how to ask for specific injunctive relief at the outset of a foster care case, long before they initiated this case. (Filing No. 89, p. 2).

Plaintiffs also claim that the Magistrate erred in relying on decisions of the Eleventh and Tenth Circuits in ***31 Foster Children*** and ***J.B.*** because Plaintiffs have failed (intentionally) to identify with specificity the nature of the relief they are seeking and because it is purportedly unknown whether injunctive relief available after trial on the merits would run afoul of ***Younger***. Plaintiffs' claim that ***Younger*** can be side-stepped through the simple expedient of artfully failing to ask for specific injunctive relief in an opening or amended complaint, taken to its logical extension, would render ***Younger*** and the constitutional principles of comity ***Younger*** is designed to protect meaningless. ***See, Local Union No. 12004 v. Massachusetts***, 377 F.3d 64, 76, n. 11 (1st Cir. 2004) ("[o]rdinarily, the ***Younger*** question must be decided before decision on the merits of the

underlying claim"); and ***Greening v. Moran***, 953 F.2d 301, 304 (7th Cir. 1992) ("[t]o say that [***Younger***] abstention is in order then is to say that federal courts should not address the merits, period," and when "there is an ongoing state proceeding, whether to abstain is the *first* question, and an affirmative answer brings the case to an end") (emphasis in original).

Thus, as Magistrate Piester correctly recognized, Plaintiffs' Amended Complaint is the epitome of "artful pleading and lack of specificity" which "should not serve to circumvent the principles of comity protected by Younger abstention." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 147). While Plaintiffs' counsel feign to have been cut to the quick by the Magistrate's rebuke, it was fully justified.

In a transparent effort to avoid ***Younger***, Plaintiffs' counsel told the Magistrate, and now tell this Court, that they filed suit without having the slightest idea as to what relief they are requesting from the Court. (Pl. Br., p. 24 ["Plaintiffs…***are plainly not in a position to identify the precise nature of the remedial relief*** that will ultimately be sought at trial"]) (emphasis added). Plaintiffs' position, that they could not possibly know the precise nature of the relief they will seek until trial, defies credulity. This is especially true if their representation to this Court at the outset of this case is to be believed that "***[t]housands of attorney hours [were] spent*** meeting with sources knowledgeable about Nebraska's system, compiling relevant facts and documentation, and researching and developing the legal claims alleged in Plaintiffs' Class Action Complaint." (AFF. OF MARCIA ROBINSON LOWEY IN SUPP. OF MOTION FOR CLASS CERT., p. 3, ¶ 6 [Filing No. 12-2]) (emphasis added). In other words, Plaintiffs' counsel, who claim to have spent "[t]housands of attorney hours" on this case ***before*** the original Complaint was even filed, have the audacity to stand before this Court and claim that they really don't know what equitable relief they might ask for until after the parties have invested huge amounts of time, effort and money conducting discovery and

trying the case.[4] "Kindly put, this argument is not worthy of belief." ***El Tabech v. Gunter***, 922 F.Supp. 244, 261 (D. Neb. 1996).

In order to determine whether granting federal injunctive and declaratory relief in this case would interfere with ongoing Nebraska juvenile court proceedings, Magistrate Piester quite logically and properly analyzed "the specific allegations of the amended complaint" (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 147), to decide what equitable relief could be available to remedy Plaintiffs' specific complaints. (***Id.***, pp. 147-149). The next logical step in the "interference" analysis, as the Magistrate correctly recognized, was to analyze these potential remedies against the existing "extent to which Nebraska juvenile court judges are already vested with oversight responsibility and authority to consider the impact of [Plaintiffs'] complaints with respect to each child and enter orders for the benefit of such children under their jurisdiction." (***Id.***, pp. 149-150).

After engaging in an exhaustive analysis of the Nebraska Juvenile Code and Nebraska case law, the Magistrate properly concluded:

> The ***juvenile court decides*** whether a child should be separated from his or her parents for protection, where the child should be placed, whether efforts to reunify should be attempted, the conditions and supervision required for such attempts, when and if parental rights should be terminated, whether the parents should be afforded an opportunity to complete a rehabilitation plan before such rights are terminated, and when or if a child should be released from HHS custody (other than by reaching adulthood). All such orders are subject to appellate review by the Nebraska Court of Appeals and the Nebraska Supreme Court.…
>
> Based on the foregoing analysis, I conclude that ***injunctive orders by this court*** which attempt to impose parameters on HHS for determining where a child should be placed; if and how often a child should be moved to another placement; the child's length of stay in HHS custody; the methods employed and attention given to parental rights termination proceedings; the supervision of the children while in HHS custody; the level of training, experience, and workload capability of HHS caseworkers assigned to a child; the level of

[4] The real explanation for Plaintiffs' "artful pleading" lies in what Plaintiffs' counsel learned from ***31 Foster Children v. Bush***, 329 F.3d 1255, 1260 (11th Cir. 2003) (identifying "Children's Rights, Inc." as one of the counsel for the plaintiff children). In ***31 Foster Children***, Plaintiffs' counsel learned that they must be as ambiguous as possible in articulating the type of injunctive relief they are seeking, if they are to have any chance of keeping their foot in the federal courthouse door.

> reporting provided to the court by HHS; the rights to visitation with family or former foster families; and the types of medical, dental, mental health, and behavioral treatment a child may need, ***would both directly and indirectly interfere with the plenary jurisdictional and decision-making authority of the Nebraska juvenile courts. The injunctive relief ordered would give the federal district court an oversight role over Nebraska's child welfare program, and would give it direct control over decisions currently vested in the juvenile court***.…

(MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 155-156) (emphasis added) (citations omitted). ***See also,*** NEB. REV. STAT. §§ 43-247, 43-278, 43-284, 43-285(1) and (2), 43-292.02, and 43-1312(3); ***In re Veronica H.***, 272 Neb. 370, 375, 721 N.W.2d 651, 655 (2006) ("when a juvenile's care is awarded to DHHS, ***the care and placement*** is 'by and with assent of the court.' This provision implicitly ***gives the juvenile court the authority to dissent from a determination made by DHHS*** and to direct the removal of a case manager ***when the facts and circumstances require a change for the best interests of the juvenile***") (emphasis added); ***In re Interest of DeWayne G., Jr. & Devon G.,*** 263 Neb. 43, 638 N.W.2d 510 (2002) (whether reasonable efforts to preserve and reunify the family are required, and if so, whether such efforts have been made, is ***determined by the juvenile court***); ***In Re Interest of C. A.***, 235 Neb. 893, 900, 457 N.W.2d 822, 827 (1990) ("Section 43-284 does not authorize DSS to determine or place restrictions on visitation rights. ***Visitation rights, as a subject within the Nebraska Juvenile Code, are matters for judicial determination***") (emphasis added); and ***In re Interest of Crystal T.***, 7 Neb App. 921, 927, 586 N.W.2d 479, 483 (1998) (the power to make decisions regarding placement, even decisions which involve "micro management" of the placement, is ***vested exclusively in the juvenile court***) (emphasis added).

In their Objection Brief, Plaintiffs assert that the foregoing conclusions by Magistrate Piester "assume[] an all or nothing proposition," in that, purportedly, "[i]f 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." (Pl. Obj. Br., p. 41). However, Magistrate Piester did no such thing.

Rather, Magistrate Piester clearly determined that there is ***no*** "non-interfering relief" which could be awarded as a remedy, given the claimed harms asserted in the Amended Complaint. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 155-156). Magistrate Piester was quite correct in reaching this conclusion.

In an effort to avoid the Magistrate's correct conclusion that there is ***no*** "non-interfering relief" which could be awarded in this case, Plaintiffs artfully change course in mid-stream, asserting that there are specific forms of injunctive relief after all which they are seeking in this case. (Pl. Obj. Br., pp. 41-42). However, Plaintiffs' claim that relief in the four areas of "placements," "supervision," "health services" and "computerized information system" would not interfere with ongoing Nebraska juvenile court proceedings is legally and factually erroneous and graphically demonstrates that the individual Plaintiffs lack Article III standing to sue.

The first purportedly "non-interfering" remedy identified by Plaintiffs relates to the issue of "placements." Plaintiffs assert that the Court could order that the Defendants cure an alleged insufficient array of foster homes and "other types of placements for class members" as a "necessary prerequisite for the Nebraska juvenile court to exercise its judgment in individual proceedings" because, in "the absence of options, the Juvenile Court's authority is illusory; it can only choose among what may be less than acceptable alternatives." (Pl. Obj. Br., p. 42). The short answer to this contention is that the "placement help" Plaintiffs seek may be interpreted "as reflecting negatively upon the [juvenile courts'] ability to enforce constitutional principles." ***Huffman v. Pursue, Ltd.***, 420 U.S. 592, 604 (1975). ***Accord, Caldwell v. Camp***, 594 F.2d 705, 707 (8th Cir. 1979) ("federal

court interference with ongoing state court proceedings…may also be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles").

Moreover, it would no doubt be news to Nebraska's hard-working juvenile court judges that their authority is "illusory." There is not a single placement order in the record before this Court which indicates that any juvenile court judge abdicated their judicial responsibility and simply chose the "lesser of two evils" for a foster child's placement. On the contrary, it is undisputed that the Nebraska juvenile courts have judicially determined ***each named Plaintiff is in an appropriate placement and their needs for safety, health and well-being are being met***. (Ex. 1, Bates Nos. HHS-000027 to HHS-000034, HHS-000072 to 000074; Ex. 2, Bates Nos. HHS-000549 to HHS-000550; Ex. 3, Bates Nos. HHS-001018 to HHS-001022; Ex. 4, Bates Nos. HHS-001492 to HHS-001496; Ex. 5, Bates Nos. HHS-002160 to HHS-002161, HHS-002212 to HHS-002223; Ex. 36, ¶¶ 10, 32-34 and 36; Ex. 48, Bates Nos. HHS-013009 to HHS-013012; Ex. 49, Bates No. HHS-018155, HHS-019616 to HHS-019625).

These juvenile court determinations also raise an insurmountable "causation" obstacle to Plaintiffs, as they cannot obtain any "placements" relief, unless they can convince this Court to interfere with the Nebraska juvenile courts in a most drastic way – the overruling of the juvenile court's orders establishing the placement and the terms and conditions thereof for each minor Plaintiff. This is so because Plaintiffs' entitlement to any "placements" relief turns on proof that the alleged systemic failures ***cause*** dangerous and deficient placements of each minor Plaintiff. Therefore, the "interference" factor of the ***Middlesex*** test is clearly met because, in order to grant any "placements" relief to Plaintiffs, this Court would have to effectively reverse the Nebraska juvenile courts' determinations that each named Plaintiff is in an appropriate placement and their needs for safety, health and well-being are being met.(Ex. 1, Bates Nos. HHS-000027 to HHS-000034, HHS-

000072 to 000074; Ex. 2, Bates Nos. HHS-000549 to HHS-000550; Ex. 3, Bates Nos. HHS-001018 to HHS-001022; Ex. 4, Bates Nos. HHS-001492 to HHS-001496; Ex. 5, Bates Nos. HHS-002160 to HHS-002161, HHS-002212 to HHS-002223; Ex. 36, ¶¶ 10, 32-34 and 36; Ex. 48, Bates Nos. HHS-013009 to HHS-013012; Ex. 49, Bates No. HHS-018155, HHS-019616 to HHS-019625).

The next allegedly non-interfering remedy suggested by Plaintiffs relates to "supervision." (Pl. Obj. Br., p. 42). Plaintiffs claim that Defendants should do a better job with respect to "criminal background checks" of foster homes and other placements. The second aspect of the proffered "supervision" remedy relates to a claim that this Court should order "a limitation on caseworker caseloads…and improvements in caseworker training." (***Id.***) However, there is no allegation that insufficient background checks or excessive caseworker caseload has ***caused*** any harm to any individual Plaintiff. Further, a key component of the Nebraska juvenile courts' oversight responsibilities is that a juvenile court has "the authority to…direct the removal of a case manager when the facts and circumstances require a change for the best interests of the juvenile." ***In re Veronica H.***, 272 Neb. at 370, 721 N.W.2d at 651, 655. Therefore, it is clear that "the supervision of the children while in HHS custody; the level of training, experience, and workload capability of HHS caseworkers assigned to a child; [and] the level of reporting provided to the court by HHS…would both directly and indirectly interfere with the plenary jurisdictional and decision-making authority of the Nebraska juvenile courts…." (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 156).

The third allegedly non-interfering remedy relates to "health services." Plaintiffs claim that "[i]t is ***exclusively the obligation of HHS*** to ensure that each class member 'receives 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)." (Pl. Obj. Br., p. 42) (emphasis added). Plaintiffs' assertions in this regard are flatly untrue.

Rather, under NEB. REV. STAT. § 43-1311, it is the obligation of "the person or ***court*** in charge of the child" to ensure that the child receives a medical examination within two weeks of removal from the home. ***Id.*** (emphasis added). The "removal" referenced in § 43-1311 is one which occurs pursuant to NEB. REV. STAT. § 43-284 (care, assistance and supervision options available to ***juvenile court*** after assuming jurisdiction over and adjudging the juvenile "under subdivision (3), (4), or (9) of section 43-247"). It is thus quite clear that "injunctive orders by this court which attempt to impose parameters on HHS for determining 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" and would give this Court "direct control over decisions currently vested in the juvenile court.…"(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 156).

Finally, Plaintiffs claim that this Court could make some kind of "non-interfering" order in relation to a "computerized information system." (Pl. Obj. Br., p. 42).[5] Plaintiffs' claim that the Magistrate did not find "to the contrary" (***Id.***) is incorrect. Magistrate Piester specifically recognized that there were 17 specific types of injunctive relief which Plaintiffs could request, based upon the allegations of the Amended Complaint, and that Plaintiffs wanted HHS to "[p]erform all the foregoing and upgrade its computerized information systems," at the same time. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 149).[6] Obviously, Plaintiffs entitlement to any "computerized information system" relief is inextricably linked to Plaintiffs entitlement to the 17 specific types of injunctive relief which Plaintiffs could request. Since Magistrate Piester correctly determined that the granting of all other forms of injunctive relief which could be granted, given the allegations of

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[5] Once again, there is no evidence or allegation that any claimed lack of a "computerized information system" has ***caused*** any harm to any individual Plaintiff.

[6] It is difficult to fathom any circumstance under which this Court would ever grant relief calling for such an unprecedented level of federal court micromanagement – directing the making of a legislative/administrative decision as to the type of computer system to be used by a state administrative agency. There are certainly no allegations in the Amended Complaint which would justify such an extraordinary judicial directive.

the Amended Complaint, "would both directly and indirectly interfere with the plenary jurisdictional and decision-making authority of the Nebraska juvenile courts" (***Id.***, pp. 156), there is nothing left upon which the "computerized information system" remedy could be based.

B. The Nebraska Juvenile Court Is an Adequate Forum to Hear the Foster Children's Federal Claims.

In attempting to evade the reach of ***Younger***, Plaintiffs make the striking admission that this case is not, in the view of their self-appointed next friends and counsel, aimed at benefitting any individual foster child. According to Plaintiffs, "even if 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." (Pl. Obj. Br., p. 48). Plaintiffs' attempt to cast the issue as being between "class action relief" and "individual relief" is a red herring which does not address whether the minor Plaintiffs have an adequate opportunity to raise their federal claims in Nebraska's juvenile courts.

While Plaintiffs argue that, as a matter of convenience, a class action, as opposed to the individual cases of each child, is a better way to obtain systemic relief, a procedural "convenience" does not outweigh the salutory basis of ***Younger*** abstention and does not expand this Court's jurisdiction.[7] ***See, Moore v. Sims***, 442 U.S. 415, 430 (1979) (with respect to ***Younger*** abstention,

[7] In no way do Defendants concede or agree that a class action is the most convenient way for the foster children to assert their rights. On the contrary, Plaintiffs' "convenience" argument highlights the fact that this lawsuit is not focused on the relief that each individual child might need. Instead, it is focused on the most convenient way to achieve ideological reform. That is, if this claim was focused on the best interests of each child, the juvenile court would be the obvious choice to conveniently obtain all of the relief each individual child could obtain. The juvenile courts were created to focus on the individual circumstances of the child and to ensure that each individual child's needs are being met.

the "***price exacted in terms of comity would only be outweighed*** if state courts were not competent to adjudicate federal constitutional claims–a postulate that we have repeatedly and emphatically rejected" and "the ***only pertinent inquiry*** is whether the state proceedings afford an adequate opportunity to raise the constitutional claims") (emphasis added); ***Owen Equipment & Erection Co. v. Kroger***, 437 U.S. 365 (1978) ("[i]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."); ***Canatella v. State of California***, 404 F.3d 1106, 1112-1113 (9th Cir. 2005) (holding that ***Younger*** trumps Fed. R. Civ. P. 24 because "***Younger*** abstention is essentially a jurisdictional doctrine"); and FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts…").

Magistrate Piester properly rejected Plaintiffs' "class vs. individual relief" dichotomy when he accurately defined the issue to be decided by the Court:

> The precise question ***is not*** whether a Nebraska juvenile court can be called upon to issue a ruling declaring that specific HHS policies violate the constitution or federal law. ***Rather, the plaintiffs must prove the juvenile courts cannot adequately consider evidence of HHS' conduct or likely future conduct toward the individual plaintiffs, determine if such conduct violates their rights under federal constitutional or statutory law, and enter orders protecting the plaintiffs from HHS' allegedly unlawful conduct***.

(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 161) (emphasis added).

Thus, the question is not whether a juvenile court can grant "systemic" injunctive relief. Rather, the question is whether the Nebraska juvenile courts have the authority to decide Plaintiffs' federal claims – and the answer to that question is undeniably "Yes." ***See***, ***In re Interest of Corey P., et al.***, 269 Neb. 925, 697 N.W.2d 647 (2005) (affirming juvenile court's ability to resolve Fourth Amendment issues); ***In re Interest of Phyllisa B.***, 265 Neb. 53, 58, 654 N.W.2d 738, 742 (2002) (where plaintiff failed to raise federal constitutional claim in the juvenile court proceeding, an appellate court will not consider such claim); and ***In re Interest of Lisa W.***, 258 Neb. 914, 920, 606

N.W.2d 804, 809 (2000) (court refused to consider appellant's federal due process claim because the claim had not been raised in the juvenile court proceeding). ***See also, Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1, 15 (1987) ("[w]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume the state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary"); and ***Neal v. Wilson***, 112 F.3d 351, 357 (8th Cir. 1997) (a court should not engage any presumption that state courts will not safeguard federal constitutional rights).

After properly framing the issue, Magistrate Piester then correctly determined that, although a class action cannot be brought in juvenile court, a Nebraska juvenile court is an adequate forum for each plaintiff to bring ***all*** the claims that he or she has standing to bring. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 162-164). In reaching this conclusion, Magistrate Piester agreed with the sound reasoning of the Tenth Circuit that "there is no persuasive authority holding 'that a party is entitled to avoid the effects of ***Younger*** abstention doctrine where relief is available to individual litigants in ongoing state proceedings but not to represented parties in a class action.'" (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 162), ***quoting Joseph A. ex. rel. Wolfe v. Ingram***, 275 F.3d 1253, 1274 (10th Cir. 2002) ("***Joseph A.***").

In so holding, Magistrate Piester properly rejected the cases referenced by Plaintiffs as, in each case, the relief sought ***was not even available to individual plaintiffs in the ongoing state proceedings***. ***LaShawn A. v. Kelley***, 990 F.2d 1319, 1322-1324 (D.C. Cir. 1993) (District of Columbia Family Division "neglect proceedings" are "not suitable arenas in which to grapple with broad issues external to the parent-child relationship," "termination hearings" were not intended to address subjects other than the cessation of parental rights and periodic review hearings were intended merely to reassess periodically the disposition of the child); ***Kenny A. v. Perdue***, 218

F.R.D. 277, 297 (N.D. Ga. 2003) (under Georgia law, "***[e]ven in individual cases***, the juvenile court cannot order DFCS 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") (emphasis added); and ***People United for Children, Inc. v. City of New York***, 108 F. Supp. 2d 275, 290-91 (S.D.N.Y. 2000) (plaintiffs were ***parents***, not children, and thus, it would have been "inappropriate and ineffectual to ask the Family Court to consider matters beyond those which are central to child neglect proceedings"). Unlike these cases, in this case, Nebraska's juvenile courts have the authority and ability to consider each minor Plaintiff's constitutional and statutory claims.

Plaintiffs final "non-interference" argument is that their requested relief is aimed at a "unitary executive agency," such that there is purportedly "no possibility of conflict between relief that might be granted here and in the Juvenile courts." (Pl. Obj. Br., p. 44). This is the same argument which was heard and rejected by the Eleventh Circuit in ***31 Foster Children***:

> The plaintiffs argue that the requested relief would not interfere because it is directed solely at the Department of Children and Families and not the state courts. We previously rejected that same argument in ***Lucky V***., and we reject it again here …'[A] case ***cannot be decided in a vacuum***,…and the federal court relief the plaintiffs seek would ***interfere with ongoing state dependency hearings, even if it were directed against the Department and state officers, instead of state courts and judges***.

31 Foster Children, 329 F.3d at 1279, n. 11 (internal citations omitted) (emphasis added).

As in ***31 Foster Children***, Plaintiffs' smokescreen argument "that the requested relief would not interfere because it is directed solely at the Department…and not the state courts," ***see, Id.***, fails as a matter of law, the facts and common sense. As Magistrate Piester properly recognized:

> Exercising federal court oversight over HHS' conduct on behalf of a child would serve to duplicate the authority already afforded to the Nebraska juvenile court by the Nebraska legislature. Federal court injunctive orders against HHS would undermine and interfere with

> the Nebraska juvenile court's ability to exercise the full extent of its authority over juvenile court proceedings.

(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 158).

Thus, this Court should likewise reject Plaintiffs' invitation to analyze their requested relief "in a vacuum" and adopt Magistrate Piester's recommendation to dismiss this case on ***Younger*** abstention grounds, to avoid "interfer[ing] with ongoing state dependency hearings." ***See, 31 Foster Children***, 329 F.3d at 1279, n. 11.

C. Magistrate Piester's Deference to Comity and Federalism and Recognition of Nebraska's Reform Efforts Was Not Unfair to Plaintiffs.

In a last ditch effort to attempt to undermine Magistrate Piester's recommendation to dismiss this case based upon ***Younger*** abstention, Plaintiffs completely mischaracterize Magistrate Piester's reference to "efforts underway" to reform Nebraska's child welfare system. In this regard, Plaintiffs claim:

> 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; 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 teams; Governor Nelson's establishment of 'The Nebraska Commission for Child Protection' in 1993; 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.
>
> The R & R's reliance on these sources is an invitation to the Court to conduct a preliminary inquiry into the merits of the suit before Plaintiffs have had the opportunity to conduct discovery….

(Pl. Obj. Br., pp. 51-52) (internal citations omitted).

The foregoing is nothing more than a "straw man" argument erected by Plaintiffs. In his ***Younger*** analysis, Magistrate Piester did not even mention these sources, let alone "rely" on them as Plaintiffs claim. (Pl. Obj. Br., p. 52). Instead, these sources were mentioned in the "Record" section of the Report and Recommendation.

The only "efforts underway" that are part of Magistrate Piester's ***Younger*** analysis are the State Foster Care Review Board's 2004 report and the Nebraska Supreme Court Commission on Children in the Courts which was formed in 2005. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 144-145). More importantly, Magistrate Piester only referenced this evidence in connection with his correct determination, as Plaintiffs have conceded, the second ***Middlesex*** factor is met–that Nebraska's juvenile proceedings implicate important state interests. (***Id.***)

II. THE PURPORTED NEXT FRIENDS HAVE SUBORDINATED THE INDIVIDUAL FOSTER CHILDREN'S BEST INTERESTS TO THE NEXT FRIEND'S DESIRE FOR SYSTEMIC REFORM.

For some inexplicable reason, Plaintiffs have chosen to object, not to an adverse recommendation, but to the Magistrate's recommendation to defer ruling on Defendants' Motion to Dismiss, on the basis of lack of prudential standing because the self-appointed next friends are not capable and adequate next friends, pending a final ruling on the remainder of Defendants' Motion to Dismiss. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 195). As a matter of obvious judicial economy, there will be no need for the Court to address prudential standing issues if the Court adopts Magistrate Piester's recommendation that this case be dismissed, pursuant to ***Younger*** abstention.

However, to the extent the Court is inclined to address this issue, it is important to recognize that "[a] review of the entirety of the each next friend's deposition reveals the defendants did not distort the deposition testimony; there is substantial reason to question whether the plaintiffs' next friends will adequately represent their ***individual interests***." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 125) (emphasis added). Magistrate Piester's concern is well taken, especially considering the admission in Plaintiffs' Objection Brief that they could not care less about obtaining "individualized" relief. (Pl. Obj. Br., p. 48).

Plaintiffs claim that certain factors "limited" the next friends' abilities to be involved in the lives of the individuals they purport to represent. (Pl. Obj. Br., pp. 33-34). However, Magistrate Piester did not hold any of these claimed limitations against the self-appointed next friends. Rather, Magistrate Piester recognized the difference between being limited in the ability to be involved and in the level of devotion, or lack thereof, to the individual foster children's best interest:

> The next friends have made little, if any, ***effort*** to communicate with members of the community who may have relevant information concerning the named plaintiff's well being.
>
> * * * *
>
> The record reflects that the next friends expended little, if any ***effort*** to seek out sources and discover the current circumstances or potential risk of harm faced by their assigned named plaintiff. They filed a complaint on behalf of the child without this knowledge; and as of the time their depositions were taken (***at least three months after this suit was filed***), they still lacked the information necessary to assess the state's current efforts on behalf of the child, and had little, if any, reliable information concerning the circumstances and suitability of the child's current placement. Whatever concerns they did have ***were not voiced*** to the juvenile court, guardian ad litem, county attorneys, HHS caseworkers, or the Foster Care Review Board.
>
> * * * *
>
> While there is some evidence that foster parents were instructed not to speak to the next friends, ***that does not explain the next friends' failure to pursue any recent investigation*** before apparently deciding litigation would serve the named plaintiffs' best interests, nor their failure to raise concerns before state agencies and authorities who could assist the child.

(MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 131, 134, n. 37 and 135) (emphasis added).

Plaintiffs also assert, incredibly, that the next friends are not "ideologues." However, the "***evidence supports a finding that each of these next friends have 'an ideological stake' in the named plaintiffs' case***; their primary objective appears to be changing Nebraska's child welfare system." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 133) (emphasis added)

In fact, the next friends in this case are exactly the type of ideologues contemplated in ***T.W. v. Brophy***, 124 F.3d 893 (7th Cir. 1997). There, two children were removed from their foster home

and placed with their abusive aunt. The children, through a next friend, sued their aunt, state agencies, and state officials, claiming that the children were removed from their foster home for racist reasons in violation of the Fourteenth Amendment's Equal Protection Clause. The children's next friend was a ***self-appointed*** child advocate. When discussing whether the child advocate was the proper next friend, the Seventh Circuit articulated the following rule:

> [T]he proper rule is that the next friend must be an appropriate alter ego for a plaintiff who is not able to litigate in his own right; that ordinarily the eligibles will be ***confined*** to the plaintiff's parents, other siblings (if there are not parents), or a conservator or ***other guardian***, akin to a trustee; that persons having only an ***ideological stake*** in the child's case are ***never eligible***; but that if a close relative is unavailable and the child has no conflict-free general representative the court may appoint a personal friend of the plaintiff or his family, a professional who has worked with the child, or, in ***desperate circumstances, a stranger*** whom the court finds to be especially suitable to represent the child's interests in the litigation.…***Without such a rule, and specifically its exclusion of purely ideological "friends," we may find [child advocates] popping up in children's suits all over the circuit, perhaps all over the country***.

T.W., 124 F.3d at 897 (emphasis added) (internal citations omitted), ***citing Whitmore v. Arkansas***, 495 U.S. 149, 164 (1990); and ***Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.***, 454 U.S. 464, 473 (1982).

There is no relevant difference between the child advocate in ***T.W.***, who had become the next friend solely to promote his philosophical opposition to the state's alleged foster care placement policies, and the purported next friends in this case. As Plaintiffs clearly state, they want nothing to do with individual relief for any minor Plaintiff, as they seek "class-wide relief to remedy harms ***caused by the policy and practices*** of a unitary executive agency." (Pl. Obj. Br., p. 44) (emphasis added). Plaintiffs call the next friend in ***T.W.*** a "purely self-interested child welfare 'ideologue[].'" (Pl. Obj. Br., p. 33). The truth of the matter is that a child advocate is rarely "purely self interested."

However, as the ***T.W.*** court explained, the "exclusion of purely ideological 'friends'" is necessary to keep the court from being "flooded by 'cause' suits," and litigants who "merely express

an interest in the subject matter." ***T.W.***, 124 F.3d at 897. Obviously, the purported next friends in this case are not "self interested." Instead, the next friends are interested, but only in the "subject matter" of this litigation; they are interested in a "cause," not a child. Magistrate Piester assessed the evidence and saw that this is clearly the case:

> The evidence currently before me indicates that while each next friend may have sincere empathy for her named plaintiff's plight, ***her goal in this litigation is system change on behalf of others and not advocating the individual interests of her named plaintiff***.

(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 134) (emphasis added).

It is clear from the evidence and the positions asserted on behalf of Plaintiffs in this case that the individual foster children have little to do with this case. The individual needs of the foster children have been "thrust aside" in deference to the next friends' and attorneys' interests in systemic reform–passionate and motivating as such interests may be. Seemingly, if the self-appointed next friends could have brought this suit without the foster children, they would have. This offends the policy behind the requirement of standing, which is to confine cases to those brought by persons who have a concrete, rather than ideological, stake. Magistrate Piester's concerns regarding the next friend's inability to adequately represent the named minor Plaintiffs is fully justified. Therefore, to the extent the court reaches this issue, Defendants' Motion to Dismiss, on the basis of lack of prudential standing because the self-appointed next friends are not capable and adequate next friends, should be sustained.

III. THE NAMED PLAINTIFFS LACK STANDING TO LITIGATE.

Notwithstanding Plaintiffs' repeated resort to the "systemic relief" mantra (***see, e.g.***, Pl. Obj. Br., p. 47), the bottom line is that, in order to establish that each individual Plaintiff has standing, Plaintiffs must demonstrate that they "would benefit in a personal and tangible way from the court's intervention." ***Warth v. Sedlin***, 422 U.S 490, 508 (1975). Further, there must be a "substantial

likelihood" that the requested relief will remedy the alleged violation of the constitutional or statutory rights of each such Plaintiff. ***Simon v. Eastern Ky. Welfare Rights Organization***, 426 U.S. 26, 45 (1976).

The Magistrate determined that the Plaintiffs have individual standing–in large part because he found that the Plaintiffs were asking for specific particularized relief for their alleged individual injuries. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 117-118). Defendants filed timely objections to that portion of the Magistrate's Recommendation and have briefed the standing issue in relation to those objections. (Filing No. 93). However, it is necessary to address the remedy aspect of standing and abstention in a single brief to make clear that, in their effort to evade ***Younger*** abstention, Plaintiffs have identified purportedly available remedies which will provide no personal benefit at all to the individual Plaintiffs, or which provide benefits that are too attenuated and speculative from any constitutional or statutory violation alleged by the individual Plaintiffs to satisfy standing requirements.

Plaintiffs claim that there is hardly a need to discuss the issue of remedy at this stage of the litigation because (they say) the Court has the power to "tailor equitable relief consistent with the evidence ultimately adduced at trial…." (Pl. Obj. Br., p. 38). However, federal law is clear that the existence of Article III standing is a jurisdictional question which must be decided at the commencement of the action. Accordingly, each Plaintiff has the burden of satisfying all standing requirements ***at this stage of the litigation*** by, among other things, demonstrating the existence of a nonspeculative remedy which will provide a personal benefit to that Plaintiff with respect to the particular constitutional and statutory violations alleged by that Plaintiff. The remedies identified by Plaintiffs do not come close to satisfying the remedy prong of time-honored federal standing requirements.

Standing is not a hyper-technical issue intended to deprive persons of their day in court. Instead, the requirement is a critical component of the concept of separation of powers. As explained by the United States Supreme Court in ***Steel Co. v. Citizens for a Better Env't***, 523 U.S. 83 (1998):

> Article III, § 2 of the Constitution extends the "Judicial Power" of the United States only to "Cases" and "Controversies." We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process.…Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all. Every criminal investigation conducted by the Executive is a "case," and every policy issue resolved by congressional legislation involves a "controversy." ***These are not, however, the sort of cases and controversies that Article III, § 2, refers to, since "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts***."…Standing to sue is part of the common understanding of what it takes to make a justiciable case.…
>
> The "irreducible constitutional minimum of standing" contains three requirements.…First and foremost, there must be alleged (and ultimately proven) an "injury in fact" -- a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'"…Second, there must be causation -- a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.…And third, ***there must be redressability – a likelihood that the requested relief will redress the alleged injury***.… This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Citizens for a Better Env't, 523 U.S. at 102-104 (emphasis added) (citations omitted). ***See also, Schlesinger v. Reservists Comm. to Stop the War***, 418 U.S. 208, 222 (1974) (to permit a federal court to rule on the claims of a plaintiff lacking Article III standing would "create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction'").

Plaintiffs openly admit (indeed insist) that they are seeking only "class relief" for alleged "systemic" deficiencies in the system, and they openly admit (and again insist) that they seek no "individualized" remedies for any of the named Plaintiffs. Thus, Plaintiffs complain that "[d]espite

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." (Pl. Obj. Br., p. 3) (emphasis in original).

By their own admissions, Plaintiffs are seeking only class relief for injuries allegedly suffered by the class, and they most definitely are ***not*** seeking any individual relief for injuries allegedly suffered by the named Plaintiffs.[8] Plaintiffs have failed to recognize that each named Plaintiff must meet standing requirements individually, and cannot rely on allegations and claims regarding other persons. The ***O'Shea*** Court held that "if none of the named plaintiffs purporting to represent a class establishes the requisites of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." ***O'Shea***, 414 U.S. at 494-495. Other federal courts have reached the same conclusion:

> Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if persons described in the class definition would have standing themselves to sue. ***If the plaintiff has no standing individually, no case or controversy arises***.

Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981) (emphasis added).

With that background in mind, Defendants now turn to the question whether the Plaintiffs have demonstrated the existence of the Article III standing requirement of "redressibility." As noted above, Plaintiffs would prefer not to talk about remedies at all at this juncture. Instead, Plaintiffs ask this Court to "tailor equitable relief consistent with the evidence ultimately adduced at trial." (Pl. Obj. Br., p. 38). The fatal flaw in Plaintiffs' request is that jurisdictional issues are to be decided at the commencement of a lawsuit, not at the end. Federal courts have repeatedly so held:

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[8] These admissions make plain that Plaintiffs are seeking remedies which are legislative in nature and which cannot be granted by this Court consistent with the limitation that the Court may only exercise jurisdiction with respect to a case which presents a justiciable case and controversy.

> ***At the outset***, a claimant must be able to show a facially colorable interest in the proceedings sufficient to satisfy Article III standing; otherwise, no constitutional case or controversy exists capable of federal court adjudication. ***See Tarsney v. O'Keefe***, 225 F.3d 929, 934 (8th Cir. 2000); ***see also Flast v. Cohen***, 392 U.S. 83, 99-100 1968) ("When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."). Because standing is a "threshold question in every federal case," ***Warth v. Seldin***, 422 U.S. 490, 498 (1975), ***judicial economy requires that the court decide the issue at the commencement of the litigation rather than deferring until trial. See Osborn v. United States***, 918 F.2d 724, 729 (8th Cir. 1990) (emphasis added).

United States v. 1998 BMW "I" Convertible, 235 F.3d 397, 399 (8th Cir. 2000) (emphasis added).

The forgoing authorities make clear that the individual Plaintiffs bear the burden of demonstrating they have standing and they must make that demonstration at the commencement of the case. It is equally clear that, in order to make the requisite showing of redressability at this stage, each Plaintiff must individually at least ***identify*** a remedy which this Court could order (that is, among other things, a remedy which will not run afoul of the abstention doctrines) and that there is a "substantial likelihood" the requested relief will redress the injuries ***Plaintiff has individually and personally suffered***.

Plaintiffs arguments in support of their objections demonstrate a fundamental misunderstanding of Article III standing requirements. Plaintiffs insist that "[i]nstead of individualized relief, the Plaintiffs require class-wide relief to remedy harms caused by policy and practices of a unitary executive agency–more foster homes, smaller caseloads, health screens, a functional computer system." (Pl. Obj. Br., p. 44). However, Plaintiffs' resort to their "systemic relief" mantra misses the mark because standing involves an individual inquiry; not a class inquiry. ***See, O'Shea***, 414 U.S. at 494-495.

The first purportedly "non-interfering" remedy identified by Plaintiffs relates to the issue of "placements." Plaintiffs vaguely claim the Court should order the Defendants to cure what they

allege to be an insufficient array of foster homes and "other types of placements for class members." (Pl. Obj. Br., p. 42). This proposed remedy falls far short of establishing the existence of standing with respect to any of the individual Plaintiffs.

It does not appear that Plaintiffs are claiming that any of them has ***personally*** been harmed by this alleged shortage of foster homes and "other placements." With respect to this proposed remedy, Plaintiffs refer only to class allegations. (***Id.*** [***citing***, AMENDED COMP., ¶¶ 5(a) and (c), 109-124, 138-140]). If none of the named Plaintiffs has been harmed by this alleged shortage, it follows that this "remedy" would not "redress" an injury suffered by any of them.

However, even if Plaintiffs are claiming a named Plaintiff has been harmed by this alleged shortage, it is entirely speculative as to whether such a Plaintiff would derive any personal benefit from such a remedy. This is true because, even if a Plaintiff is currently in what Plaintiffs consider to be an unsatisfactory placement, increasing the pool of foster homes would result in a change of placement for that particular Plaintiff only through a subsequent order of the juvenile court. Plaintiffs do not even identify which of the individual Plaintiffs they believe should be moved to a new foster care or "other" placement and they most certainly cannot predict whether the placement of any named Plaintiff would be changed by the juvenile court with jurisdiction, even if the number of foster placements was doubled as a consequence of an order entered by this Court.

The next "remedy" proposed by Plaintiffs relates to "supervision." (Pl. Obj. Br., p. 42). First, Plaintiffs claim Defendants should do a better job with respect to "criminal background checks" of foster homes and other placements. However, there is no claim in the Amended Complaint that any of the individual Plaintiffs was ever put in the custody of a person with a criminal history which Defendants could have ascertained through a criminal background check. Likewise, there is no claim any named Plaintiff suffered any harm because of a failure of Defendants to conduct an

adequate criminal background check. As to the named Plaintiffs, this is a remedy in search of a wrong. None of the Plaintiffs has standing with respect to the issue of criminal background checks.

The second aspect of the "supervision" remedy referenced by Plaintiffs relates to a claim this Court should order "a limitation on caseworker caseloads…and improvements in caseworker training." (***Id.***) It is not clear from Plaintiffs' Objection Brief or the Amended Complaint how any individual Plaintiff claims that he or she is currently being harmed by "caseworker caseloads" or a lack of caseworker training or if or how any named Plaintiff claims that this "remedy" would correct any current or threatened violation of his or her rights. Once again, Plaintiffs' allegations relating to caseload and training of caseworkers are limited to the class allegations and not specifically linked to any named Plaintiff. (AMENDED COMP., ¶¶ 131-137).

Even the class allegations are extraordinarily vague as to how any member of the class has allegedly been adversely affected by high case loads. In paragraph 133 of the Amended Complaint, Plaintiffs allege high case loads have led to a "high turnover rate." In paragraph 134, Plaintiffs claim:

> The high turnover rate denies Plaintiff children the appropriate and consistent services, stable placements and case planning that are essential to their safety and well-being and to preventing them from languishing in state custody without permanent homes.

Assuming Plaintiffs are claiming the named Plaintiffs have been denied stable placements and case planning, in part because of a high turnover rate of caseworkers, the "remedy" proposed by Plaintiffs (increasing the number of caseworkers) would produce benefits for the individual Plaintiffs which would be, at best, highly speculative. The clear remedy for the lack of a stable placement would be for this Court to order a new placement; the remedy for a lack of planning would be for this Court to make specific orders regarding a permanency plan for the affected Plaintiff. However, Plaintiffs insist they are not asking for this type of "individualized" relief because, as Plaintiffs'

counsel surely know (***see 31 Foster Children***), decisions regarding a foster child's placement and permanency plan are within the exclusive continuing jurisdiction of the Nebraska juvenile courts.

The third proposed remedy relates to "health services." As to that issue, there is no allegation in the Amended Complaint that any named Plaintiff is being denied adequate medical care in a manner which is so extreme as to violate that Plaintiff's right to substantive due process. (If there was such a Plaintiff, his or her "next friend" would have a fiduciary duty to seek immediate injunctive relief, and that has not happened). Thus, in so far as the issue of standing is concerned (with respect to which named Plaintiffs are required to assert their own claims and not those of the class), this is another purported remedy in search of a wrong.

Finally, Plaintiffs claim this Court could make some kind of order in relation to a "computerized information system." (Pl. Obj. Br., p. 42). Once again, there is no allegation that any named Plaintiff has been denied his or her federal constitutional or statutory rights because of the claimed lack of such a system. More importantly, such a system would affect any named Plaintiff only in the most indirect and attenuated manner. Thus, there is no substantial likelihood that such a system would provide relief for any alleged unlawful action or inaction of the Defendants with respect to a named Plaintiff.

IV. MAGISTRATE PIESTER CORRECTLY FOUND THAT 42 U.S.C. §§ 671(a)(1), 672, AND 675(4) DO NOT CONFER A PRIVATE RIGHT OF ACTION TO PLAINTIFFS UNDER § 1983.

In their Amended Complaint, Plaintiffs allege that "Defendants are engaging in a policy, pattern, practice or custom of depriving Plaintiffs the rights individually conferred upon them by the [Adoption Assistance and Child Welfare Act ("AACWA")] and the regulations promulgated thereunder (45 C.F.R. Parts 1355-1357) . . ." (AMENDED COMP., ¶ 186). The Amended Complaint contains a list of alleged "rights" conferred under 42 U.S.C. §§ 622(b)(1)(B), 672(b)(2) (repealed),

671(a)(1), 671(a)(11), 671(a)(15), 671(a)(16), 671(a)(19), 671(a)(22), 672, 675, 675(4), 675(5)(B), 675(5)(D), 675(5)(E); and C.F.R Parts 1355-1357. (AMENDED COMP., ¶ 186).

Magistrate Piester analyzed these provisions in light of complex Supreme Court jurisprudence and correctly found that ***none*** of these provisions conferred a private right of action to Plaintiffs enforceable under 42 U.S.C. § 1983. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 165-193). Plaintiffs have only objected to Magistrate Piester's recommendation concerning three of the AACWA provisions – Sections 671(a)(1), 672, and 675(4). (Pl. Obj. Br., p. 57).

Magistrate Piester found that Sections 671(a)(1), 672, and 675(4) do not confer a private right of action for ***two*** independent reasons. First, Magistrate Piester reasoned:

> Foster children do not directly receive the benefit of a claim brought under § 672, and while adequate foster care maintenance payments may enhance the likelihood of increasing the available pool of foster parents, ***such indirect benefits do not support a private right of action in favor of the named plaintiffs…The link between increased foster care maintenance payments and the services provided to any particular child "is far too tenuous" to support the notion that Congress meant to give each and every Nebraska juvenile in foster care a right to have foster care providers paid at a sufficient level***.

(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 182) (emphasis added) (citation omitted).

In accord with controlling precedent, Magistrate Piester accurately drew the distinction between statutory language which confers "rights" and that which confers "benefits" or "interests," the latter two of which are ***not*** enforceable under §1983. ***Gonzaga v. Doe***, 536 U.S. 273, 283 (2002). While Plaintiffs may benefit from these provisions by "fall[ing] within the general zone of interest that the statute is intended to protect," such interests or benefits are "less than what is required for a statute to create ***rights*** enforceable directly from the statute itself…." ***Id.*** (emphasis added).

Magistrate Piester's second reason for concluding that Sections 671(a)(1), 672, and 675(4) do not create private rights of action was that the provisions fail the second prong of the test articulated in ***Blessing v. Freestone***, 520 U.S. 329 (1997) –"[P]laintiffs' asserted right to foster care

maintenance payments is too 'vague and amorphous' to support a federal right enforceable under § 1983." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 184).

In concluding that Plaintiffs' AACWA claims should be dismissed for failure to state a claim upon which relief can be granted, Magistrate Piester specifically rejected ***Missouri Child Care Ass'n v. Martin***, 241 F. Supp. 2d 1032 (W.D. Mo. 2003), the main case relied upon by Plaintiffs. Magistrate Piester properly determined that the ***Missouri Child Care*** case was both inapplicable and was "not persuasive authority for recognizing a private right of action on behalf of the named plaintiffs" because the ***Missouri Child Care*** court "held that the foster care providers, ***not the foster children***, can pursue a private claim to set foster care rates." (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 181-182) (emphasis added). Thus, Plaintiffs' objection is focused on trying to prop up ***Missouri Child Care***. Yet, Plaintiffs' objection simply ignores Magistrate Piester's cogent reasons for concluding that the AACWA does not confer any private rights of action upon the individual Plaintiffs.

Plaintiffs cite ***Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services***, 443 F.3d 1005 (8th Cir. 2006) ("***Pediatric III***"), apparently to show that the Eighth Circuit has held enforceable rights can vest in more than one group. (Pl. Obj. Br., p.58). However, the ***Pediatric III*** decision is completely irrelevant to Magistrate Piester's AACWA conclusions. Magistrate Piester never stated that the three AACWA provisions relied upon by Plaintiffs could only confer a right to one group; he never reasoned that foster children were automatically excluded ***because*** ***Missouri Child Care*** found that foster care providers had a private right of action. Rather, Magistrate Piester independently analyzed whether these AACWA statutes conferred a private right of action to ***foster children*** under ***Blessing*** and ***Gonzaga*** and, as explained above, properly held that Congress did not so intend. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 182).

As to the second prong of the ***Blessing*** test, Magistrate Piester acknowledged that the ***Missouri Child Care*** court found the claims in ***Wilder v. Virginia Hospital Association***, 496 U.S. 498, 520 (1990), which were claims under the federal Medicaid Statutes, were indistinguishable from the claims at issue there. However, because Magistrate Piester correctly determined that the claims in ***Wilder*** were clearly distinguishable from the claims in this case, he properly found that ***Missouri Child Care*** was "unpersuasive." (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 182-183).

Plaintiffs further object to Magistrate Piester's AACWA findings by pointing out the Court in ***Wilder*** stated 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 judicary*." (Pl. Obj. Br., p. 59, ***citing Wilder***, 496 U.S. at 520 (emphasis added)). However, this quote must be viewed within the context in which it was made. The ***Wilder*** Court made this statement after considering the fact that the Medicaid provisions provided specific factors and objective benchmarks to be used to determine payments.[9] Therefore, the allowance of judicial inquiry allowed by ***Wilder*** is not nearly so broad as Plaintiffs claim.

Based upon their misreading of ***Wilder***, Plaintiffs state, "[i]f 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***

[9] The ***Wilder*** Court found the provisions were not too "vague and amorphous" because "the statute and regulation set out factors which a State must consider in adopting its rates… [and] the statute requires the State, in making its findings, to judge the reasonableness of its rates against the objective benchmark of an 'efficiently and economically operated facility.'" ***Wilder***, 496 U.S. at 519. The AACWA provisions at issue here provide no factors or objective benchmarks which the state must consider in determining payments. Therefore, when analyzing the second prong of the ***Blessing*** test, it is clear that the provisions in this case are "vague and amorphous."

the definite and specific guidelines of statutory provisions here." (Pl. Obj. Br., p. 59) (emphasis added). However, this assertion merely begs the question–***what*** definite and specific guidelines?

In a footnote, Plaintiffs seem to assert that the factors to consider are found in § 675(4). (Pl. Obj. Br., p. 58, n. 55). However, § 675(4) simply defines what foster care maintenance payments cover. It does not give any guidance for determining what the amount of payments should be, unlike the provisions at issue in ***Wilder***. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 183, ***citing Wilder***, 496 U.S. at 520, n. 17.)

The issue, however, is whether this distinction, between the objective statutory benchmarks involved in ***Wilder*** and the definitional statutory provisions of the AACWA involved in this case, is relevant in the analysis of the second prong of the ***Blessing*** test. The court in ***Missouri Child Care*** apparently overlooked the distinction, yet Plaintiffs hang their hat on that one case. On the other hand, Magistrate Piester found the distinction relevant–as did the Supreme Court in ***Suter v. Artist M.***, 503 U.S. 347 (1992).[10] Accordingly, Magistrate Piester correctly found that Sections 671(a)(1), 672, and 675(4) of the AACWA do not confer a private right of action to Plaintiffs under § 1983.

V. MAGISTRATE PIESTER CORRECTLY DETERMINED THAT PLAINTIFFS' PROPOSED CLASS SHOULD NOT BE CERTIFIED UNDER FED. R. CIV. P. 23.

Magistrate Piester's Report and Recommendation should be adopted in total and without limitation as it pertains to Plaintiffs' proposed class and FED. R. CIV. P. 23. Magistrate Piester applied established law to the specific facts of this case. His 195-page Report and Recommendation addressed every legal nuance and factual distinction. Such an extensive review was necessary because "[c]lass certification must be based on the facts and circumstances of each individual case,

[10] "Suter, decided two years later, noted that the specific statutory and regulatory methods for calculating rates in Wilder supported finding a private right action for health care providers. However, no private right of action existed in Suter because § 671(a)(15) and its regulations provided no guidance as to how the 'reasonable efforts' required under § 671(a)(15) were to be measured." (Magistrate's Report and Recommendation, p. 183).

and must depend upon a careful balance between the convenience of maintaining a class action and the need to guarantee adequate representation to the class members." ***Caroline C. ex rel. Carter v. Johnson,*** 174 F.R.D. 452, 459 (D. Neb. 1996), ***quoting Wright v. Stone Container Corp.,*** 524 F.2d 1058, 1061 (8th Cir. 1975).

"District courts ultimately retain broad discretion in determining whether or not to certify a class under Rule 23." ***Id., quoting Lockwood Motors, Inc. v. Gen. Motors Corp.,*** 162 F.R.D. 569, 573 (D. Minn. 1995). ***See also, Sperry Rand Corp. v. Larson,*** 554 F.2d 868, 873 (8th Cir. 1977) (holding that the trial court "is, of necessity, clothed with a good deal of discretion in determining the appropriateness of a class action"). In fact, the review of a district court's decision on class certification is limited to whether the district court abused its discretion. ***See, Fink v. Nat'l Sav. and Trust Co.,*** 772 F.2d 95 (D.C. Cir. 1985); ***Walker v. Jim Dandy Co.,*** 747 F.2d 1360 (11th Cir. 1984); ***Gilbert v. City of Little Rock, Ark.,*** 722 F.2d 1390 (8th Cir. 1983); ***Livesay v. Punta Gorda Isles, Inc.,*** 550 F.2d 1106 (8th Cir. 1977); and ***Caroline C.,*** 174 F.R.D. at 452.

A. A Class Action Lawsuit is Not the Only Manner in which Nebraska Children Can Challenge and Seek a Remedy for the Alleged Harmful Practices of HHS.

Class actions should be reserved for clearly identifiable groups of Plaintiffs and not for a highly diverse population that requires individualized review of unique circumstances. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 104-105). Moreover, a federal court should not "lightly assume" the power of awarding broad declaratory and injunctive relief against a state agency, as requested by Plaintiffs. (MAGISTRATE'S REPORT AND RECOMMENDATION, P. 65). "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power

and State administration of its own law." ***Id., quoting Elizabeth M. v. Montenez,*** 458 F.3d 779, 784 (8th Cir. 2006) (internal quotations omitted).

Magistrate Piester's recommendation not to certify Plaintiffs' proposed class action is consistent with these principals and other controlling authority. It is also important to recognize that an order adopting this recommendation ***would not*** preclude Nebraskan children from challenging and seeking a remedy for any alleged harmful practices of HHS as Plaintiffs attempt to argue. (Pl. Obj. Br., pp. 1-4). Rather then pursuing a class action lawsuit, Nebraska children may challenge alleged harmful practices: (1) through the juvenile court; or (2) by lobbying for policy and/or legislative change through the executive and/or legislative branches of government. Where, as here, there exists alternative avenues of redress, a court should be even more critical of a class consisting of a highly diverse population that requires individualized review of unique circumstances and that seeks broad declaratory and injunctive relief against a state agency.

1. Nebraska Foster Children May Challenge Alleged Harmful Practices of HHS by Petitioning the Juvenile Court.

Nebraska foster children can challenge and seek a remedy for any alleged harmful practices of HHS by petitioning the juvenile court that has continuing jurisdiction over their case. ***See, In re Interest of Veronica H.***, 272 Neb. at 372-373, 721 N.W.2d at 653. In ***Veronica H.*** a child adjudicated under NEB. REV. STAT. § 43-247 (3)(a) had been subject to inappropriate sexual contact by her stepfather. ***Id.*** at 372, 721 N.W.2d at 653. Dissatisfied with the case manager assigned to the child's case, the juvenile court ordered HHS to reassign the case to a more experienced case manager. ***Id.*** at 373, 721 N.W.2d at 653. HHS appealed the order alleging that the juvenile court did not have the power to do so. The Nebraska Court of Appeals concluded the juvenile court did not abuse its discretion and the Nebraska Supreme Court affirmed. ***Id.*** at 376, 721 N.W.2d at 655.

In reaching its decision, the Nebraska Supreme Court relied upon NEB. REV. STAT. § 43-285, which provides that, when a juvenile's care is awarded to HHS, the care and placement is "by and with the assent of the court." ***Id.*** at 375, 721 N.W.2d at 655. Accordingly, the juvenile court has the authority to "direct the removal of a case manager when the facts and circumstances require a change for the best interests of the juvenile." ***Id.***

Veronica H. illustrates the broad jurisdiction of the juvenile courts and the potential remedies available to Nebraska foster children outside the context of class actions. Because the juvenile courts have the authority to approve placements of children in foster homes, reassign case workers, and modify a child's case plan, it is disingenuous for Plaintiffs to claim the class action is the "only" way that "abused and neglected Nebraska children can challenge, and seek a remedy for, the harmful practices" of HHS. (See, MAGISTRATE'S REPORT AND RECOMMENDATION, p. 11).

2. <u>Nebraska Children May Challenge Alleged Harmful Practices of HHS by Lobbying for Policy and/or Legislative Change Through the Legislative and/or Executive Branches of Government.</u>

Another way one can reform the foster care system is through the legislative or political processes. If Plaintiffs' ultimate goal is to make broad, system-wide changes to the foster care system, with little regard to the individualized alleged injuries of each Plaintiff[11], Children's Rights should lobby the Nebraska Legislature or HHS for their wish list of reforms.

If Plaintiffs desire a new computer system or more caseworkers, then Plaintiffs should look to the Nebraska Legislature to appropriate funding for such reforms. It is not the role of the federal

[11] "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." (Pl. Obj. Br., p. 18).

judiciary to decide the best allocation of limited State resources, to evaluate whether the State's computer system should be designed differently or to dictate the caseload of HHS caseworkers.

The legislative and executive branches are better equipped and constitutionally authorized to fund and administer the foster care system. To the extent Children's Rights disagrees with the design and implementation of Nebraska's foster care system, it should seek legislative and/or regulatory change.[12] This lawsuit is Children's Rights' thinly-veiled attempt to further its reform agenda riding on the backs of foster children through the federal judiciary, effectively side-stepping the more appropriate state legislative and executive branches.

B. <u>The Class Definition Outlined by Magistrate Piester Should be Adopted.</u>

After considering the arguments of both parties and the evidence presented, Magistrate Piester redefined Plaintiffs' class definition to include 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;

3. have been adjudicated under NEB. REV. STAT. § 43-247(3)(a) and/or § 43-247(3)(b); and

4. are not Native American.

(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 91).

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[12] For example, during the Ninety-Ninth Nebraska Legislative Session, Senator Gwen Howard introduced a package of bills to begin reform of Nebraska's child welfare system. The package of bills sought to better focus limited resources on prevention, ensuring greater accountability, including cost accountability and increased responsibility, with the ultimate goal of providing permanent resolutions and better futures for children under State supervision. ***See*** LB 264, LB 265, LB 266, LB 267, LB 416, and LB 719. Ultimately the Nebraska Legislature passed LB 264 which combined provisions from the original package of bills introduced by Senator Howard. Among other things, LB 264 requires the Director of HHS to establish child protection caseload standards and in doing so, "to consider workload standards recommended by national child welfare organizations and factors related to the attainment of such standards." LB 264, § 2. LB 264 also requires the Director of HHS to provide annual, instead of a biennial, report of child protective services caseloads which shall include statistics as required by NEB. REV. STAT. § 68-1207.01. LB 264, § 3(2)-(4).

Plaintiffs have objected to this well-crafted and well-reasoned class definition for three reasons. First, Plaintiffs argue that the class definition should ***exclude*** "status offenders" in HHS legal custody pursuant to NEB. REV. STAT. § 43-247(3)(b). (Pl. Obj. Br., p. 6). Second, Plaintiffs argue that the class definition should ***exclude*** children in HHS legal custody who physically reside "in-home".[13] (***Id.***) Finally, Plaintiffs argue that the class definition should ***include*** those 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 been formally adjudicated. (***Id.***) Although Defendants do not oppose Plaintiffs' proposals to ***exclude*** "status offenders" and children in HHS legal custody who physically reside "in-home," Defendants submit that Plaintiffs' proposed limitations only further emphasize the amorphous nature of the proposed class and the significant problems that this Court would face if the class was certified.

Plaintiffs' third objection should be rejected because children who are "alleged" to be "abused and neglected" are not subject to the same policies and procedures as adjudicated children. As a result, they cannot suffer from the alleged "group harms" of which Plaintiffs' claim. Children who are "alleged" to be "abused and neglected" may be placed in HHS temporary custody for up to forty-eight hours. NEB. REV. STAT. § 43-250(4). During this forty-eight hour period, HHS's authority is limited to providing and supervising a temporary placement and consenting to any necessary medical, psychological, or psychiatric treatment. ***Id***. (***See also***, MAGISTRATE'S REPORT AND RECOMMENDATION, p. 82). Under NEB. REV. STAT. § 43-278, an adjudication hearing should be conducted within 90 days after a petition is filed. (***See also***, MAGISTRATE'S REPORT AND

[13] Arguably, Magistrate Piester's redefined class definition already excluded those children who physically reside "in-home." Magistrate Piester held that the class "would not include children adjudicated under § 43-247 and in HHS legal custody, but 'placed' in their own homes." Since Plaintiffs' intent was to include 'in-home' placements as members of the class, the class should be modified. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 74).

RECOMMENDATION, p. 83). Then, if the State proves the allegations of the petition, the juvenile court assumes jurisdiction over the minor child. ***Id.***

As recognized by Magistrate Piester, "[p]rior to adjudication, HHS does not (and should not) engage in formulating long-term case plans for exploring whether family reunification is a safe and viable option, or whether parental rights should be terminated, adoption pursued, or the child placed in long-term foster care or an appropriate, permanent home as envisioned under the Adoption Assistance and Child Welfare Act." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 84). Magistrate Piester was correct in finding that children in the "temporary" legal custody of HHS should not be included in a potential class that focuses on alleged harm caused by "long-term" and "languishing" problems that are part of alleged systemic deficiencies. ***Id.***

Because most "non-adjudicated" children are in HHS temporary legal custody for less than four months, their situation is also factually different from the remaining members of the proposed class. In fact, none of Plaintiffs' alleged harms (alleged multiple damage placement, placement in unsafe and insufficient homes, extended placements in emergency shelters, and excessive lengths of stay in state custody) are relevant or applicable to pre-adjudication children in the temporary legal custody of HHS. (***See***, Pl. Obj. Br., pp. 11-13). Clearly, the children in this "very fluid subset of the plaintiffs' proposed class" should be excluded as properly recommended by Magistrate Piester. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 86).

Plaintiffs boldly claimed that "many" of the non-adjudicated children are ultimately adjudicated under 3(a) and are likely to remain in state custody. (Pl. Obj. Br., p. 7). Notwithstanding, this unsubstantiated statement ignores the fact that numerous children are never adjudicated, that children may be alleged as "abused or neglected" but adjudicated under another statute, and that this Court would need to determine whether a child is "alleged" to be "abused or neglected."

C. Magistrate Piester Correctly Found that Plaintiffs' Proposed Class Lacks Commonality as Required by Rule 23.

Magistrate Piester did ***not*** ignore established law as Plaintiffs conclusorily claim. To the contrary, he recognized a potential split between various circuit and district courts regarding whether class actions seeking reform of local child welfare systems meet the commonality requirement of Rule 23.[14] (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 96). On one side are ***J.B.*** and ***Reinholdson v. State of Minnesota,*** 2002 WL 31026580 (D. Minn. Sept. 9, 2002), and on the other side are ***Kenny A. ex rel. Winn v. Perdue,*** 218 F.R.D. 277 (N.D. Ga. 2003) and ***Baby Neal v. Casey,*** 43 F.3d 48 (3rd Cir. 1994).

1. Magistrate Piester's Decision to Reject the Third Circuit's Decision in *Baby Neal* Is Consistent with Controlling Authority.

Plaintiffs rely wholly on ***Baby Neal*** for the proposition that "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, where putative class members are joined by constitutional and statutory claims possessed by all members." (Pl. Obj. Br., p. 9). To adopt Plaintiffs' position, the Court must adopt the reasoning of ***Baby Neal***. Magistrate Piester's refusal to follow ***Baby Neal*** is well-founded because ***Baby Neal*** is based on opinions not suited for this Circuit (especially in light of the Eighth Circuit's decision in ***Elizabeth M.***). (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 102).

One of the only decisions discussed at length in ***Baby Neal*** that is also binding on this Court is ***Califano v. Yamasaki,*** 442 U.S. 682 (1979). ***Baby Neal*** relied on ***Califano*** for the proposition

[14] It is a "potential" split because, as recognized by Magistrate Piester, the "differing outcomes may in reality only reflect the highly case-specific nature of motions to certify a class." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 96).

that "class relief is consistent with the need for case-by-case adjudication, especially where it is ***unlikely*** that differences in the factual background of each claim will effect the outcome of the legal issue." ***Baby Neal***, 43 F.3d at 57 (internal quotations omitted) (emphasis added). A review of ***Califano*** suggests that the Third Circuit either overextended or misapplied ***Califano***.

Califano involved the ***very specific issue*** of whether an oral hearing must be held before the federal government can recover overpayments made by the Department of Social Security by withholding future benefits to which the recipients would otherwise be entitled. ***Califano***, 442 U.S. at 684. On this specific issue, the Supreme Court determined that it is "unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." ***Id.*** at 701. The Court further held that, in this specific instance, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23." ***Id.***

Defendants have found no case law in the Eighth Circuit which interpreted or adopted the ***Califano*** holding on this issue. Notwithstanding ***Baby Neal***, the better interpretation of ***Califano*** is that a class action may be a proper device to resolve the claims of multiple plaintiffs ***so long as*** the proposed class members' factual background (and factual differences) ***does not affect*** the outcome of the legal issue before the Court. In other words, the individual differences must not defeat the cohesiveness of the proposed class.

In ***Califano,*** the singular issue was whether beneficiaries should receive an oral hearing. Here, the issues include whether children received proper placements and whether HHS provided the statutorily-required services. While it may have been possible to ignore individual differences on a procedural question, it is difficult (if not impossible) to divorce each child's individual situation (*i.e.*, adjudication, special needs, placements, behaviors, etc.) from the legal questions that Plaintiffs

seek to litigate in this case. In fact, any inquiry by this Court that disregards the specific needs and best interests of each individual child would arguably be contrary to Nebraska law and the jurisdiction of the juvenile courts. The numerous differences in each Plaintiffs' factual background distinguish this case from the ***Califano*** case.

Instead of adopting the Third Circuit's application of Rule 23 in a factually different case, Magistrate Piester adopted the better interpretation of Rule 23: "[w]hen the resolution of a 'common' legal issue is dependent on factual determinations that will be different for each putative class plaintiff, a common issue of law does not exist for the purposes of Rule 23(a)(2)." (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 106-107). Notably, Magistrate Piester's movement away from ***Baby Neal*** is not novel. For example, in ***Marisol A. ex rel. Forbes v. Giuliani***, 126 F.3d 372 (2nd Cir. 1997), the Second Circuit affirmed the certification of a class, albeit with noted reservation and with specific instructions to the trial court. The Second Circuit commented that "the district court is near the boundary of the class action device" but it was "not prepared to say that it has crossed into forbidden territory." ***Id.*** at 377.

Other decisions relied on by the Third Circuit in ***Baby Neal***, in addition to being non-binding, are also factually different. ***See, e.g., Hassine v. Jeffes,*** 846 F.2d 169, 172 (3rd Cir. 1988) (involving prison overcrowding and "double-bunking" of inmates); ***Eisenberg v. Gagnon,*** 766 F.2d 770, 785 (3rd Cir. 1985) (involving the purchase of limited partnership securities); ***Troutman v. Cohen,*** 661 F.Supp. 802, 809 (E.D.Pa. 1987) (involving the validity of the administrative hearing process afforded patients whose level of care has been reduced from skilled to intermediate care); ***Appleyard v. Wallace,*** 754 F.2d 955 (11th Cir. 1985) (involving the validity of a Medicaid admissions procedure); ***La-Shawn A. v. Dixon,*** 762 F.Supp. 959 (D.D.C. 1991) (not discussing either class certification or Rule 23); ***B.H. v. Johnson,*** 715 F.Supp. 1387 (N.D. Ill. 1989) (not discussing either

class certification or Rule 23); ***Smith v. Org. of Foster Families***, 431 U.S. 816 (1977) (not discussing either class certification or Rule 23).

Because ***Baby Neal*** should be rejected, so should the Northern District of Georgia's decision in ***Kenny A.***, 218 F.R.D. at 277. This non-binding decision allowed a class action to proceed under the non-binding authority of ***Baby Neal***.

2. Plaintiffs' Allegation of "System-wide Deficiencies" Cannot Overcome Lack of Commonality.

Plaintiffs allege six "system-wide deficiencies" in their Objection Brief. (Pl. Obj. Br., pp. 10-11). A close reading of Plaintiffs' Objection Brief reveals that these "deficiencies" have been over-simplified in an attempt to gain class certification. ***Id.*** Indeed, the allegations in Plaintiffs' Amended Complaint reveal more detailed, fact-specific and individualized claims. Plaintiffs' attempt to now paint their claims as all-inclusive only reinforces Magistrate Piester's finding that the "individualized nature of the harm experienced by children in Nebraska's child welfare system cannot be hidden behind the term 'systemic deficiencies.'" (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 106).

Examples of Plaintiffs' simplification of the issues include the omission of the following allegations:

(1) that Nebraska children are "left for extended periods of time, sometimes many months, in inappropriate emergency shelters…often for the simple reason that the State has nowhere else to place them." (AMENDED COMP., ¶ 4b.

(2) that "facilities often randomly mix…non-offenders…with young and vulnerable children." ***Id.***

(3) that "overcrowding prevents adequate parental supervision." ***Id.*** at ¶ 4d.

(4) that the State denies children "individualized treatment and important one-on-one relationships with consistent caregivers." ***Id.*** at ¶ 4f.

(5) that children "are discharged from the foster care system . . . without the life skills necessary for them to live independently." ***Id.*** at ¶ 4g.

(6) that 25% of the out-of-home foster care cases in 2003 "were placed in homes that were unsafe, inappropriate or had never undergone a documented safety assessment." ***Id.*** at ¶ 5c.

(7) that children are "denied timely basic medical examinations and dental health services." ***Id.*** at ¶ 5d.

It is difficult to understand how a class could be certified, when Plaintiffs ask this Court to consider these highly individualized issues. However, even if this Court chooses to accept Plaintiffs' after-the-fact attempt to simplify and broaden their claims, Plaintiffs' class action, nonetheless, fails for lack of commonality.

a. Plaintiffs' Complaints Regarding a Shortage of Foster Homes and Other Placements Do Not Support a Finding of Commonality.

Plaintiffs' first alleged system-wide deficiency is that 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 children wherever a bed or slot is available and not where their needs can be met." (Pl. Obj. Br., p. 10). This allegation illustrates the individualized nature of Plaintiffs' proposed class. Whether a child is placed "wherever a bed or slot is available" or in a place "where their needs can be met" involves an individualized inquiry into each child's specific placement and the reasons the juvenile court approved the placement.

HHS is legally required to consider the best interests of the child as its primary concern. Accordingly, the most this Court could accomplish would be an order requiring the Defendants to "implement policies directed at exercising 'reasonable professional judgment' on behalf of each child." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 105). Such an injunction would

inevitably lead to a review of each child's "unique circumstances." ***Id.*** ***See also,*** NEB. REV. STAT. § 43-532(2) (stating that "the health and safety of the child is the paramount concern and reasonable efforts shall be made to provide such assistance in the least intrusive and least restrictive method consistent with the needs of the child"); NEB. REV. STAT. § 43-533 ("government resources shall be utilized to complement community efforts to help meet the needs of such families or the needs and the safety and best interests of such children…"); NEB. REV. STAT. § 43-285(2) (requiring the "health and safety of the juvenile" to be "the paramount concern" when preparing the "plan for the care, placement, services, and permanency which are to be provided to such juvenile and his or family"); NEB. REV. STAT. § 43-402 (declaring that "[i]t is the intent of the Legislature that the juvenile justice system provide individualized accountability and individualized treatment for juveniles in a manner consistent with public safety to those juveniles who violate the law"); and NEB. REV. STAT. § 43-402(7) (requiring that "[b]ase treatment planning and service provision upon an individual evaluation of the juvenile's needs recognizing the importance of meeting the educational needs of the juvenile in the juvenile justice system"). No commonality can exist when decisions regarding a juvenile's placement in a foster home is inexorably intertwined with each juvenile's unique circumstances.

b. Plaintiffs' Complaints Regarding an Inadequate Workforce Do Not Support a Finding of Commonality.

Plaintiffs' second alleged "system-wide deficiency" is that "HHS fails to maintain an inadequate [sic] workforce, with dangerously high caseloads and turnover for caseworkers monitoring the safety and care of foster children." (Pl. Obj. Br., p. 10). A class action based on this alleged deficiency would require a case-by-case investigation into each caseworker, their work load, productivity and whether they have made reasoned judgments in their handling of each child's situation. Allowing a class to proceed on this issue would also infringe upon the jurisdiction of the

juvenile court, which has the authority to remove and reassign caseworkers based on the specific needs of the child. ***See, Veronica H.***, 272 Neb. at 375, 721 N.W.2d at 655 (holding that the juvenile court may "direct the removal of a case manager when the facts and circumstances require a change for the best interests of the juvenile"). Finally, any remedy that this Court could fashion (*i.e.* limiting the number of children per caseworker), not only ignores individual differences among the caseworkers, but also the individual differences among the children, as some "special needs" children may require far more of a caseworker's time than a child without special needs.

c. Plaintiffs' Complaints Regarding Inadequate Monitoring Do Not Support a Finding of Commonality.

Plaintiffs' third alleged "system-wide deficiency" is that the "HHS system fails to adequately monitor child safety, which includes 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 [sic] provide consistent visits." (Pl. Obj. Br., p. 10). Many of the problems with this alleged deficiency are the same problems discussed in subsections a. and b. above (*i.e.*, individualized investigation into separate foster homes and placements). In addition, most, if not all, group and foster homes are owned and operated, not by the State, but rather by independent contractors. The independent contractors who provide foster care are screened and licensed by the State of Nebraska. ***See***, NEB. REV. STAT. § 71-1902. The screening and licensing of each foster care provider is a highly individualized process, each having a unique set of facts and circumstances. Further, not all members of the proposed class have been or will be placed in a foster home (***e.g.*** some juveniles may be placed with a relative). Because of the wide variance in the types of placements, the claims of the proposed class members have little in common with each other.

Plaintiffs' request for additional monitoring is substantially similar to medical monitoring cases where class actions have been routinely denied because of a lack of commonality. ***See, e.g., Grovatt v. St. Jude,*** 425 F.3d 1116 (8th Cir. 2005)***; Ball v. Union Carbide Corp.,*** 385 F.3d 713, 727-28 (6th Cir. 2004); ***Zinser v. Accufix Research Inst., Inc.,*** 253 F.3d 1180, 1195-96, amended, 273 F.3d 1266 (9th Cir. 2001); ***Barnes v. Am. Tobacco Co.,*** 161 F.3d 127, 143-146 (3rd Cir. 1998); and ***Holmes v. Cont'l Can Co.,*** 706 F.2d 1144, 1166, n.8 (11th Cir. 1983). This issue is more fully discussed in Section 4 below.

d. Plaintiffs' Complaints Regarding Health Screenings Do Not Support a Finding of Commonality.

Plaintiffs' fourth alleged system-wide deficiency is that "HHS lacks the capacity to provide basic health services for foster children such as access to regular health screenings." (Pl. Obj. Br., p. 11). Once again, this alleged deficiency would involve a case-by-case investigation and determination as to whether basic health services were provided in each case. Administrative policy dictates that children in out-of-home placements are to receive a health examination during the first fourteen (14) days of placement. ***See***, NEB. ADMIN. CODE § 7-003.04 (HHS003601). Thereafter, children are to receive annual health exams. ***Id.*** Nebraska law further requires that the evaluation and determination of placement of Section 3(a) juveniles involves, among other things, a "medical examination within two weeks of his or her removal from his or her home", and "further diagnosis and evaluation as is necessary." ***See***, NEB. REV. STAT. § 43-1311.

If Plaintiffs' dispute is with the frequency of medical exams as established by Nebraska law, a legislative change would be required. If, however, Plaintiffs' dispute involves the alleged failure of HHS to meet the requirements established by the Legislature, the only possible remedy would

be to order HHS to follow the law. Magistrate Piester recognized that such an injunction would be unenforceable. (MAGISTRATE'S REPORT AND RECOMMENDATION, p.104).

In addition to the problem of enforceability, not all juveniles in the proposed class have alleged a claim for failure of HHS to provide the required health screening. Therefore, the proposed class lacks commonality.

e. Plaintiffs' Complaints Regarding per Diem Payments Do Not Support a Finding of Commonality.

Plaintiffs' fifth alleged "system-wide deficiency" is that "HHS fails to pay per diem payments to foster care providers, including payments to foster parents of less than $8 per day, that cover the cost of caring for foster children, contributing to the shortage of foster homes and inadequate placements for children." (Pl. Obj. Br., p. 11). This purported deficiency should be disregarded because it is inaccurate and misleading. Payments for the care of a child in a foster home are based on each child's specific needs and behaviors. ***See***, NEB. ADMIN. CODE § 7-004.05 (HHS003608). These payments include "all usual costs of maintaining a child" including, but not limited to, room and board, personal needs, school needs, transportation, clothing, child care, and allowance. ***Id.*** A formula is used to determine the amount of funding provided for the care of juveniles in HHS custody. Fifty three (53) different factors are considered including the child's need for specialized medical equipment or physical assistance with feeding, drinking or other necessities of life; whether the child has behavioral or emotional needs that require special monitoring, supervision, or assistance by the care giver; and whether the child exhibits nervousness, impulsiveness, depression, argumentativeness, or disobedience. (***See***, Doc. No. 73, Ex. 11, Bates Nos. HHS006589-HHS006591; and Doc. No. 73, Ex. 36, ¶ 19). As a result, there are vast differences in the sums paid to foster care providers. For example, the ***minimum*** maintenance payment received for a juvenile

in 2004 was $222.00 per month (approximately $7.40 per day). (***See***, Ex. 36, ¶ 3). The ***maximum*** maintenance payment ranges from $1,230 per month (approximately $41.00 per day) for a juvenile five years and under, to $1,624.00 (approximately $54.00 per day) for a juvenile twelve years and over. (***Id.*** at ¶ 4). It is unlikely (and extremely uncommon) that a child would receive the minimum monthly maintenance payment. To do so, all 53 factors would need to be deemed irrelevant for that particular child. Obviously, different factors will apply to various members of the proposed class, which renders each juvenile's case very different from the other class members.

f. Plaintiffs' Complaints Regarding HHS's Information System Do Not Support a Finding of Commonality.

Plaintiffs' final alleged system-wide deficiency is that "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." (Pl. Obj. Br., p. 11). Each member of the proposed class may or may not have a claim based on the alleged inadequate information system. In addition, the numerous types and wide variance of information stored in the information system further supports the lack of commonality.

3. The "Group Harms" of Which Plaintiffs Complain Have No Direct Proximate Causal Relationship to Alleged System-Wide Deficiencies.

Plaintiffs claim that as a result of the "system-wide" problems, they and the proposed class members either suffer, or are at risk of suffering, from four distinct "group harms": (1) injury caused by multiple placements; (2) placement in an unsafe home; (3) extended placements in emergency shelters and other short term placements; and (4) excessive lengths of stay in state custody. (Pl. Obj. Br., pp. 11-13). It is difficult to understand how these are "group harms" as they do not affect each class member and, if they do exist, rest upon highly individualized circumstances.

Contrary to Plaintiffs' assertions, this Court should not and cannot sever the "***individualized***" factors and harms from the alleged "systemic failures"and "group harms." (Pl. Obj. Br., p. 13). It would be difficult (if not impossible) to determine whether such harms are a result of system-wide deficiencies or individualized reasons unless a case-by-case review is conducted. To determine whether "system-wide deficiencies" result in "group harms" that justify injunctive relief, this Court would have to (at a minimum) perform a differential analysis whereby other potential non-systematic causes of the harm are ruled out. In doing so, the Court would undoubtably be immersed in a case-by-case evaluation of each class member. For example, when looking at multiple placements or extended placements, the Court would need to consider the child's physical and mental health, personality, behaviors, age, level of aggression, physical location and education. Other considerations might include the child's living situation and his or her foster family's personal obligations. When determining whether a child is insufficiently monitored, additional factors that should be considered include, location and travel distance, caseload and caseworker experience. Embracing any deficiency without examining each of these factors would ignore very legitimate potential causes. It would also ignore the fact that the juvenile court approved each of the placements and that the state of Nebraska has licensed each of the foster care providers. ***See***, NEB. REV. STAT. § 71-1902. ***See also,*** NEB. REV. STAT. § 43-285.

4. Magistrate Piester Did Not Apply a "Significantly Heightened" Commonality Standard.

Plaintiffs argue that Magistrate Piester erroneously applied a "heightened" commonality standard in 23(b)(2) cases based on an overly broad interpretation of ***St. Jude,*** 425 F.3d at 1116. (***See,*** Pl. Obj. Br., p. 14). Plaintiffs' argument is without merit.

Plaintiffs attempt to distinguish ***St. Jude*** on the basis that it is a medical monitoring case. This is nothing more than a red herring used to divert this Court's attention from the Eighth Circuit's very straight-forward analysis of the difference between classes certified under Rule 23(b)(2) and classes certified under 23(b)(3). Magistrate Piester properly recognized the binding precedent and his decision should be affirmed. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 103). In ***St. Jude***, the Eighth Circuit stated:

> Class certification under Rule 23(b)(2) is proper only when the primary relief sought is declaratory or injunctive. ***Although Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder still must be cohesive***. Because unnamed members are bound by the action without the opportunity to opt out of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class. ***A suit could become unmanageable and little value would be gained in proceeding as a class action…if significant individual issues were to arise consistently***. At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness ….Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries. The members of a (b)(2) class are generally bound together through preexisting or continuing legal relationships or by some significant trait such as race or gender.

St. Jude at 1121-1122 (internal citations and quotations omitted) (emphasis added).

Medical monitoring cases are not significantly or materially different from the present case. For example, ***St. Jude*** involved a class action filed by five plaintiffs claiming to represent over 11,000 recipients of a prosthetic heart valve which was recalled because of an increased risk of leaks at the site where the valve is implanted. ***Id.*** at 1117. Following "medical monitoring law of different states," the trial court conditionally certified the medical monitoring class only as to "those plaintiffs whose valves were implanted in states that recognize a stand-alone cause of action for medical monitoring, absent proof of injury." ***Id.*** at 1118. The Eighth Circuit concluded that the diverse legal and factual issues preclude class certification and reversed on that ground. ***Id.*** at 1121. The Eighth Circuit recognized that "[p]roposed medical monitoring classes suffer from cohesion difficulties" and that "numerous courts across the country have denied certification of such classes." ***Id. See also,***

e.g., Ball, 385 F.3d at 727-28; ***Zinser,*** 253 F.3d at 1195-96; ***Barnes,*** 161 F.3d at 143-146; and ***Holmes,*** 706 F.2d at 1166, n.8.

In ***Amchem Prods., Inc., v. Windsor,*** 521 U.S. 591 (1997), the Supreme Court recognized "some of the individual variations precluding class certification." ***St. Jude,*** 425 F.3d at 1122. These variations included:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma….Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Windsor, 521 U.S. at 624, ***quoting Georgine v. Amchem Prods.***, 83 F.3d 610, 626 (3rd Cir. 1996).

The Eighth Circuit adopted the ***Windsor*** Court's reasoning in ***St. Jude****:*

> In this case, like in ***Windsor,*** each plaintiff's need (or lack of need) for medical monitoring is highly individualized. Every patient in the 17-state class who has ever been implanted with a mechanical heart valve already requires future medical monitoring as an ordinary part of his or her follow-up care. A patient who has been implanted with the Silzone valve may or may not require additional monitoring, and whether he or she does is an individualized inquiry depending on that patient's medical history, the condition of the patient's heart valves at the time of implantation, the patient's risk factors for heart valve complications, the patient's general health, the patient's personal choice and other factors . . .. Simply put, the medical monitoring class presents a myriad of individual issues making class certification improper….While every mechanical heart valve patient will require follow-up care in connection with the implant, the question of additional monitoring above that required for normal mechanical heart valve implantation is not clear.

St. Jude, 83 F.3d at 1122-1123 (citations omitted).

Similar to medical monitoring class actions, each Plaintiffs' or potential class members' need (or lack of need) for foster care monitoring is highly individualized. Each child was, and will be,

exposed to different placements and different caseworkers for different amounts of time, in different ways and over different periods. Each child has individualized needs different from other proposed class members. Each requires "monitoring," "screening," "tracking," and "visitation" as an ordinary part of his or her custody. However, there can be no doubt that some children may require additional "monitoring," "screening," "tracking," and "visitation" because of that child's individual circumstances. This determination is based on, among other things, the child's medical and psychiatric history, the services the child requires, and factors not within the control of HHS or its employees, such as voluntary acts by the child and foster families. Because this case "presents a myriad of individual issues" similar to a medical monitoring case, class certification is similarly improper. ***See, St. Jude***, 83 F.3d at 1122.

Plaintiffs also rely on a district court decision in Maine. ***See, In re: Motor Vehicles Canadian Export Antitrust Litigation***, No. MDS1532, 2006 WL 623591 (D. Me. Mar. 10, 2006). While ***Canadian Export*** is non-binding, it is, nonetheless, worth distinguishing. In ***Canadian Export***, plaintiffs sought a Rule 23(b)(2) class of automobile buyers and lessees seeking injunctive relief against motor vehicle manufacturers, distributors and dealer associates for conspiring and violating federal antitrust law by preventing new Canadian cars from being imported into the United States. ***Id.*** at *2. This case is inapposite because "the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist." ***Id.*** at *12. It is interesting to note, however, that ***Canadian Export*** relied on ***Allison v. Citgo Petroleum Corp.***, 151 F.3d 402, 413 (5th Cir. 1998), in which the court held that any "presumption of cohesiveness breaks down when individualized remedies predominate," and ***Barnes***, 161 F.3d at 142-143, which found that "a (b)(2) class may require more cohesiveness than a (b)(3) class" and when "too many individual issues" are presented, cohesiveness is defeated. ***Canadian Export***, 2006 WL 623591 at *38-40 (internal

quotations omitted). Thus, the very authority upon which Plaintiffs rely supports Magistrate Piester's recommendation to deny class certification.

5. Magistrate Piester Did Not "Misconstrue" Plaintiffs' Claims and the Scope of Relief Sought.

Plaintiffs' allegation that Magistrate Piester's reasoning was based on a "fundamental misconception" is a result of Plaintiffs' misunderstanding of the Magistrate's Report and Recommendation. Plaintiffs' argue that their claims and the relief available are ***not*** "individualized and specific to each child." (Pl. Obj. Br., p. 18). Magistrate Piester did not, however, view Plaintiffs' claims the same way:

> I conclude the plaintiffs' intended class lacks sufficient commonality for class certification. A close reading of the amended complaint reveals that the named plaintiffs each alleged the following factual claim: ***Under the State's current "systemically deficient" policies and procedures, the State fails to adequately supervise them or the placements they are in, and fails to develop and implement appropriate permanency plans for their benefit, instead moving them from placement to placement, some of which are harmful, unsafe, or inappropriate in the context of their individual needs***. Thus, the claim is that due to a lack of monetary resources, caseworkers and more and better placement options and the State's reluctance to pursue termination of parental rights, the named plaintiffs are languishing in the child welfare system rather than living a normal family life. No doubt the concern is both valid and heartbreaking, but I disagree with ***Baby Neal's*** holding that because injunctive relief is requested, "the factual differences [among the class members] are largely irrelevant."

(MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 101-102) (emphasis added).

Magistrate Piester went on to conclude that the class lacked "cohesiveness", that "significant individual issues [will] arise consistently" and that any common issues would be based on factual determinations that are different for each intended class member. (***Id.*** at 105-106). The Magistrate's Report and Recommendation did not "misconstrue" anything. Rather, Magistrate Piester correctly recognized that any "systemic" issues are so intertwined with and/or dependent on individual factual differences that the class should not be certified. (***Id.*** at 106).

Any injunction would involve the possibility of reviewing each "child's unique circumstances," despite Plaintiffs' conclusory assertion that it would not. (***Id.*** at 105). (***See also***, Pl. Obj. Br., p. 10). Plaintiffs' own "narrowly tailored remedies" further illustrate the individualized nature of Plaintiffs' claims. For example, Plaintiffs seek a Court order requiring "HHS to conduct and implement the results of a system-wide placement 'needs assessment' to ensure that 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." (***See***, Pl. Obj. Br., pp. 19-20). This Court could not make such an order without considering each child's individual situation. Enforcement of such an Order would be even more case-by-case specific. Plaintiffs' other suggested remedies (*i.e.,* monitoring the safety and well-being of class members and providing class members with access to periodic medical, mental health and dental health examinations and treatment) are unworkable as they would require this Court to either: (1) order HHS to follow established Nebraska statute and administrative policy; or (2) order HHS employees to exercise "reasonable professional judgment." (***See***, MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 105-106). Magistrate Piester has correctly determined such injunctions would be improper. (***Id.***)

6. Magistrate Piester Did Not "Ignore" Binding Authority.

Plaintiffs' argument that Magistrate Piester relied on a few factually distinguishable cases from other jurisdictions and rejected persuasive, on-point case law is a self-serving conclusion that ignores the potential split in the circuit and district courts. (***See***, Pl. Obj. Br., pp. 20-21). In fact, the alleged "persuasive on-point reasoning" upon which Plaintiffs rely are factually distinguishable cases from other jurisdictions. ***See, Baby Neal,*** 43 F.3d at 48; ***Kenny A.,*** 218 F.R.D. at 277; ***Christina A.,*** 197 F.R.D. at 664; and ***Marisol A.***, 126 F.3d at 372.

Magistrate Piester properly followed the reasoning of the Tenth Circuit's decision in ***J.B.*** and the District of Minnesota's decision in ***Reinholdson***, rather then the Third Circuit's Decision in ***Baby Neal*** or the district court decisions from Georgia (*i.e.*, ***Kenny A.***) or South Dakota (*i.e.*, ***Christina A.***). Magistrate Piester's Report and Recommendation is consistent with the recent Eight Circuit ruling in ***Elizabeth M.*** – a case which more closely follows ***J.B.*** than ***Baby Neal***.

In ***J.B.***, the Tenth Circuit rejected a proposed class that was similar but even smaller than the class proposed in the present case. ***See J.B.***, 186 F.3d at 1280. In ***J.B.***, sixteen mentally or developmentally disabled juveniles who were in the custody of the State of New Mexico filed a lawsuit for declaratory and injunctive relief against several New Mexico state officers. ***Id.*** at 1282-83. The named ***J.B.*** plaintiffs sought certification for a class comprised of "all children who are now or in the future will be (a) in or at risk of 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." ***Id.*** The district court held the ***J.B.*** plaintiffs "failed to meet the Rule 23(a) requirements for commonality and typicality." ***Id.*** at 1288. The 10th Circuit affirmed the decision, specifically finding that:

> . . . the circumstances of these children vary greatly. ***Other than all being disabled in some way and having had some sort of contact with New Mexico's child welfare system, no common factual link joins these plaintiffs.*** We cannot say that the district court abused its discretion in finding no factual commonality in the proposed class.

Id. at 1189 (emphasis added).

Similar to ***J.B.***, the children that would be a part of the class proposed in the present case would have "no common factual" links other than having some sort of contact with Nebraska's foster care system. Plaintiffs have already admitted each of the named Plaintiffs require an "individualized placement plan" and "individualized services" that are "tailored to the child's unique needs." (***See***,

Interrogatory Answers, Doc. No. 73, Ex.44, ¶¶ 25 and 26). Magistrate Piester correctly held Plaintiffs' "link" was insufficient to certify a class. (MAGISTRATE'S REPORT AND RECOMMENDATION, pp. 105-107).

With respect to ***Reinholdson***, 2002 WL at 31026580, Plaintiffs' attempt to distinguish this case by arguing that certain claims "should be dismissed for 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." (Pl. Obj. Br., p. 22). However, this case appears to be very similar to ***Reinholdson*** in that Plaintiffs' claims are not really "systemic," but rather, are an expression that the next friends "are dissatisfied with the decisions" made by the juvenile court with respect to the children's individualized care.[15]

According to the District of Minnesota, the "determination of plaintiffs' claims will necessarily depend on highly individualized evidence." ***Id.*** at *23. To meet its substantive and procedural obligations under the IDEA, a school must (1) appropriately classify the student's educational handicap, (2) develop an individualized education plan ("IEP") that provides the student educational benefit, (3) place the student in appropriate school and classroom facilities, (4) afford the student suitable main-streaming opportunities, and (5) follow procedures that allow the parents to participate in the IEP process. ***Id.*** at *24. Because each IEP must be "individually tailored to the ***specific needs*** of the particular child, [t]he claims of each named plaintiff will vary depending on his or her ***individual educational needs***." ***Id.*** (emphasis added) The Court, in the context of the

[15] Even this dissatisfaction is skeptical at best. As recognized by the Magistrate, the next friends have little, if any, link to the named Plaintiffs and have made little (if any) attempts to redress their complaints through the juvenile court system. (***See***, MAGISTRATE'S REPORT AND RECOMMENDATION, p. 125).

typicality requirement, further found that "[t]he named plaintiffs' claims vary depending on the school's shortcomings with regard to each of their ***particularized, individual situations***." ***Id.*** at *25 (emphasis added).

Similar to ***Reinholdson***, the determination of Plaintiffs' claims in this case also "depend on highly individualized evidence." For example, after a child is adjudicated by the juvenile court, the child may be assigned to the legal custody of HHS. ***See***, NEB. REV. STAT. §§ 43-250(4) and (5). Thereafter, HHS must: (1) appropriately identify the child's educational, medical, psychological, emotional and physical needs; (2) develop an individualized placement plan; (3) place the child in an appropriate placement; (4) provide appropriate educational, medical, psychological, emotional and physical care; and (5) follow the procedures for approval, review and oversight by the guardian ad litem and juvenile court. ***Id. See also***, NEB. REV. STAT. §§ 43-1311(1) and 43-1313; and NEB. ADMIN. CODE. § 4-002.01 (HHS003515). Because of the factual similarities between ***Reinholdson*** and the present case, Magistrate Judge Piester properly followed its reasoning.

Finally, Plaintiffs fail in their attempt to distinguish ***Elizabeth M.*** from the present situation. As Plaintiffs point out, ***Elizabeth M.*** involved a proposed class of present and future residents of three separate mental health facilities that alleged distinct "failure to protect" and "inadequate treatment" claims. (Pl. Obj. Br., p. 23). What Plaintiffs fail to discuss is this case involves "failure to protect" and "inadequate treatment" claims in, not three, but all foster homes and other out of home placements. Moreover, ***Elizabeth M.*** involved a broad umbrella of procedures and statutes similar to the present case.[16] ***Compare,*** Nebraska Mental Health Commitment Act, NEB. REV. STAT.

[16] The named plaintiffs in ***Elizabeth M***. are women who are or were involuntarily confined at three residential mental health facilities – the Lincoln Regional Center, the Norfolk Regional Center and the Hastings Regional Center. ***Id.*** at 782-783.

§§ 71-901, ***et seq.*** and Nebraska Juvenile Code, NEB. REV. STAT. §§ 43-245, ***et seq***. In fact, the procedures for involuntarily committing a person believed to be mentally ill and dangerous are similar to the procedures for taking a child into custody who may be abused and/or neglected. ***Id.***

As recognized by Magistrate Piester, the class certification problems in ***Elizabeth M.*** also exist in this case. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 65). One of these concerns is that, if sweeping injunctive relief is granted, a federal district court would be required to monitor and control every facet of the State's operation. ***See, Elizabeth M.***, 458 F.3d at 783-784. In ***Elizabeth M.***, the Court would have had to take control over the operation of three distinct mental health facilities. ***Id.*** In this case, the Court would have to take control over the operation of all foster homes and other out of home placements and many of the functions of HHS related to provision of services. A federal court should "not lightly assume this power." ***Id.*** at 784.

D. Magistrate Piester Correctly Found that Plaintiffs' Proposed Class Lacks Typicality as Required by Rule 23.

Typicality exists if there are other members of the class who "have the same or similar grievances as the plaintiff." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 107), ***quoting Alpern v. UtiliCorp United, Inc.***, 84 F.3d 1525, 1540 (8th Cir. 1996). Here, Magistrate Judge Piester was correct in determining that:

> As individuals, the named plaintiffs are not similar to one another. Even acting collectively for policy change, the named plaintiffs have failed to prove they "have the same or similar grievances" of other members of the putative class such that their claims for relief are typical of the class as a whole.

(MAGISTRATE'S REPORT AND RECOMMENDATION, p. 108).

Once again, Plaintiffs attempt to argue they have alleged "no individual claims and seek no relief apart from a class-wide remedy directed to systemic practices of Defendants." As previously discussed, it is illogical and unrealistic to classify Plaintiffs' alleged harms and remedies as "class-

wide" rather than "individual." Again, Plaintiffs' have alleged that foster children are placed "wherever a bed or slot is available and not where their needs can be met." (***See***, Pl. Obj. Br., p. 10). ***See also***, §§ C2 and C3, ***supra***. Moreover, because each named Plaintiff and each proposed class member have different placement goals, are in different placements, receive different services, and have different family structures, it is also illogical to accept that all children share the same interest (or perhaps any interest) in the named Plaintiffs' goals. (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 108).

Plaintiffs' reliance on ***Deboer v. Mellon Mortgage Co.,*** 64 F.3d 1171 (8th Cir. 1995) and ***Alpern,*** 84 F.3d at 1540 is weak, at best. First, in ***Deboer***, the Eighth Circuit held that "the presence of factual variations is ***normally*** not sufficient to preclude class action treatment." ***Id.*** at 1175 (emphasis added). The term "normally" is of great importance because ***Deboer*** involved a dispute over the amount of cushion that could be retained in an escrow account. ***Id.*** at 1173. The "factual variations" involved the amount of money withheld and the amount of expenses (*i.e.,* taxes, insurance, etc.) that would be paid. The factual differences did not affect the issue in ***Deboer*** as they do here. As previously discussed, the factual differences in the present case go to the very heart of the questions that this Court has been asked to resolve. ***See*** §§ C2 and C3, ***supra***.

Citing ***Deboer***, in ***Alpern,*** the Eighth Circuit held that "[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." ***Alpern,*** 84 F.3d at 1540. (***See also***, MAGISTRATE'S REPORT AND RECOMMENDATION, p. 107). ***Alpern*** involved allegations that UtiliCorp violated various securities laws by fraudulently concealing adverse material information in order to maintain inflated stock. ***Alpern***, 84 F.3d at 1531. The Court upheld

typicality because the same set of events "underlie the claims of the other putative class members" – *i.e.,* UtiliCorp's failure to disclose financial information. ***Id.*** at 1540.

This case is not so simple. Here, Plaintiffs' contention that all of their problems (and all of the problems of the proposed class members) arise from the exact same set of events ignores reality. ***See*** §§ C2 and C3, ***supra***. Magistrate Piester did not take this tunnel-vision approach and neither should this Court.

E. Magistrate Piester Correctly Found that Plaintiffs will not Adequately Represent the Class as Required by Rule 23.

As recognized by Magistrate Piester, the "adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 119), ***citing Amchem,*** 521 U.S. at 625. Magistrate Piester concluded that, to the extent Plaintiffs ask for an Order to enforce HHS policy in accordance with the "applicable law and reasonable professional standards, even 3(a) 'abused and neglected' juveniles will have divergent viewpoints and goals in this litigation." (MAGISTRATE'S REPORT AND RECOMMENDATION, p. 120). As previously discussed, Plaintiffs continue to request such an order. Plaintiffs' argument that either they or their next friends have the same interests and goals as the proposed class is simply not believable. To adopt such an argument would be to ignore the individualized needs and goals established for each child. It would also ignore the complete lack of connection between the next friends and the named Plaintiffs.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court enter an Order adopting the Magistrate's Report and Recommendation in all respects.

Dated this 13th day of November, 2006.

DAVE HEINEMAN, NANCY MONTANEZ, JOANN SCHAEFER, RICHARD NELSON; DENNIS LOOSE, and TODD RECKLING, Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2006, I filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of each filing to the following: Marcia Robinson Lowry, Ira P. Lustbader, Douglas C. Gray, Tara S. Crean, CHILDREN'S RIGHTS; D. Milo Mumgaard, Jennifer A. Carter, NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST; V. Gene Summerlin, Marnie A. Jensen, OGBORN, SUMMERLIN & OGBORN, P.C.; and Stanley J. Adelman, Anne C. Auten, DLA PIPER US LLP.

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