THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CASSIE M. by Next Friend Kymberli Irons ALEX AND JARED C. by next friend Gregory C. Elliott; TERRENCE T., by next friend Gregory C. Elliott, TRACY L., by Next Friend Kymberli Irons; and DANNY B., by next friend Gregory C. Elliott; for themselves and those similarly situated	:	
v.	:	**C.A. 1:07-cv-00241-ML-LDA**
LINCOLN CHAFEE, in his official capacity as Governor of the State of Rhode Island; STEVEN M. COSTANTINO in his official capacity as Secretary of the Executive Office of Health & Human Services; and JANICE E. DEFRANCES, in her official capacity as Director of the Department of Children, Youth and Families	:	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE CLAIMS ASSERTED ON BEHALF OF TERRENCE T.

This matter is before this Honorable Court on Defendants Governor Lincoln D. Chafee, Secretary Steven M. Costantino and Director Janice E. DeFrances motion for judgment as a matter of law pursuant to Fed.R.Civ.P.56 with respect to the claims of Terrence T. Defendants submit that based on the undisputed material facts, they are entitled to judgment as a matter of law as Terrence T.'s claims are moot.

Wherefore, Defendants pray that this motion is granted and Plaintiff Terrence T.'s Amended Complaint is denied and dismissed.

Respectfully submitted

DEFENDANTS
By their Attorney,

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/s/ Brenda D. Baum

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CERTIFICATION

I, the undersigned, hereby certify that I filed the within Defendants' Motion for Summary Judgment with respect to the claims of Terrence T. via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF System to the following attorneys of record on this 17th day of July 2013.

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE CLAIMS ASSERTED ON BEHALF OF TERRENCE T.

I. INTRODUCTION

This matter is before this Honorable Court on Defendants Governor Lincoln D. Chafee, Secretary Steven M. Costantino and Director Janice E. DeFrances (the "State Defendants") motion for judgment as a matter of law pursuant to Fed.R.Civ.P.56 with respect to the claims of Terrence T. Terrence T. turned eighteen (18) years old on July 4, 2013 and the Rhode Island Family Court entered a decree closing the petition and terminating DCYF's involvement and legal custody of Terrence on July 9, 2013. State Defendants submit that based on the undisputed material facts, they are entitled to judgment as a matter of law as Terrence T.'s claims are moot.

II. STATEMENT OF FACTS

On February 24, 2012, Plaintiffs' filed a Second Amended Complaint adding Terrence T. as a Named Plaintiff Child by his next fried Gregory C. Elliot. Document 115. At the time of the filing of the Second Amended Complaint, Terrence was sixteen and a half (16½) years old. It is alleged in the Second Amended Complaint that Terrence suffered violations of his constitutional and statutory rights as a result of alleged actions and/or inactions of the Rhode Island Department of Children, Youth and Families ("DCYF") while in their legal foster care custody. Document 115, pp. 18-21. The Second Amended Complaint seeks only prospective injunctive relief against the State Defendants. Document 115, pp. 78-79.

On July 4, 2013, Terrence T. turned 18 years old. Exhibit A: Birth Certificate, filed under seal. On July 9, 2013, a hearing on Terrence's case was held before a justice of the Rhode Island Family Court. Exhibit B: Decree of the Rhode Island Family Court, filed under seal. At the conclusion of the hearing, the Family Court entered an Order and Decree holding that the petition that brought Terrence into DCYF's legal custody was closed and terminated DCYF's involvement and legal custody of Terrence. Exhibit B.

III. ARGUMENT

This Honorable Court should dismiss the claims of Plaintiff Terrence T. as he does not satisfy the "case or controversy" threshold requirement of a federal court suit. Terrence turned 18 years old and an Order and Decree of the Rhode Island Family Court terminated DCYF's legal custody and involvement with him. Terrence is no longer subject to placements, visitation, services, etc. through DCYF or its social workers. Terrence has no legally cognizable interest in the outcome of this case.

Article III of the Constitution restricts the jurisdiction of federal courts to the resolution of actual cases and controversies. Overseas Military Sales Corporation, Ltd. v. Giralt–Armada, 503 F.3d 12 (1st Cir. 2007); Sam and Tony M. ex rel. Elliott v. Chafee, 800 F.supp.2d 363, 371 (D.R.I. 2011). "Because 'those words limit the business of federal courts to questions presented in an adversary context,' courts are precluded from rendering advisory opinions." Sam and Tony M., 800 F.Supp.2d at 371(citing Giralt–Armada, 503 F.3d 12, 160-17)(1st Cir. 2007)). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Id. (citing Overseas Military Sales Corporation, Ltd. v. Giralt–Armada, 503 F.3d at 17). See also Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969).

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

> Article III considerations require that an actual case or controversy "must be extant at all stages of review, not merely at the time the complaint is filed." Steffel, 415 U.S. at 459 n.10, 94 S.Ct. 1209. When, as now, a plaintiff has initial standing to bring a particular claim, a federal court is duty bound to dismiss the claim as moot if subsequent events unfold in a manner that undermines any one of the three pillars on which constitutional standing rests: injury in fact, causation, and redressability. See Goodwin v. C.N.J., Inc., 436 F.3d 44, 46 (1st Cir.2006) ("A case becomes moot if, at some time after the institution of the action, the parties no longer have a legally cognizable stake in the outcome."); Mangual, 371 F.3d at 60. ("If events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case.").

Ramirez v. Sanchez Ramois, 438 F.3d 92, 100 (1st Cir. 2006). To demonstrate mootness, the Defendants "must show that, after the case's commencement, intervening events have blotted out the alleged injury and established that the conduct complained of cannot reasonably be expected to recur. If it is sufficiently plain that intervening events have wiped the slate clean, the case has become moot." Ramirez, 438 F.3d at 100. See also, Sam and Tony M., 800 F.Supp.2d at 372.

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

As Terrence has turned eighteen (18) years old, he is a legal adult and will not become subject to foster care in the future. Therefore, there is no reasonable expectation that Terrence will be "subjected to the same action again."

Plaintiffs similarly cannot demonstrate that Terrence's claims should not be dismissed based on being "inherently transitory." In order to be "inherently transitory", there must be a realistic threat that no trial court will ever have enough time to decide the underlying issues before mootness attaches." Marek v. State of Rhode Island, 702 F.3d 650, 655 (1st Cir. 2012); Cruz v. Farquharson, 252 F.3d 530, 535 (1st Cir.2001). As it did in 2011, this Court should reject an "inherently transitory" argument. In the 2011 decision on Defendants' Motion to Dismiss, this Court rejected Plaintiffs' argument that the claims of the five (5) adopted children were "inherently transitory" and should be treated as an exception to the mootness doctrine. Sam and Tony M., 800 F.Supp.2d at 363. This Court explained:

> The plaintiffs also suggest that their claims are "inherently transitory" because "it was reasonable to expect, given the temporary nature of foster care, that these five named Plaintiffs might leave DCYF custody prior to a ruling on class certification." Pltfs.' Obj. 68. It is undisputed, however, that two of the named plaintiffs, who have asserted identical claims and seek identical relief, are still in DCYF custody. Moreover, the plaintiffs have repeatedly stated that they are prepared to seek leave to supplement the amended complaint by adding other plaintiffs to this action. *See e.g.* Pltfs.' Obj. 4 n. 3. Therefore, as the plaintiffs rightly point out, a determination that the claims of the adopted plaintiff children are moot is not dispositive. However, because no live controversy exists between

> the adopted children and the defendants, the Court finds that the claims of these particular plaintiffs have been rendered moot. Therefore, the claims of Deanna H., Sam M., Tony M., Michael B., and Caesar S. are dismissed from the case.

Id. at 373. Plaintiff's cannot show that if this Court dismissed Terrence's claims that there is a realistic threat that no trial court will ever have enough time to decide the underlying issue. It is undisputed that at least two of the Named Plaintiffs, Cassie M. and Danny B., who have asserted identical claims and seek identical relief, are still in the legal custody of DCYF.[1]

In similar challenges to a state's child welfare system, other federal courts have dismissed a plaintiff child from the lawsuit based on adoption or becoming an adult. In 2009, the United States District Court for the Northern District of Oklahoma similarly rejected the argument that a foster child's 42 U.S.C. §1983 claims for alleged failures in the Oklahoma foster care system legal claims were "inherently transitory" and dismissed his individual case on mootness grounds. D.G. ex rel. Stricklin v. Henry, 1009 WL 1011595 (N.D.Okla. 2009)[2]. The D.G. District Court rejected Plaintiffs' "inherently transitory" generalizations and reviewed the facts as to the individual child, D.G.

In D.G,

> [t]he case was filed February 13, 2008, by nine named plaintiff children in Oklahoma Department of Human Services ("DHS") custody alleging DHS's foster care policies and practices violate their federal constitutional and statutory rights. [Doc. No. 2, Complaint]. Plaintiff children sought prospective injunctive relief compelling defendants to correct alleged deficiencies in the foster care system. Simultaneous with the filing of their complaint, plaintiff children filed a motion seeking certification of a class of all children currently in DHS custody. [Doc. No. 4] The class certification motion is set for hearing May 5, 2009.

2009 W.L. 1011595 at *1. Plaintiffs alleged in their Complaint that D.G. was a five (5) month

[1] Plaintiffs' Motion for Class Certification is not extinguished if Terrence is dismissed as Cassie and Danny remain as plaintiffs.

[2] Children's Rights Organization is one of Plaintiffs' legal counsels in both D.G. and this case.

old boy who had been in state foster care shortly after his birth. Id. The complaint alleged that D.G. had already been moved to at least four different placements by the state DHS. Id. D.G. was adopted by his foster parents on November 4, 2008. Id. On that same date D.G.'s "juvenile case was dismissed; thus he is no longer in the physical or legal custody of DHS." Id.

The State of Oklahoma moved for summary judgment seeking dismissal of D.G.'s case on the grounds of mootness. "Defendants argue[d] that since D.G. [was] no longer in the physical or legal custody of DHS, he [could not] be harmed by the agency's allegedly unconstitutional practices; therefore his claims are moot. Plaintiffs contend D.G. should remain a named plaintiff because two exceptions to the mootness doctrine apply: first, they allege plaintiff's claims are inherently transitory and second, plaintiffs assert defendants purposefully expedited the adoption to force D.G. out of the suit." Id. The District Court for the Northern District of Oklahoma found that D.G.'s claims did not fall within the "inherently transitory" exception so as to escape dismissal. Specifically, the District Court reasoned:

> … In the 14 months since this lawsuit was filed, D.G. is the only named plaintiff reported to have left DHS custody. The remaining eight plaintiffs, who are all still in DHS custody, assert identical constitutional violations and request the same prospective injunctive relief sought by D.G.[3] Moreover, plaintiffs' class certification motion is set for hearing within three weeks. Therefore, plaintiffs' claims are not so "inherently transitory" as to give rise to an exception to the mootness doctrine.

Id. at 2. The District Court granted the State Defendants' motion for summary judgment as to the claims of D.G. on the grounds of mootness. Two days after the District Court's decision, the

[3] As Plaintiffs' correctly note in their memorandum in this case, "even if the claims of these five Named Plaintiffs were dismissed, the action would nonetheless survive as Named Plaintiffs David and Danny B. are still in Defendants' custody and" the request for injunctive relief remain viable. Plaintiffs' Memorandum of Law [Document 80] at p. 79. As the D.G. Court recognized, David and Danny assert identical constitutional violations and request the same prospective injunctive relief sought by Sam and Tony M., Deanna H. Caesar S., and Michael B. The factual history for each of these five children cannot be deemed "inherently transitory" as to defeat mootness.

State Defendants filed a motion for summary judgment seeking dismissal of the claims of Plaintiff child C.S. as she was adopted and her claims were moot. On July 8, 2009, the District Court granted Defendants motion and dismissed C.S.'s claims.

Similarly, in 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003)[4], Plaintiffs, twenty-two children in state foster care, filed suit against the Governor and Florida's Department of Children and Families, under §1983 alleging declaratory and injunctive relief. Although brought as a putative class action, it is uncertain from the decision whether the court ever certified a class. The District Court granted and the Eleventh Circuit affirmed the dismissal of the claims of two children who had been adopted. 329 F.3d at 1255. After reciting the well-settled "case or controversy" requirements, the Eleventh Circuit explained:

> [t]he defendants contend that Larissa C.'s and Leanne G.'s claims are moot, and we agree. Because Larissa C. and Leanne G. have been adopted, they are no longer in the defendants' legal or physical custody and therefore cannot be further harmed by the defendants' alleged illegal practices. Because the plaintiffs' amended complaint seeks only prospective injunctive relief against the defendants to prevent future harm, no live controversy exists between them and these two plaintiffs. Larissa C. and Leanne G. have no legally cognizable interest in the outcome of this lawsuit. All of their claims are moot.

Id. at 1263. In the past, Plaintiffs have attempted to distinguish the Eleventh Circuit's ruling arguing that it did not make "findings and did not rule upon whether the named plaintiffs' claims were so inherently transitory that they should survive." Plaintiffs' memorandum [Document 80] at p. 69. Had the Eleventh Circuit Court of Appeals found the claims of these two foster children to be inherently transitory, a well-settled exception to the mootness doctrine, it would not have dismissed the claims.

The United States District Court for the District of Nebraska also dismissed the claims of two named plaintiff foster children for mootness as they had reached the age of majority and

[4] Children's Rights Organization was one of Plaintiffs' legal counsels.

would not be in the custody of Nebraska's child welfare agency. In Carson P. ex rel Foreman v. Heineman, 240 F.R.D. 456 (D.Neb. 2007) the Complaint[5] brought by foster children against the Governor and Nebraska's child welfare agency sought declaratory and injunctive relief for the alleged systemic deficiencies in state foster care. The plaintiffs filed a motion to certify the case as a class action with the Complaint. The District Court ruled upon Defendants' Motion to Dismiss and Motion for Class Certification simultaneously. The Defendants specifically moved to dismiss the claims of Cheryl H. and Paulette V. based on lack of standing, mootness of claims and whether they could adequately represent the class under Rule 23. 240 F.R.D. at 510. Both Cheryl and Paulette had reached the age of adulthood under Nebraska law and, as such, would no longer be subject to the alleged harm caused by the Nebraska child welfare system.[6] Id.

Objecting to defendants' theories for dismissal, Plaintiffs alleged that the claims of Cheryl and Paulette fell within the mootness exceptions of "capable of repetition, but evading review" and that "foster care" claims are transitory. The Foreman Court found neither argument persuasive. It reasoned:

> The plaintiffs argue that "foster care" claims are "inherently transitory" and therefore the "capable of repetition, but evading review" doctrine must be applied on that basis. However, the plaintiffs have not cited and the court has not found any law stating that the claims at issue in this litigation are considered sufficiently "transitory" to invoke the application of the doctrine. To the contrary, both Cheryl H. and Paulette V. allege they were allowed to "languish" or were required to

[5] The Complaint is substantially to the one filed against Rhode Island. Children's Rights Organization is one of Plaintiffs' legal counsels.

[6] Specifically, the Foreman Court reasoned: "[t]he amended complaint seeks declaratory and injunctive relief. However, by operation of law and based solely on their age (not on the discretion of any HHS representative), Cheryl H. and Paulette V. are not now and never will be in HHS legal custody again. They face no present or future risk of exposure to HHS' allegedly deficient policies and procedures. Therefore, Paulette V. and Cheryl H. cannot show they " face[ ] some likelihood of becoming involved in the same controversy in the future," because their claims for injunctive relief "may arise again." Geraghty, 445 U.S. at 398, 100 S.Ct. 1202."

remain in HHS legal custody for many years. Filing 64 (Amended Complaint), ¶¶ 58-66, 78-80. The evidence submitted in this case demonstrates that the claims of Cheryl H. and Paulette V., as well as the other named plaintiffs, are not transitory in nature. [Footnote omitted].

Cheryl H. and Paulette V. were juveniles in HHS legal custody when this litigation was filed, but they are now adults. As such, they have neither a current nor a potential future claim for injunctive relief against HHS arising from its allegedly deficient child welfare system. A case can become moot if events occur after it was filed that make it absolutely clear that the allegedly wrongful behavior at issue in the lawsuit cannot reasonably be expected to occur again. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Since Cheryl H. and Paulette V. will not "suffer a future injury that will be remedied" by the relief requested in this lawsuit, their claims are moot. Elizabeth M., 458 F.3d 779, 784-85 (8th Cir.2006). Their continued presence in the class "poses a substantial risk to the 'efficiency and economy of litigation which is a principal purpose' behind the class action device." Elizabeth M., 458 F.3d 779, 784-85 (8th Cir.2006)(citing Falcon, 457 U.S. at 159, 102 S.Ct. 2364).

Since Cheryl H. and Paulette V. cannot be members of the class they seek to represent, they cannot be class representatives. For the same reasons, their claims for injunctive and declaratory relief should be dismissed. FN30 See e.g. Elizabeth M., 458 F.3d 779, 784-85 (8th Cir.2006)(holding the district court abused its discretion by including former residents of residential mental health facilities in a class seeking declaratory and injunctive relief for allegedly harmful state practices and policies). See also 31 Foster Children v. Bush, 329 F.3d 1255, 1263 (11th Cir.2003)(holding that two plaintiffs who had been adopted had no legally cognizable interest in the outcome of a lawsuit for injunctive relief-they were "no longer in the defendants' legal or physical custody and therefore cannot be further harmed by the defendants' alleged illegal practices. Because the plaintiffs' amended complaint seeks only prospective injunctive relief against the defendants to prevent future harm, no live controversy exists between them and these two plaintiffs."); J.B., 186 F.3d at 1290 (granting defendants' motions to dismiss certain named plaintiffs because they had reached the age of majority or otherwise fallen outside of state custody, rendering their claims moot); Robinson v. Leahy, 73 F.R.D. 109, 113-14 (D.C.Ill.1977)(holding that a post-adjudication child welfare custody, unlike pretrial detention (distinguishing Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)), cannot be characterized as so transitory that a putative class representative whose claim became moot before a class was certified can nonetheless represent the class).

FN30. The basis for dismissal is not lack of standing. Both Cheryl H. and Paulette V. were minors when the suit was filed. However, " [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must

> continue throughout its existence (mootness)." Friends of the Earth, 528 U.S. at 189, 120 S.Ct. 693 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68, n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)(quoting Geraghty, 445 U.S. at 397, 100 S.Ct. 1202)).

Foreman, 240 F.R.D. at 511-512.

The Defendants submit that the sound reasoning of these various federal courts support the dismissal of the claims of Plaintiff Terrence T. on mootness grounds.

IV. CONCLUSION

The State Defendants are entitled to Fed.R.Civ.P. 56 judgment as a matter of law on the claims of Terrence T. By Order and Decree of the R.I. Family Court, the petition that brought Terrence into foster care and legal custody of DCYF is closed and DCYF's involvement has been terminated. Terrence's claims are moot and there is no live case or controversy between Terrence and the State Defendants. Wherefore, State Defendants pray that this motion is granted and Terrence's claims are dismissed with prejudice.

Respectfully submitted

DEFENDANTS
By their Attorney,

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