IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

G.K., by their next friend, Katherine Cooper; C.I., by their next friend, Christine C. Wellington; T.L., by their next friend, Christine C. Wellington; R.K., by their next friend, Katherine Cooper; for themselves and all others similarly situated, **Plaintiffs,** v. CHRISTOPHER SUNUNU, in his official capacity as the Governor of New Hampshire; LORI SHIBINETTE, in her official capacity as the Commissioner of the New Hampshire Department of Health and Human Services; JOSEPH RIBSAM, in his official capacity as the Director of the Division for Children, Youth and Families; HENRY LIPMAN, in his official capacity as the Director of New Hampshire Medicaid Services; and CHRISTOPHER KEATING, in his official capacity as the Director of the Administrative Office of the Courts, **Defendants.**	Case No. 1:21–cv–0004–PB

PLAINTIFFS' OBJECTION AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

Plaintiffs are youth, ages 14 through 17, with mental and behavioral health disabilities in the New Hampshire foster care system ("Plaintiffs" or "Plaintiff Youth"). While in the custody or under the supervision of New Hampshire's Division for Children, Youth & Families ("DCYF"), Named Plaintiffs G.K., C.I., T.L., and R.K.[1] and a putative class of Plaintiff Youth continue to experience the trauma of being unnecessarily warehoused in institutional and group care (together,

[1] Named Plaintiffs proceed using pseudonymous initials to protect their identities. *See* ECF No. 13.

called "congregate care") facilities without the benefit of an attorney or adequate case planning. Plaintiff Youth have filed a detailed Class Action Complaint (ECF No. 1) ("Complaint or Compl.")[2] with ample factual allegations showing that Defendants violate Plaintiff Youth's federal rights by 1) denying Plaintiff Youth attorney representation while they are placed or at risk of being placed in restrictive congregate care settings; 2) failing to adequately and timely provide and implement required case plans; and 3) discriminating against Plaintiff Youth, both by failing to ensure that Plaintiff Youth receive housing (also called "placements") and services in the most integrated setting appropriate to their needs and by utilizing methods of administration that result in the unnecessary institutionalization of Plaintiff Youth.

To support their motion to dismiss, Defendants make several arguments that misconstrue the law and ask the Court to ignore well-established Rule 12(b)(6) pleading standards. Each of these arguments should be rejected.

- First, Defendants seek to skip discovery and proceed to a trial on the merits of Plaintiff Youth's Fourteenth Amendment due process claim, without even applying the relevant legal standard to the alleged facts. Plaintiffs show, with ample factual allegations, that Plaintiff Youth in New Hampshire dependency proceedings, who face significant deprivations of their physical liberty interests through placement in restrictive congregate care facilities, have a constitutional right to counsel in those proceedings under the governing balancing test.

- Second, Plaintiff Youth state a claim under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 622, 671 *et seq*. ("AACWA"), as First Circuit courts have recognized that youth in foster care have a private right of action to enforce the case planning and case review requirements asserted here.

- Third, Defendants mischaracterize the "integration mandate" under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. ("ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq*., and the facts alleged in the Complaint. Plaintiff Youth state claims under these statutes and their implementing regulations

[2] Named Plaintiffs bring this suit on behalf of themselves and a class of "Plaintiff Youth": all children ages 14 through 17 who: (1) are, or will be, in the legal custody or under the protective supervision of DCYF under New Hampshire RSA 169-C:3, XVII and/or XXV; (2) have a mental impairment that substantially limits a major life activity, or have a record of such an impairment, or are regarded as having such an impairment; and (3) currently are, or are at risk of being, unnecessarily placed in congregate care settings. *See* Compl. ¶ 2.

because they plausibly allege that they are segregated from their communities and denied full community integration, or are at risk thereof—the heart of an *Olmstead* integration mandate claim. Plaintiffs also plausibly allege that New Hampshire's methods of administering its foster care and Medicaid systems illegally discriminate against older youth with mental and behavioral health disabilities.

- Fourth, Plaintiff Youth plead sufficient facts to maintain a class action for declaratory and injunctive relief. The Complaint details the common questions of fact and law underlying the structural failures in New Hampshire's foster care system under Rules 23(a) and 23(b)(2). Defendants will have the opportunity to dispute class certification and the contours of appropriate remedies to cure the specific violations of rights determined at trial. However, Defendants' attempt to dismiss this fact-intensive lawsuit at the motion to dismiss stage asks this Court to ignore controlling law and should be rejected.

Plaintiff Youth have plausibly alleged specific structural failures that, if proven at trial, violate their constitutional and statutory rights. At this stage of the case, Plaintiff Youth's well-pleaded Complaint entitles them to proceed with their claims. Defendants' motion to dismiss should be denied.

LEGAL STANDARD

Defendants move to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss for failure to state a claim, a court must "accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences therefrom in the pleader's favor." *Artuso v. Vertex Pharms., Inc*., 637 F.3d 1, 5 (1st Cir. 2011). "[D]etailed factual allegations are not necessary," as long as the complaint "contain[s] sufficient factual matter to state a claim to relief that is plausible on its face." *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (cleaned up); *see also Cruz v. Melecio*, 204 F.3d 14, 21 (1st Cir. 2000) (dismissal is reversible error "if the well-pleaded facts, taken as true, justify recovery on any supportable legal theory"). Put another way, the complaint must have "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. Plaintiff Youth Plausibly Allege a Procedural Due Process Right to Counsel in Their Dependency Proceedings Under the *Mathews* Balancing Test.

Defendants wrongly claim that Plaintiff Youth argue for "an absolute right to counsel in the course of child protection proceedings." Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss (ECF No. 29-1) ("Def. Br.") at 6. Rather, the Complaint alleges that a class of individuals—older youth with mental and behavioral health disabilities who are currently placed or at risk of being placed in restrictive congregate care settings—have their procedural due process rights violated during RSA 169-C dependency proceedings where counsel is not appointed. Compl. ¶¶ 231-32. Such circumstances plausibly give rise to due process violations. *See, e.g.*, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (finding after consideration of the factual record, on summary judgment, that plaintiff youth, and those similarly situated, possessed a procedural due process right to counsel in state dependency proceedings).[3] Defendants ask this Court to dismiss Plaintiff Youth's well-pleaded claim before it would have the opportunity to conduct any factual analysis under the factors established in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[4] The Court should reject this request. As explained

[3] The court in *Kenny A.* analyzed due process under the Georgia state constitution, which is co-extensive with the U.S. Constitution. *Kenny A.*, 356 F. Supp. 2d at 1359; *In re Floyd Cnty. Grand Jury Presentments for May Term 1996*, 225 Ga. App. 705, 709 (1997) (the Georgia constitution's grant of due process is generally co-extensive with the Fourteenth Amendment of the United States Constitution). Like this case, *Kenny A.* included allegations of deprivations of foster youth's physical liberty interests through unnecessary institutionalization and frequent and harmful moves among placements. *See, e.g.*, *Kenny A.*, 356 F. Supp. 2d at 1359 n.6, 1360-61 (discussing evidence of placements in institutional facilities where children's liberty was greatly restricted and frequent moves among placements). The class of foster youth in *Kenny A.* also included older youth with disabilities—including "Conduct Disorder, Post-Traumatic Stress Disorder, and Depression"—suffering from severe emotional, psychological, psychiatric, and/or behavioral problems, "many of which developed or worsened while [plaintiff youth] ha[d] been in foster care." *Kenny A.* First Am. Complaint ¶¶ 117-19, 153-56, 171-74, No. 1: 02-CV-1686-MHS, 2003 WL 25682412 (N.D. Ga. Aug. 20, 2003).

[4] Rather than applying the *Mathews* factors, Defendants ***exclusively*** rely on non-binding and factually distinct case law in support of their motion. *See* Def. Br. at 7-10. In the cases on which Defendants rely, the Washington Supreme Court analyzed due process claims under Washington's statutory framework for child dependency proceedings. Aside from being unpersuasive as a matter of law, the Washington state cases depended on that state's particular statutory framework. For example, since 2014, that statutory framework provided that Washington courts "**must** appoint an

below, applying the Rule 12(b)(6) standard to Plaintiff Youth's detailed factual allegations under *Mathews* shows that Plaintiffs have pleaded ample facts demonstrating a plausible due process claim.

As stated by the Supreme Court, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (cleaned up); *see also Wade v. Brady*, 460 F. Supp. 2d 226, 246 (D. Mass. 2006). Rather, "due process is flexible," which is "necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12-13 (1979) (cleaned up). Evaluating what process is due involves weighing the *Mathews* factors, which are:

> (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335. Whether Plaintiff Youth have a procedural due process right to counsel in their New Hampshire dependency proceedings, and whether Defendants have violated that right, requires a fact-intensive application of the *Mathews* factors, including on a motion to dismiss. *See, e.g., Spierdowis v. Brooks*, C.A. No. 83-0493-F, 1984 U.S. Dist. LEXIS 14750, at *9 (D. Mass.

attorney for a child in a dependency proceeding six months after granting a petition to terminate the parent and child relationship pursuant to RCW 13.34.180 and when there is no remaining parent with parental rights." Wash. Rev. Code Ann. § 13.34.100(6) (emphasis added). This statutory requirement is not present in New Hampshire's Child Protection Act. Moreover, unlike in those cases, the New Hampshire dependency proceedings at issue here present a uniquely significant risk of physical liberty deprivation as Defendants house over ninety percent of older youth with DSM-V diagnoses in congregate facilities and routinely move older youth from placement to placement. *See* Compl. ¶¶ 43, 50, 53, 202-03. *Cf.*, *In re Dependency of E.H.*, 427 P.3d 587, 597 (Wash. 2018) (finding the trial court did not err in denying counsel because "[n]o decisions regarding placement were at issue"); *In re Dependency of M.S.R.*, 271 P.3d 234, 245-46 (Wash. 2012) (finding there was no evidence in the record that would have compelled the court to appoint counsel).

July 23, 1984) (denying motion to dismiss based on complaint allegations in view of *Mathews* factors); *Martin v. Kim*, No. 2:03 CV 536, 2005 WL 2293797, at *6 (N.D. Ind. Sept. 19, 2005) (denying motion to dismiss and noting it seemed "obvious . . . that such a fact-intensive inquiry" as the *Mathews* factors was "ill-suited for a motion to dismiss").

While Defendants' motion to dismiss ignores the application of *Mathews* to the alleged facts, the Complaint details a profound risk of the deprivation of Plaintiff Youth's physical liberty interests while in the New Hampshire foster care system. *Ninety percent* of the putative class of older foster youth with a mental or behavioral health disability are housed in restrictive congregate facilities at any given time and all are at risk of such placement. Compl. ¶ 43. Older youth are also subjected to a structural practice of movement among placements with alarming frequency, risking psychological harm and physical harm to normal brain development. *Id*. ¶¶ 44-47. The detailed facts in the Complaint plausibly establish all three factors of the *Mathews* balancing test.

A. Under the *Mathews* Factors, Plaintiffs Plausibly Allege that New Hampshire's Failure to Provide Counsel in Dependency Proceedings Violates Due Process.

Applying the *Mathews* factors, Plaintiffs have plausibly alleged a constitutional right to due process during their New Hampshire dependency proceedings, requiring the appointment of counsel.

1. Plaintiff Youth Have Significant Physical Liberty Interests at Stake.

Meeting the first *Mathews* factor, Plaintiff Youth plausibly allege they have significant physical liberty interests that are threatened during every phase of New Hampshire dependency proceedings. *See* Compl. ¶¶ 127, 135, 138-39, 141, 155. Plaintiffs have been, and/or are at risk of being, unnecessarily placed in restrictive, unstable, and/or out-of-state congregate care settings. *Id.*; *see also id*. ¶¶ 39-43; *Kenny A.*, 356 F. Supp. 2d at 1360-1361 (concluding that where "foster children in state custody are subject to placement in . . . institutional facilities where their physical

liberty is greatly restricted[,]" the "private liberty interests at stake support a due process right to counsel in deprivation and TPR proceedings"). For example, many of the congregate facilities Plaintiffs are placed in also house youth involved in juvenile delinquency proceedings, impose "level systems" to deprive youth of basic living privileges, impose arbitrary rules that children would not experience in a family environment, or are located far from Plaintiffs' communities, even across the country. *See, e.g.*, Compl. ¶¶ 40-41, 65-67, 103. In addition, as minors with mental and behavioral health disabilities, frequent movement between and among placements, as well as placement in restrictive settings, causes Plaintiff Youth to experience toxic stress, compromised brain development, and related psychological adjustment problems. *See id*. ¶¶ 51-54. Further, Plaintiffs' factual allegations show that Defendants maintain a policy, practice, pattern, and/or custom of routinely denying Plaintiff Youth legal representation during dependency proceedings, despite the fact that Plaintiffs at risk of lengthy institutionalization are minors with mental and behavioral health disabilities, have no legal representation, and have no legal knowledge. *See id*. ¶¶ 27, 130-44.

2. Plaintiff Youth Risk Erroneous Deprivation of Their Liberty Interests.

Plaintiff Youth satisfy the second *Mathews* factor because they plausibly allege a significant risk of erroneous deprivation of their physical liberty interests at each of their New Hampshire dependency proceedings, which existing or other safeguards cannot adequately address. Compl. ¶¶ 125-29. These proceedings include the 48-hour hearing, the preliminary hearing, the adjudicatory hearing, the dispositional hearing, and the permanency hearing. *Id*. ¶¶ 135-44. As Plaintiffs' factual allegations show, each of these proceedings presents a significant risk of erroneous liberty deprivation in the form of out-of-state, unstable, and unnecessary placements in institutional settings. *Id*. ¶¶ 68, 83, 96, 121, 129, 145-55; *see also Kenny A.*, 356 F. Supp. 2d at 1361 (noting that without attorneys, broad judicial discretion coupled with judges'

dependence on others for information about children's circumstances creates "a significant risk that erroneous decisions will be made" during proceedings).

Plaintiff Youth also show that New Hampshire's discretionary appointment system—where counsel is almost *never* appointed—offers insufficient protection for Plaintiffs' physical liberty interests. *See* Compl. ¶¶ 150-55. Without counsel and with no legal training, Plaintiff Youth are incapable of exercising their rights to call upon witnesses, present and object to evidence, conduct cross-examinations, present experts, appeal key court orders, and otherwise advocate and protect their legal rights during dependency proceedings. Plaintiff Youth further allege that the existing participants in the dependency proceedings—including a CASA or guardian ad litem—do not and cannot adequately protect against these risks as they have neither legal training nor an obligation to advocate for the child's express wishes to the court. *Id.* ¶¶ 149-52.

As Plaintiffs show, provision of legal counsel to Plaintiff Youth is essential to assure constitutionally adequate process and protection from unwarranted deprivations of liberty—especially placement in unnecessarily restrictive congregate care facilities—and the significant associated harms. *See id.* ¶¶ 128-29.

3. The Government Has a Strong Interest in Appointing Counsel.

Under the third *Mathews* factor, Plaintiff Youth plausibly allege that New Hampshire has a strong interest in appointing counsel to protect older youth with mental and behavioral health disabilities during dependency proceedings. *See* Compl. ¶¶ 156-60. This interest is codified in the New Hampshire state constitution. *See* N.H. Rev. Stat. Ann. § 169-C:2 (2020) (noting that the state constitution and its judicial procedures "protect the rights of *all* parties involved in the adjudication of child abuse or neglect cases" including "*children whose life, health or welfare is endangered*") (emphasis added); *see also Kenny A.*, 356 F. Supp. 2d at 1361 (finding that "[t]his fundamental [State] interest far outweighs any fiscal or administrative burden that a right to appointed counsel

may entail"). Plaintiffs plausibly allege that protection for Plaintiff Youth during New Hampshire dependency proceedings is only possible where counsel is appointed. *See* Compl. ¶¶ 132-34, 153-59; s*ee also Kenny A.*, 356 F. Supp. 2d at 1361 (finding that the state's "protection [of a child's safety and well-being,] can be adequately ensured only if the child is represented by legal counsel throughout the course of" proceedings). Appointment of counsel for children in New Hampshire dependency proceedings under the circumstances Plaintiff Youth face would also reduce the overall fiscal and administrative burden that unnecessary placements and inefficient resolution of dependency proceedings exact upon New Hampshire and its taxpayers. Compl. ¶¶ 156-59.

B. Defendants Have Failed to Meet Their Burden Under F.R.C.P. 12(b)(6).

Defendants cite no cases that show a bright line rule that there is *no* due process right to counsel for children in dependency proceedings under any facts, let alone for older youth with mental and behavioral health disabilities who face significant restrictions of their physical liberty interests in New Hampshire dependency proceedings, like Plaintiff Youth. This is because determinations of due process depend on context and facts. Summary judgment and/or a trial on the merits after discovery of the facts is the more appropriate stage to evaluate the insufficiency of New Hampshire's discretionary appointment process for Plaintiff Youth. *See, e.g., Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1021 (D. Minn. 2019) (denying motion to dismiss after applying *Mathews* factors, noting that "[f]inal resolution of these factors will necessarily depend on facts which can only be acquired through discovery").

Plaintiff Youth's allegations, taken as true, state a plausible claim to relief. *Haley*, 657 F.3d at 46. On a motion to dismiss, this Court should not ignore, as Defendants do, Plaintiffs' well-pleaded facts that under the United States Constitution, older youth with disabilities who are currently in, or are at risk of being placed in, congregate care settings have their due process rights

violated when Defendants fail to ensure they have counsel during New Hampshire's dependency proceedings.

II. Plaintiff Youth State a Claim Under the Adoption Assistance and Child Welfare Act for New Hampshire's Failure to Provide and Implement Adequate Case Plans.

Plaintiffs seek to enforce specific requirements of AACWA that are integral to ensuring youth in New Hampshire's foster care system are safe and healthy, especially when they are placed in congregate care facilities away from their communities. Although Defendants claim that Plaintiff Youth have no private right of action to enforce these AACWA provisions, application of established Supreme Court standards and First Circuit authority makes clear that Congress intended for youth in foster care to have a private right of action to enforce case planning requirements.

The AACWA provisions Plaintiffs seek to enforce are part of Titles IV-B and IV-E of the Social Security Act, which Congress enacted to ensure the protection of youth in foster care. Under AACWA, Defendants must ensure (1) Plaintiff Youth are timely provided with written case plans containing mandated elements; (2) case plans are regularly updated to include accurate and complete information; (3) Plaintiff Youth and their families participate in case planning; and (4) case plans are implemented through the provision of needed services, including transition services for older youth. Compl. ¶ 168. *See also* 42 U.S.C. §§ 622 (listing the requisite features of State plans for child welfare services, including a case review system for each child); 671(a)(16) (requiring states to provide for the development of case plans for each child in foster care); 671(a)(22) (requiring states to develop and implement standards to provide quality services that protect the safety and health of children in foster care); 675(1) (listing the required elements of a case plan); 675(5) (listing the required elements of a case review system); and 675a (listing additional required elements of case plans and case reviews).

These requirements are critical to the health and safety of Plaintiff Youth, as they ensure the child's needs and permanency goals are identified, and set in motion the services that will be provided to meet those needs. *See* Compl. ¶¶ 162-67. Plaintiff Youth's factual allegations show that Defendants routinely fail to provide Plaintiffs with adequate case plans as required by law. *See id*. ¶¶ 168-83. None of the Named Plaintiffs recall participating in any case planning at all, and none have been made aware of an adequate case plan prepared for them. *Id*. ¶¶ 63, 68, 84, 98, 122, 124. Without proper case planning, Plaintiff Youth experience harmful outcomes, including unnecessary housing in congregate care facilities, frequent moves among placements, inadequate access to mental health services in the community, and inadequate services to transition to adulthood. *Id*. ¶ 185.

Defendants admit that New Hampshire must develop a case plan for each child that receives foster care maintenance payments under its State plan. Def. Br. at 10. Defendants also do not dispute the sufficiency of Plaintiffs' factual allegations supporting the AACWA claim. Defendants' sole argument is that the case plan provisions are not privately enforceable under Section 1983. *See, e.g.*, Def. Br. at 17. As shown below, Defendants' argument fails.

A. The Weight of Authority—Including First Circuit Authority—Acknowledges a Private Right of Action to Enforce Case Planning Requirements Under Section 1983.

The First Circuit Court of Appeals has long held that the case planning requirements of AACWA are privately enforceable by youth in the foster care system. In *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983), the Court of Appeals affirmed a preliminary injunction requiring Massachusetts's child welfare agency to provide case plans and a periodic review of those plans to each child in its foster care system. *Id*. at 514. The First Circuit rejected the defendants' arguments that the provisions were solely enforceable by the U.S. Secretary of Health & Human

Services—the exact argument Defendants make here. *Id*. at 512 (citing §§ 671(a)(16), 675(1), and 675(5) of AACWA); *see also, e.g.*, Def. Br. at 13.

In cases Defendants ignore, courts within the First Circuit have applied *Lynch* and reaffirmed the private enforceability of AACWA's case planning provisions for children in foster care. The District of Massachusetts denied a motion to dismiss on the same grounds raised here, and explained that "the right to a case plan was clearly upheld in *Lynch*." *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 170 (D. Mass. 2011) (citing §§ 671(a)(16) and 675(1)). The District of Rhode Island similarly applied First Circuit law and held that AACWA allows private enforcement actions by foster youth for adequate case plans under §§ 671(a)(16) and 675(1). *Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 385 (D.R.I. 2011) (citing *Lynch*). These decisions are in line with the weight of authority across the country, as the "majority of federal courts" have held that foster youth's rights to adequate case plans are privately enforceable under Section 1983. *Henry A. v. Willden*, 678 F.3d 991, 1006-08 (9th Cir. 2012).[5]

Defendants incorrectly rely on the Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), to argue that the Supreme Court has foreclosed private enforcement of AACWA. Defendants' argument is without merit. The Supreme Court held in *Suter* that § 671(a)(15), a provision requiring "reasonable efforts" to prevent removal of a child from their home or facilitate

[5] *See, e.g.*, *L.J. v. Wilbon*, 633 F.3d 297, 307-10 (4th Cir. 2011) (case plan and case review); *L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988) (case plan); *Elisa W. ex rel. Barricelli v. City of New York*, No. 15-CV 5273-LTS-HBP, 2016 WL 4750178, at *5-7 (S.D.N.Y. Sept. 12, 2016) (case plan and case review); *Clark K. v. Guinn*, No. 2:06-CV-1068-RCJ-RJJ, 2007 WL 1435428, at *10-12 (D. Nev. May 14, 2007) (case plan and case review); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 290-93 (N.D. Ga. 2003) (case plan and case review); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 945-49 (M.D. Tenn. 2000) (case plan and case review); *Occean v. Kearney*, 123 F. Supp. 2d 618, 625 (S.D. Fla. 2000) (case review); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 683 (S.D.N.Y. 1996) (case plan); *Jeanine B. ex rel. Blondis v. Thompson*, 877 F. Supp. 1268, 1283-85 (E.D. Wis. 1995), *rev'd in part on other grounds*, 967 F. Supp. 1104 (E.D. Wis. 1997) (case plan and case review); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 989 (D.D.C. 1991) (case plan); *B.H. v. Johnson*, 715 F. Supp. 1387, 1402 (N.D. Ill. 1989) (case plan and case review).

reunification, did not create a private right of action enforceable under Section 1983. *Id*. at 359-63. Congress subsequently enacted what is referred to as the "*Suter* Fix," however, stating that "[i]n an action brought to enforce a provision of this chapter, such provision is *not to be deemed unenforceable* because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-2 (emphasis added). Legislative history shows that a primary purpose of this amendment was to "preserve[] private rights of action as they existed before the *Suter v. Artist M.* Supreme Court decision," and to "restore to an aggrieved party the right to enforce, as it existed prior to [*Suter*], the Federal mandates of the State plan titles of the Social Security Act in the Federal courts." H.R. Rep. No. 102-631, at 365-66 (1992).

Courts have since explained that "although the ruling in *Suter* regarding . . . [reasonable efforts] was unaltered by the '*Suter* fix,' the amendment also expressed Congress's intent *not* to preclude courts from determining whether *other* provisions of the AACWA allowed private enforcement actions." *Sam M.*, 800 F. Supp. 2d at 388 (emphasis in original). In line with this intent, courts have reiterated the private right of action recognized in *Lynch*, by applying *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), as discussed below. Contrary to Defendants' assertions that many decisions identifying a private right came down before *Gonzaga* (*see* Def. Br. at 17), many courts identifying a private right, including those in the First Circuit, did so post-*Suter* and post-*Gonzaga*.[6] Defendants misconstrue *Suter*'s import, which does not preclude Plaintiffs' AACWA claim.

[6] *See, e.g.*, *Henry A.*, 678 F.3d at 1006-09; *L.J. v. Wilbon*, 633 F.3d at 307-10; *Elisa W.*, 2016 WL 4750178, at *5-7; *Sam M.*, 800 F. Supp. 2d at 388; *Connor B.*, 771 F. Supp. 2d at 168; *Clark K.*, 2007 WL 1435428, at *10-12; *Kenny A.*, 218 F.R.D. at 290-93.

While ignoring First Circuit precedent supporting private enforcement of Plaintiffs' case planning claims, Defendants rely on two inapposite decisions. First, in *Eric L. ex rel. Schierberl v. Bird*, 848 F. Supp. 303 (D.N.H. 1994), the court found that claims under AACWA were "foreclosed by the decision in *Suter*." *Id.* at 312. The *Eric L.* court acknowledged that Congress was considering an amendment to clarify rights under AACWA—the *Suter* Fix—and that the court's decision was constrained by *Suter* "[i]n the meantime." *Id.* at 311. Because the court viewed the plaintiffs' claims as categorically foreclosed, the court did not apply the *Blessing*/*Gonzaga* standard, discussed below. Second, in *B.K. v. N.H. Dep't of Health and Human Servs.*, 814 F. Supp. 2d 59 (D.N.H. 2011), the court followed *Suter* and found that the "reasonable efforts" provisions did not create a private right of action, but specifically *distinguished* the case planning provisions under §§ 671(a)(16) and 675(1) as sections that "set forth more specific requirements." *B.K.*, 814 F. Supp. 2d at 67 n.6. Accordingly, *Eric L.* and *B.K.* are inapplicable and do not undermine Plaintiffs' private right of action to enforce the case planning provisions at issue here.[7]

B. The Case Planning and Case Review Requirements Are Privately Enforceable Under the *Blessing/Gonzaga* Standard.

Defendants' motion entirely avoids application of established factors to determine the existence of a private right of action under Section 1983. Application of those factors leads to the same conclusion reached by courts in the First Circuit: Plaintiff Youth have privately enforceable rights to adequate case plans.

The Supreme Court has established a three-part test to determine whether federal statutory provisions create rights enforceable under Section 1983. *Blessing*, 520 U.S. at 340-42; *Gonzaga*,

[7] Like *B.K.*, both *Pethtel v. Tenn. Dep't of Child. Servs.*, No. 3:10-CV-469-TAV-HBG, 2020 WL 6827791, at *7 (E.D. Tenn. Nov. 20, 2020), and *Melton v. District of Columbia*, 85 F. Supp. 3d 183, 191 (D.D.C. 2015), which Defendants rely on (Def. Br. at 15), concerned the "reasonable efforts" provision explicitly ruled on in *Suter M.*—not the case planning provisions, and are therefore similarly inapplicable.

536 U.S. at 290; *see also Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 73 (1st Cir. 2005). Under that test, courts must consider (1) whether the provision contains "rights-creating language;" (2) whether the provision has an aggregate as opposed to an individualized focus; and (3) the other enforcement provisions that Congress has provided. *Rio Grande*, 397 F.3d at 73.[8] Where plaintiffs "satisf[y] the threshold inquiry and demonstrate[] that Congress intended to confer an individual right, the right is presumptively enforceable by § 1983." *Colón-Marrero v. Vélez*, 813 F.3d 1, 16 (1st Cir. 2016). To overcome the presumption, defendants must show that Congress "shut the door to private enforcement either expressly in the statute creating the right, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id*. (cleaned up). The case planning provisions meet all three *Gonzaga* factors and there is no evidence that Congress shut the door to private enforcement. *Connor B.*, 771 F. Supp. 2d at 172 ("application of the *Gonzaga* factors makes it clear that Congress intended to create privately enforceable rights to individualized case plans . . . under the AACWA"); *see also Sam M.*, 800 F. Supp. 2d at 387-88.

1. The provisions contain "rights-creating language" to benefit youth in foster care.

The AACWA case planning provisions satisfy the first *Blessing/Gonzaga* prong because they contain rights-creating language to benefit youth in foster care, including Plaintiff Youth. "Rights-creating language" (1) speaks in "mandatory, rather than precatory, terms"; (2) unmistakably focuses on the benefitted class; and (3) contains "individually focused terminology."

[8] *Gonzaga* "tightened up the *Blessing* requirements" and "relied on several somewhat different factors in determining whether a right existed." *Rio Grande*, 397 F.3d at 73. The First Circuit has "appl[ied] the more recent analysis used in *Gonzaga* rather than the *Blessing* test," but has found that satisfaction of the *Gonzaga* factors has also satisfied the earlier *Blessing* test. *Id.* at 73 n.10. The earlier test asked (1) whether Congress intended that the provision in question benefit the plaintiff; (2) whether the right supposedly protected by the statute is vague and amorphous so that its enforcement would strain judicial competence; and (3) whether the provision unambiguously imposes a binding obligation on the States. *Blessing*, 520 U.S. at 340-41; *see also Connor B.*, 771 F. Supp. 2d at 168 n.8.

Connor B., 771 F. Supp. 2d at 170-71 (quoting *Gonzaga*, 536 U.S. at 284, 295). The case planning and case review requirements under §§ 622, 671(a)(16), 671(a)(22), 675(1), 675(5), and 675a, collectively, contain such language.

The requirements are "explicitly mandatory," rather than merely providing an incentive for state compliance through funding. *Sam M.*, 800 F. Supp. 2d at 388. For example, § 671(a)(16) requires that "a State . . . *shall* have a plan approved by the Secretary which . . . provides for the development of a case plan." *Id.* (quoting § 671(a)(16)). Sections 622(b) and 671(a)(22) use similarly mandatory language, requiring that "[e]ach plan for child welfare services . . . *shall* . . . (8) provide assurances" of the State's operation of a case review system, 42 U.S.C. § 622(b)(8)(A)(ii) (emphasis added), and that the State "*shall* develop and implement standards" for providing quality services to protect the safety and health of children in foster care. *Id.* § 671(a)(22) (emphasis added). Section 671 further incorporates the requirement of a "case review system which meets the requirements described in [§§] 675(5) and 675a." *Id.* § 671(a)(16). As the *Connor B.* court concluded, provisions like these "express[] a clear mandate" and therefore reflect "rights-creating" language. 771 F. Supp. 2d at 170-71.

The case planning and case review provisions benefit a particular class—foster youth—and contain individually focused terminology. *Id.* at 171; *Henry A.*, 678 F.3d at 1006-09. Specifically, the provisions mandate a case plan with respect to "'*each child*' . . . who has been removed from his or her family." *Sam M.*, 800 F. Supp. 2d at 387-88 (quoting §§ 671(a)(16), 675(a)(1)) (emphasis added). Likewise, § 622 requires states to operate "a case review system (as defined in section 675(5) . . .) for *each child* receiving foster care under the supervision of the State." 42 U.S.C. § 622(b)(8)(A)(ii) (emphasis added). Courts have repeatedly found that this recurring reference to "each child" in foster care is individually focused language identifying a

discrete beneficiary group, satisfying the first *Blessing/Gonzaga* prong. *Connor B.*, 771 F. Supp. 2d at 171; *see also Henry A.*, 678 F.3d at 1006-09; *Colón-Marrero*, 813 F.3d at 17-18 (quoting *Rio Grande*, 397 F.3d at 74).

2. The provisions focus on the needs of individual youth.

The AACWA case planning provisions focus on the individualized needs of each child, satisfying the second *Blessing/Gonzaga* prong. AACWA "contains very specific requirements for an individualized case plan for each eligible child." *Sam M.*, 800 F. Supp. 2d at 388 (citing § 675(1)'s list of "required numerous and detailed elements of case plan[s]"). Those requirements include specific health and safety measures, a plan for assuring the youth receives safe and proper care, and a description of services to help transition the youth from foster care to successful adulthood, among other requirements. *See* § 675(1)(A)-(G); Compl. ¶ 162.

AACWA's required "case review system" is similarly framed in terms of specific assurances for each individual child. For example, § 675(5)(A) requires that a state ensure that "each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available." Repeated reference to "each child" illustrates an individualized, rather than aggregate, focus. *Connor B.*, 771 F. Supp. 2d at 171; *see also Henry A.*, 678 F.3d at 1008-09 (explaining that the provisions state what must be done for "each child," using singular and definite language throughout). The provisions therefore satisfy the second *Blessing/Gonzaga* prong.

3. AACWA lacks a comprehensive enforcement scheme that would foreclose private enforcement for harmed youth.

Finally, because AACWA lacks an alternative, comprehensive enforcement mechanism through which harmed youth could assert and remedy statutory violations, Plaintiffs' AACWA claim satisfies the third *Blessing*/*Gonzaga* prong. *See Sam M.*, 800 F. Supp. 2d at 388; *Connor B.*,

771 F. Supp. 2d at 171-72. While the U.S. Secretary of Health & Human Services is tasked with overseeing child welfare programs, nothing in AACWA indicates Congress intended the possible withholding of federal funds by the Secretary to be an exclusive remedy. *Sam M.*, 800 F. Supp. 2d at 388. On its own, the Secretary's ability to withhold federal funds is not the comprehensive remedial scheme that would preclude private enforcement of statutory rights. *See Lynch*, 719 F.2d at 510-11 (collecting the Supreme Court's rulings holding Social Security Act provisions enforceable under Section 1983 notwithstanding remedies analogous to the Secretary's withholding of federal funds). Thus, Defendants' claim that the provisions are not privately enforceable solely because they were passed under the Spending Clause and in connection with New Hampshire's State plan is without merit. "[T]he fact that a statutory command is directed at state officials as part of a broader plan for implementation does not preclude it from likewise creating privately enforceable rights." *Colón-Marrero*, 813 F.3d at 17.

The case planning and case review provisions do not "contain[] another enforcement mechanism through which an aggrieved individual can obtain review," *Connor B.*, 771 F. Supp. 2d at 168 (citing *Gonzaga*, 536 U.S. at 287-90), let alone "a remedial scheme that is sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Blessing*, 520 U.S. at 346 (cleaned up). The case planning provisions contrast with, for example, those in *Gonzaga* (where no private right was identified), where individuals could file a written complaint with a federal agency, triggering investigation and the possibility of relief. *See Connor B.*, 771 F. Supp. 2d at 171-72 (finding no comprehensive remedial scheme for case plan violations and explaining that periodic review of state compliance "is not the same as an individualized enforcement mechanism"). The AACWA provisions at issue here therefore satisfy the third *Blessing*/*Gonzaga* prong.

The First Circuit has highlighted the "rarity" of a "deliberate exclusion" of private rights of action under § 1983. *Colón-Marrero*, 813 F.3d at 20. Defendants cannot show that Congress "shut the door" to private enforcement: the *Blessing*/*Gonzaga* standard and First Circuit authority make clear that Congress intended to create privately enforceable rights to adequate case plans and case reviews. *See id*.[9] Defendants' motion to dismiss Plaintiffs' AACWA claim should be denied.

III. Plaintiff Youth State Claims Under the ADA and the Rehabilitation Act for Discrimination Against Youth With Mental and Behavioral Health Disabilities.

Defendants make three arguments challenging Plaintiffs' ADA and Rehabilitation Act claims: (1) that the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), requires proof of total isolation of persons with disabilities from persons without disabilities to show discrimination; (2) that Plaintiff Youth allege an "abstract" right to services in the community; and (3) that Plaintiffs' methods of administration claims are just a restatement of the integration mandate claims. These arguments stem from a flawed interpretation of the *Olmstead* decision and its progeny. Plaintiff Youth plead sufficient facts, consistent with *Olmstead* and cases that followed, to support their integration mandate and methods of administration claims under the ADA and the Rehabilitation Act.

A. Defendants Misconstrue the Integration Mandate, Which Prohibits the Unnecessary Institutionalization of Persons With Disabilities.

Defendants' first argument rests on the incorrect premise that *Olmstead* requires proof of total isolation of persons with disabilities from persons without disabilities. *See* Def. Br. at 23. As *Olmstead* and other precedent make clear, segregation from the community is the core concern

[9] Application of the pre-*Gonzaga* factors under *Blessing*, which some courts have considered even post-*Gonzaga*, requires the same conclusion. The concrete case plan and case review requirements for each individual child mean the "provisions cannot be said to be so vague and amorphous that [their] enforcement would strain judicial competence." *Sam M.*, 800 F. Supp. 2d at 388 (quoting *Blessing*, 520 U.S. at 340-41) (cleaned up); *see also Kenny A.*, 218 F.R.D. at 292. Similarly, the mandatory language throughout demonstrates the provisions "clearly impose a binding obligation on the States." *Kenny A.*, 218 F.R.D. at 292.

underlying an integration mandate claim. Plaintiff Youth allege they have been unnecessarily segregated from their communities by being placed in restrictive congregate care settings or are at risk of such segregation.

1. Segregation of people with disabilities from their communities is the crux of an *Olmstead* claim.

Contrary to Defendants' argument, *Olmstead* requires that individuals with disabilities be afforded the maximum possible integration with (and not be unnecessarily segregated from) their communities, consistent with their needs. *See Olmstead*, 527 U.S. at 600-01; *see also id.* at 589 n.1. As the Court explained,

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life . . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Id. at 600-01. Likewise, the ADA's and Rehabilitation Act's implementing regulations require that public entities provide services, "in *the most integrated setting* appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (emphasis added); *see also* 28 C.F.R. § 41.51. *Olmstead* made clear that individuals with disabilities are entitled to live in the *least restrictive setting* possible. *See Olmstead*, 527 U.S. at 599.

Courts applying *Olmstead* have therefore focused on community integration as the critical aspect of ADA and Rehabilitation Act integration mandate claims. For example, in *Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, the court certified a class asserting ADA and Rehabilitation Act claims, explaining that the integration mandate is a response to the "needless segregation of persons with disabilities" in institutions and requires that people with disabilities be "integrated in general society." 293 F.R.D. 254, 259 (D.N.H. 2013) (cleaned up). Thus, *Olmstead*

applies wherever persons with disabilities are needlessly separated from their communities. The Seventh Circuit explained that *Olmstead*'s "rationale . . . reaches more broadly" than even "unjustified institutional segregation," and applies to persons with disabilities who are unable to spend significant time in the general community. *Steimel v. Wernert*, 823 F.3d 902, 910 (7th Cir. 2016); *see also E.B. ex rel. M.B. v. Cuomo*, No. 16-CV-735, 2020 WL 3893928, at *7 (W.D.N.Y. July 11, 2020) (explaining that the integration mandate applies when individuals with disabilities "needlessly are placed in non-institutional, but nevertheless more-restrictive-than-necessary, settings").

Regarding the most integrated (or least restrictive) settings, the Department of Justice explained:

> Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible.

See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*[10] Assessing whether a setting violates the integration mandate is therefore a factual inquiry that courts are reluctant to resolve on the pleadings. For example, in *Murphy by Murphy v. Harpstead*, 421 F. Supp. 3d 695, 716 (D. Minn. 2019), after significant discovery, the district court denied the defendants' summary judgment motion where the evidence indicated that the settings at issue showed segregation from the

[10] U.S. DEP'T OF JUST., C.R. DIV., DISABILITY RTS. SECTION, available at https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Apr. 7, 2021). The ADA authorizes the U.S. Department of Justice to provide technical guidance to individuals and entities with rights and responsibilities under the ADA.

community given the "isolation, limited choice, and lesser quality of life" in the facilities. The court found the evidence raised "disputes of material fact regarding the level of integration," given that the integration mandate requires "enabl[ing] individuals to interact with non-disabled persons *to the fullest extent possible*"—a "fact intensive" determination. *Id*. (emphasis added); *see also Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 198 (E.D.N.Y. 2009), *vacated on other grounds*, 675 F.3d 149 (2d Cir. 2012).

Defendants' argument that DCYF does not discriminate against Plaintiff Youth on the basis of disability simply because DCYF places youth with disabilities and youth without disabilities in congregate care settings reflects an incorrect reading of *Olmstead*. Def. Br. at 31. The segregation of persons with disabilities from their communities is itself discrimination under the ADA and Rehabilitation Act: "Congress had a . . . comprehensive view of the concept of discrimination advanced in the ADA," and intended to thwart the continued historical practice of "unjustified 'segregation' of persons with disabilities." *Olmstead*, 527 U.S. at 598–600. Thus, contrary to Defendants' contention, *see* Def. Br. at 31, an integration mandate claim need not demonstrate that "similarly situated individuals" without disabilities are "given preferential treatment." *Olmstead*, 527 U.S. at 598. Rather, as the District of New Hampshire and other courts have made clear, the segregation of Plaintiff Youth from the more integrated settings where they could thrive is discrimination under *Olmstead*. *See id*. at 596; *Bryson v. Vailas*, No. Civ. 99-558-M, 2004 WL 613027, at *2 (D.N.H. Mar. 26, 2004); *Kenneth R.*, 293 F.R.D. at 259; *see also Steimel*, 823 F.3d at 910 (explaining that *Olmstead* established that discrimination under the ADA includes "undue institutionalization of disabled persons, *no matter how anyone else is treated*") (cleaned up).

Defendants do not cite a single case in which a court determined that an integration mandate claim requires proof that institutional settings house only individuals with disabilities.

None of the cases Defendants cite (*see* Def. Br. at 23-26) involved similar facts to those here, and not one suggests that Plaintiff Youth who are unnecessarily removed from their communities and placed in congregate care facilities do not state *Olmstead* claims. In fact, most do not address whether a plaintiff may maintain an integration mandate claim where an institutional setting houses individuals without disabilities. Defendants cite cases that simply happen to involve facilities that housed only persons with disabilities. *See, e.g.*, *Kenneth R.*, 293 F.R.D. at 260 (certified class consisted only of individuals with disabilities housed at, or at risk of being housed at, two specific facilities that only treat individuals with mental illness); *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 489 (3d Cir. 2004) (class consisted solely of individuals who were housed at a state psychiatric hospital); *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d. 938, 942 (3d Cir. 2012) (plaintiffs were individuals institutionalized at facilities for persons with intellectual disabilities).

Defendants cite other cases that also do not address the question of whether an integration claim may be maintained where a placement houses both persons with and without disabilities. In these cases, however, the settings *did* include persons with and without disabilities. In *Bryson v. Stephen*, No. 99-CV-558-SM, 2006 WL 2805238 (D.N.H. Sept. 29, 2006), for example, the court noted it had certified a plaintiff class of individuals with acquired brain disorders who were institutionalized in nursing homes, general hospitals, rehabilitation facilities, and other settings housing both individuals with disabilities and individuals without disabilities. *Id.* at *1 n.1. Similarly, in *J.S., III ex rel. J.S. Jr. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979 (11th Cir. 2017), the Eleventh Circuit held that a student with disabilities who was primarily educated with his non-disabled peers *could* maintain integration mandate claims where he was improperly removed from the classroom for even small portions of the day. *Id*. at 986-87. Thus, the cases Defendants cite do

not actually support the proposition that isolation from individuals without disabilities is the only avenue to a valid *Olmstead* claim.

2. Plaintiff Youth allege that they are unnecessarily segregated or at risk of unnecessary segregation from their communities.

Plaintiff Youth sufficiently allege integration mandate claims under the ADA and Rehabilitation Act. They allege: (1) they are qualified persons with disabilities who should receive community-based services but are currently institutionalized or at serious risk of institutionalization; (2) they do not oppose community-based treatment; and (3) providing community-based services would be a reasonable accommodation given that New Hampshire already includes these services in the State's service array. *See, e.g.*, Compl. ¶¶ 38-47, 58-124, 200-19.

The factual allegations in the Complaint also show that each of the Named Plaintiff Youth has been unnecessarily segregated or is at risk of unnecessary segregation from their communities. For example, G.K. resides in a congregate care facility that is punitive, routinized, and regulated by strict and impersonal rules resulting in G.K.'s inability to fully integrate within their community. *Id*. ¶¶ 60-61, 64-68, 206. Similarly, C.I. was forced to reside in a congregate care facility out-of-state, where they have been unable to participate in any community activities. *Id*. ¶¶ 71-82, 84, 207. T.L. and R.K. have been forced to reside in congregate care facilities, preventing them from having regular visits with their families and from making, or visiting with, friends outside of the facilities. *See id*. ¶¶ 89-95, 99, 102-18, 124, 208-09.

The Complaint further alleges Defendants' common practices or policies that unnecessarily segregate Plaintiff Youth in institutional settings from their communities. For example, Plaintiff Youth allege that in 2019, 90.5% of older youth with a DSM-V diagnosis had a current or most recent placement setting in a congregate care setting. Compl. ¶ 43. In addition, they allege that

Defendants engage in policies, practices, or customs that routinely segregate older youth in foster care in congregate facilities and in accordance with bed availability, rather than any specialized need. *Id*. ¶ 204. They also allege that Defendants fail to maintain a continuum of existing services to support community-based family settings for older youth in foster care, including a failure to recruit and maintain an adequate number of foster homes and community mental health services. *Id*. ¶¶ 211-16.

Plaintiff Youth plead the unnecessary institutionalization that is discriminatory under *Olmstead*. For example, in *Disability Advocates, Inc. v. Paterson*, the court found that the placement of adults in adult homes and nursing homes was, in effect, institutionalization, because the plaintiffs there, just like Plaintiff Youth, were "stuck" in institutional settings. 653 F. Supp. 2d at 184, 198 (E.D.N.Y. 2009), *vacated on other grounds*, 675 F.3d 149 (2d Cir. 2012). The plaintiffs in *Paterson* were placed in institutions "designed to manage and control . . . by eliminating choice and personal autonomy, establishing inflexible routines for the convenience of staff, restricting access, implementing measures which maximize efficiency, and penalizing residents who break the rules." *Id*. at 199. These are precisely the type of restrictions that Plaintiff Youth assert here. *See, e.g.*, Compl. ¶¶ 65-67, 75-82, 92-95, 104, 112-15.

B. Plaintiffs Seek Access to Placements and Services Already Provided in Their Communities.

Defendants next argue that Plaintiff Youth's *Olmstead* claims fail because "neither the ADA nor the Rehabilitation Act confer an abstract right to receive services in the most integrated setting tailored to one's needs." Def. Br. at 35. This argument misstates Plaintiff Youth's claims and should be rejected. Plaintiff Youth do not allege an "abstract"[11] right to services. Instead,

[11] It is unclear precisely what Defendants mean by "abstract." For purposes of this Objection, Plaintiff Youth interpret Defendants to mean a right to new services or a right to preferential treatment for services.

Plaintiff Youth assert their right to integration into their communities, to the extent guaranteed by the ADA, the Rehabilitation Act, and their implementing regulations. Plaintiff Youth plead that Defendants can make reasonable accommodations to enable them to live and receive services in their communities by, for example, shifting resources away from institutions to ensure access to community foster homes and mental health services. *See* Compl. ¶ 227. Nor do Plaintiff Youth seek additional or "special services." *See* Def. Br. at 34. They seek access to services in the community that New Hampshire already provides according to the State's own policies, albeit to such a limited extent that youth who are entitled to those services end up in congregate settings or at risk of being placed in congregate settings. *See* Compl. ¶ 38. These services include family foster homes, home-based therapy, and independent service options. *See* Compl. ¶¶ 212, 216.

Defendants rely heavily on two cases, *Alexander v. Choate*, 469 U.S. 287 (1985), and *Charlie H. v. Whitman*, 83 F. Supp. 2d 476 (D.N.J. 2000), (Def. Br. at 32-34) neither of which applies here. First, *Alexander* is not about the integration mandate at all. In *Alexander*, the plaintiffs sued to stop Tennessee from reducing, from 20 to 14, the number of inpatient hospital days the state's Medicaid program would cover for all individuals. 469 U.S. at 290. The Court held that the reduction did not give rise to a Rehabilitation Act claim because the factual record did not reflect evidence that individuals with disabilities would be denied "meaningful access to Tennessee Medicaid services or exclude them from those services," and "nothing in the record" suggested individuals with disabilities would be "unable to benefit meaningfully" from coverage under the 14-day rule. *Id*. at 302. *Alexander* therefore illustrates that whether individuals with disabilities have "meaningful access" to state benefits depends entirely on the specific system at issue. Moreover, as explained above, unlike the *Alexander* plaintiffs, Plaintiff Youth seek access to the very community placements and services the state must provide for all children in its custody,

including foster family, kinship, and home and community-based therapeutic services. *See, e.g.*, Compl. ¶¶ 212-13.

Charlie H. also did not concern *Olmstead*'s integration mandate. 83 F. Supp. 2d at 499-500. The *Charlie H.* court was concerned that the plaintiffs were challenging the "substance of services provided," and that the accommodations plaintiffs sought did not exist at all. *Id*. at 501 (cleaned up). Unlike in *Charlie H.*, Plaintiff Youth do not seek any "special" programs or services beyond those New Hampshire already offers. They clearly allege the availability of these services in the state. *See* Compl. ¶¶ 212-17.

C. Plaintiff Youth Plausibly Allege Methods of Administration Claims.

Finally, in one page-long footnote, Defendants suggest that Plaintiffs' methods of administration claims are redundant of the integration mandate claims. *See* Def. Br. at 19 n.5. The claims are separately actionable as a matter of law, and Plaintiff Youth specifically and plausibly assert methods of administration claims.[12]

The implementing regulations for both the ADA and the Rehabilitation Act prohibit New Hampshire, either directly or through contractual or other arrangements, from utilizing criteria or methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; or (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities. *See* 28 C.F.R. § 35.130(b)(3)(i)–(ii); 45 C.F.R. § 84.4(b)(4)(i)–(ii).

[12] While Plaintiffs allege facts that independently support their methods of administration claims (*see* Compl. ¶¶ 220-28), to the extent any of the allegations overlap with those underlying the integration mandate claims, that is not a basis for dismissal of either set of claims. Under Fed. R. Civ. P. 8(d)(2), "[a] party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."

Courts routinely recognize methods of administration claims such as those alleged here, separate and apart from integration mandate claims. For example, in *Kathleen S. v. Dep't of Pub. Welfare of Pa.*, 10 F. Supp. 2d 460, 471 (E.D. Pa. 1998), the Eastern District of Pennsylvania found that the state failed to "transfer funds from the institution to the community to assure prompt community placements for appropriate class members," and that there was "nothing to preclude [the state] from shifting the cost of treatment of class members from the institution to the community." *Id.* at 473. The district court held the state engaged in methods of administration that had the effect of discriminating against the plaintiffs by contributing to their unnecessary segregation in institutions. *Id.* The District of Connecticut also allowed a methods of administration claim to proceed where nursing home residents alleged the state's failure to assess them for community placements and inform them of their right to choose placement in the community. *See Conn. Off. of Prot. & Advoc. for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 278 (D. Conn. 2010); *see also Kenneth R.*, 293 F.R.D. at 259 (certifying a class where plaintiffs alleged the government utilized methods of administration causing plaintiffs to be unnecessarily confined); *Day v. District of Columbia*, 894 F. Supp. 2d 1, 22-23 (D.D.C. 2012) (denying a motion to dismiss where plaintiffs alleged that defendants utilized methods of administration causing their confinement).

Plaintiffs allege that Defendants utilize methods of administration that cause Plaintiff Youth to live unnecessarily in institutions and segregated from the community. For example, they allege Defendants have a practice of routinely segregating older youth in foster care based on bed availability, rather than any specialized need. *See* Compl. ¶ 204. Defendants also continue to rely on restrictive placements out-of-state, routinely sending Plaintiff Youth across the country, far from their home communities and families. *See id.* ¶ 225. Plaintiff Youth further allege that

Defendants have a practice of failing to recruit and support adequate foster homes, including kinship caregivers. *See id.* ¶ 213.

Moreover, Plaintiffs allege that Defendants administer their systems in a manner that disproportionately funds institutional placements and services over family and community settings. *See id.* ¶¶ 221-22. Defendants admitted in their own 2018 assessment that "[t]he current system is skewed to serve children, youth, and families with the most expensive, most restrictive services, rather than with more upstream, preventive services and supports." *See id.* ¶ 223. As described in the Complaint, Defendants have an ongoing policy, practice, pattern, and/or custom of funneling excessive resources into congregate settings, consequently impacting the availability of family foster homes and access to community mental health services for older youth in foster care. *See id.* ¶¶ 203, 224. Plaintiff Youth have plausibly alleged facts which support independent "methods of administration" claims under the ADA and Rehabilitation Act. Defendants' motion to dismiss these claims should be denied.

IV. The Court Should Reject Defendants' Attempt to Dismiss the Class Action Allegations at the Pleadings Stage of This Action.

Defendants next argue for dismissal of the class action allegations and Plaintiffs' request for injunctive relief at this pleadings stage. These arguments are easily defeated as Plaintiff Youth's Complaint alleges more than sufficient facts to support a putative Rule 23(b)(2) class action for injunctive relief.

First, Defendants' argument for dismissal of the class allegations is premature. Plaintiff Youth have not moved for class certification, no discovery on the class allegations has taken place, and neither party has presented evidence on whether the facts alleged meet the standard for class certification. The First Circuit has cautioned that ruling on class allegations at the pleading stage is "drastic," "rare," and "disfavored." *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st

Cir. 2013) (reversing grant of motion to strike class allegations on pleadings, holding that courts should await the development of a factual record before deciding class certification).[13]

Second, Plaintiff Youth have alleged ample facts in the Complaint to support class certification at this stage, including common questions of law and fact. *See* Compl. ¶¶ 27-28. Class certification under Rule 23(b)(2) is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is intended for cases such as this, in which "class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *García-Rubiera v. Calderon*, 570 F.3d 443, 461 (1st Cir. 2009) (cleaned up).

Contrary to Defendants' suggestion, *see* Def. Br. at 37, courts do not require identical facts among plaintiffs to allege a Rule 23(b)(2) class. Rather, it is black-letter law that the "conduct complained of is the benchmark for determining" the existence of a Rule 23(b)(2) class, "making it uniquely suited to civil rights actions." *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972), *abrogated on other grounds*; *see also Murphy v. Piper*, No. 16-2623 (DWF/BRT), 2017 WL 4355970, at *15 (D. Minn. Sept. 29, 2017) (certifying a Rule 23(b)(2) class in an action "center[ing] on Defendant's conduct in administering" services statewide for individuals with

[13] *See also Ortiz v. Sig Sauer, Inc.*, 448 F. Supp. 3d 89, 99 (D.N.H. 2020) (denying motion to strike or dismiss plaintiff's proposed class as premature without discovery); *Begley v. Windsor Surry Co.*, No. 17-CV-317-LM, 2018 WL 1401796, at *11 (D.N.H. Mar. 19, 2018) (denying motion to strike class allegations as premature and without "exceptional circumstances that justify relief prior to the certification phase"). Even cases Defendants cite demonstrate that class allegations should rarely, if ever, be dismissed at this stage. *See Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 655 (D. Nev. 2009) ("dismissal of class allegations at the pleading stage should be done rarely and . . . the better course is to deny such a motion because the shape and form of a class action evolves only through the process of discovery") (cleaned up); *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 451 (D.R.I. 2002) (denying motion to strike class allegations, noting that "at the initial stages of litigation, prior to discovery, defendant cannot prevail because it has a hunch or even a reasonable basis to believe that plaintiff will fail to meet Rule 23's requirements for class action").

disabilities "whose circumstances are impacted by Defendant's actions and inactions with respect to the class as a whole"). As the Supreme Court has explained, a Rule 23(b)(2) class is appropriate where the relief requested would apply *generally* to the class as a whole, and not where "each individual class member would be entitled to a *different* [form of relief]." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Members of the class need not have identical situations, and here the relief requested applies to the class generally as a whole.

The Complaint specifically alleges that "Defendants have acted or failed to act on grounds generally applicable to all members of the Class, necessitating class-wide declaratory and injunctive relief" (Compl. ¶ 26), including through the unnecessary warehousing of Plaintiff Youth in congregate care facilities (*id*. ¶¶ 37-48); the harmful structural practice of frequently moving Plaintiff Youth from one placement to another (*id*. ¶¶ 49-54); the failure to ensure the provision of counsel to Plaintiff Youth in their New Hampshire dependency proceedings (*id*. ¶¶ 125-60); the failure to ensure Plaintiff Youth receive adequate case plans (*id*. ¶¶ 161-85); and the structural practice of discriminating against Plaintiff Youth with mental and behavioral health disabilities (*id*. ¶¶ 186-228). The Complaint includes ample allegations showing possible forms of relief that would apply to the proposed class as a whole, including, for example: ensuring access to counsel at Plaintiff Youths' dependency proceedings (Compl. ¶ 268(d)(i)); and ensuring both "a process and quality assurance mechanism reasonably calculated to timely provide and implement adequate case plans" to the putative class (*id*. ¶ 268(d)(ii)). The class action allegations are more than sufficient. The Court should reject Defendants' premature attempt to litigate class certification.

V. Plaintiffs Adequately Allege Possible Injunctive Relief in Their Complaint.

Finally, Defendants' request to dismiss Plaintiffs' request for injunctive relief at the pleading stage lacks any merit.

First, Defendant's motion is again premature. Plaintiffs have not sought liability findings, much less remedies tailored to any liability. Defendants have not admitted or denied the allegations, discovery has not begun, and evidence has not been marshalled for or against an injunction. Defendants suggest that because the Plaintiffs' prayer for relief includes a request for "affirmative action by the non-moving party," Def. Br. at 42, Plaintiffs' burden is so high that the request for injunctive relief may be dismissed at this early stage. But any request for an injunction would be evaluated under the familiar, fact-intensive, four-part test: 1) whether the movant has suffered an irreparable injury, 2) whether there are adequate remedies at law to compensate the movant, 3) the balance of relevant hardships between the parties, and 4) the effect of the ruling on the public interest. *See Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 622 F.3d 36, 40-41 (1st Cir. 2010); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Defendants' motion to dismiss the request for injunctive relief now is fatally premature, as the Court does not have a sufficient record to evaluate whether an injunction, or what precise injunction, is appropriate at this early stage. *See, e.g.*, *S.E.C. v. Tambone*, 802 F. Supp. 2d 299, 305-06 (D. Mass. 2011) (precluding injunctive relief would be "premature," given that information relevant to relief was "likely to be elicited at trial").[14]

Second, Defendants' reliance on the dissenting and concurring opinions in *Olmstead* to suggest that "federalism concerns" would prevent the Court from issuing *any* injunctive relief on Plaintiffs' ADA and Rehabilitation Act claims, Def. Br. at 40, ignores the prematurity of Defendants' objection and the fact-specific nature of relief under the heart of an *Olmstead* claim,

[14] *See also Fauley v. Wash. Mut. Bank FA*, No. 3:13-cv-00581-AC, 2014 WL 1217852, at *9 (D. Or. Mar. 21, 2014) (a request for an injunction is not a "claim for relief" susceptible to Rule 12(b)(6) dismissal); *Kiluk v. Select Portfolio Servicing, Inc.*, No. 11-10731-FDS, 2011 WL 8844639, at *1 n.2 (D. Mass. Dec. 19, 2011) (holding on a motion to dismiss it would be "clearly premature to determine the form of relief . . . before adjudicating the merits").

as discussed in detail above. *See Olmstead*, 527 U.S. at 587. As discussed, Plaintiffs' request for relief falls squarely within the paradigm contemplated by *Olmstead*. *See* Complaint ¶¶ 268(d)(iii), (iv). Defendants' generalized "federalism concerns" cannot form a basis to dismiss the request at this stage. *See Lynch v. Dukakis*, 719 F.2d 504, 413 (1st Cir. 1983) ("the scope of injunctive relief is dictated by the extent of the violation established") (cleaned up).[15]

Third, Defendants' suggestion that, based solely on the New Hampshire Constitution, Plaintiffs' request for injunctive relief should be dismissed because Plaintiffs have sued executive branch officials rather than legislative branch officials, *see* Def. Br. at 41, must also fail. The New Hampshire Constitution does not limit Defendants' obligations to comply with federal law. *See, e.g.*, *Lynch*, 719 F.2d at 511 ("Indeed, one purpose for enacting section 1983 was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.") (cleaned up). Nor do Plaintiffs, as Defendants suggest, "ask this Court to order that additional funds be appropriated for community based-services and family placements." Def. Br. at 41. Rather, Plaintiffs provide examples of how the Court might tailor relief at the appropriate stage. *See, e.g.*, Compl. ¶ 268(d)(iii) (requesting a remedy in the form of "a process and quality assurance mechanism" to ensure the availability of integrated housing and services in the community); *id*. ¶ 268(d)(iv) (requesting, "for example," a remedy "ensuring the availability of community-based family settings and services" and "shifting resources from segregated congregate care facilities to community-based services and family placements"). The Court should reject Defendants' attempt to skip to the remedy stage at the early stages of this fact-intensive suit.

[15] To the extent Defendants attempt to raise, without naming, a "fundamental alteration" defense, the motion to dismiss stage is not appropriate for such a factual determination. *See M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 13 (D.D.C. 2019) (plaintiffs stated a claim under the ADA and Rehabilitation Act where they alleged compliance with the law would not require a fundamental alteration to defendants' service system); *Martin v. Taft*, 222 F. Supp. 2d 940, 972 (S.D. Ohio 2002) ("[W]hether requested relief would entail a fundamental alteration is a question that cannot be answered in the context of a motion to dismiss . . . ."); *see also* Compl. ¶ 227.

REQUEST FOR ORAL ARGUMENT UNDER LOCAL RULE 7.1(d)

Under Local Rule 7.1(d), Plaintiffs request that the Court hear oral argument on Defendants' motion. Given the complexity of this case and the multiple issues raised by Defendants' motion, Plaintiffs seek the opportunity to answer any questions the Court may have in reaching a ruling.

CONCLUSION

For all of the reasons stated herein, this Court should deny Defendants' Motion to Dismiss in its entirety.

DATED: April 7, 2021

Respectfully submitted,

/s/ *Henry R. Klementowicz*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 7th day of April, 2021, on all counsel of record, via the ECF System.

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