UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CASSIE M., by Next Friend Kymberli Irons; 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, **Plaintiffs,** **v.** **LINCOLN D. 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 & Families,** **Defendants.**	**Class Action** **Civil Action No. 1:07-cv-00241-ML-LDA**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL, AND RULE 23(C)(1)(A) REQUEST FOR TIMELY DETERMINATION

TABLE OF CONTENTS

Table of Authorities iv

Preliminary Statement 1

Procedural History 4

Background Facts and Legal Issues 8

I. Defendants Cause Harm to Plaintiff Children in the Putative Class 8

II. Defendants Have Caused Harm to the Named Plaintiffs and Expose Them to Risks of Harm 9

III. Defendants' Actions and Inactions Violate the Constitutional and Statutory Rights of All Plaintiff Children 11

Argument 13

I. As Numerous Courts Have Held in Similar Cases, This Action Meets All Rule 23 Requirements for Class Certification 13

II. The Class Meets the Numerosity, Commonality, Typicality and Adequacy Requirements of Rule 23(a) 16

A. The Class Is So Numerous that Joinder Is Impracticable 16

B. There Are Multiple Questions of Fact and Law Common to All Class Members 17

C. The Claims of the Named Plaintiffs Are Typical of the Claims of the Class 29

D. The Named Plaintiffs Will Adequately Represent the Members of the Proposed Class 31

III. Class Certification Is Warranted Under Rule 23(b)(2) 33

IV. Plaintiffs' Counsel Will Fairly and Adequately Represent the Interests of the Class and Should Be Appointed Class Counsel 35

V. The Court Should Rule on Plaintiffs' Second Motion for Class Certification Without Delay To Avoid Irreparable Prejudice to Plaintiff Children 36

A. Rule 23(c)(1)(A) Requires a Prompt Determination of Class Certification Where As Here Recurring Mootness Problems Are Inherent to the Class and Threaten Irreparable Prejudice 36

B. Expedited Pre-Class Certification Discovery Should Be Ordered 42

Conclusion 45

TABLE OF AUTHORITIES

Cases

Advertising Specialty National Ass'n v. Federal Trade Commission,
238 F.2d 108 (1st Cir. 1956) ... 16

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) ... 13

Andrews v. Bechtel Power Corp.,
780 F.2d 124 (1st Cir. 1985) ... 31

Avilez v. Pinkerton Government Services,
286 F.R.D. 450 (C.D. Cal. 2012) ... 19

Baby Neal ex rel. Kanter v. Casey,
43 F.3d 48 (3d Cir. 1994) ... passim

Bond v. Fleet Bank (RI), N.A.,
No. Civ.A 01-177 L, 2002 WL 31500393 (D.R.I. Oct. 10, 2002) ... 39

BookLocker.com, Inc. v. Amazon.com, Inc.,
650 F. Supp. 2d 89 (D. Me. 2009) ... 37

Burton v. District of Columbia,
277 F.R.D. 224 (D.D.C. 2011) ... 43

Carson P. ex rel. Foreman v. Heineman,
240 F.R.D. 456 (D. Neb. 2007) ... 15

Chen-Oster v. Goldman, Sachs & Co.,
285 F.R.D. 294 (S.D.N.Y. 2012) ... 43

Colon v. Wagner,
462 F. Supp. 2d 162 (D. Mass. 2006) ... 14

Comer v. Cisneros,
37 F.3d 775 (2d Cir. 1994) ... 37

Connor B. ex rel. Vigurs v. Patrick,
272 F.R.D. 288 (D. Mass. 2011) ... passim

Connor B. ex rel. Vigurs v. Patrick,
278 F.R.D. 30 (D. Mass. 2011) ... 2, 14, 17

Connor B. ex rel. Vigurs v. Patrick,
771 F. Supp. 2d 142 (D. Mass. 2011) ... 12

Curtin v. United Airlines, Inc.,
275 F.3d 88 (D.C. Cir. 2001) 37

D.G. ex rel. Strickland v. Yarbrough,
278 F.R.D. 635 (N.D. Okla. 2011) 2, 15, 18, 22

David C. ex rel. Brown v. Leavitt,
No. 93-C-206 W, 1993 WL 764518 (D. Utah May 7, 1993) 15

DeGrace v. Rumsfeld,
614 F.2d 796 (1st Cir. 1980) 31

Delagarza v. Tesoro Refining & Marketing Co.,
No. C-09-5803 EMC, 2011 WL 4017967 (N.D. Cal. Sept. 8, 2011) 20

Deposit Guaranty National Bank, Jackson, Mississippi v. Roper,
445 U.S. 326 (1980) 39

DG ex rel. Stricklin v. DeVaughn,
594 F.3d 1188 (10th Cir. 2010) 15, 18, 30

DL v. District of Columbia,
277 F.R.D. 38 (D.D.C. 2011) 19

Driver v. AppleIllinois, LLC,
No. 06 C 6149, 2012 WL 689169 (N.D. Ill. Mar. 2, 2012) 19

Dwayne B. ex rel. Stempfle v. Granholm,
No. 06-13548, slip op. (E.D. Mich. Feb. 15, 2007) 15

Eric L. ex rel. Schierberl v. Bird,
848 F. Supp. 303 (D.N.H. 1994) 12

Eric L. v. Bird,
CIV. No. 91-376-M, 1993 WL 764420 (D.N.H. Dec. 16, 1993) 14

Evans v. Taco Bell Corp.,
No. Civ. 04CV103JD, 2005 WL 2333841 (D.N.H. Sept. 23, 2005) 37

García-Rubiera v. Calderón,
570 F.3d 443 (1st Cir. 2009) 16, 29

Good v. Altria Group, Inc.,
231 F.R.D. 446 (D. Me. 2005) 37

Gordon v. Corporate Receivables,
No. 09-230S, 2010 WL 376386 (D.R.I. Jan. 27, 2010) 16

Gray v. Hearst Communications, Inc.,
444 F. App'x 698 (4th Cir. 2011) 19

Hawkins v. Commissioner of the New Hampshire Department of Health & Human Services,
No. Civ. 99-143-JD, 2004 WL 166722 (D.N.H. Jan. 23, 2004) 33

Hodgson v. Minnesota,
497 U.S. 417 (1990) 12

Holmes v. Pension Plan of Bethlehem Steel Corp.,
213 F.3d 124 (3d Cir. 2000) 40

Jeanine B. ex rel. Blondis v. Thompson,
877 F. Supp. 1268 (E.D. Wis. 1995) 15

Kenny A. ex rel. Winn v. Perdue,
218 F.R.D. 277 (N.D. Ga. 2003) 15

LaShawn A. v. Dixon,
762 F. Supp. 959 (D.D.C. 1991) 15

Lynch v. Dukakis,
719 F.2d 504 (1st Cir. 1983) 14

M.D. ex rel. Stukenberg v. Perry,
675 F.3d 832 (5th Cir. 2012) 15

Marisol A. ex rel. Forbes v. Giuliani,
126 F.3d 372 (2d Cir. 1997) 15, 19, 32

Marisol A. ex rel. Forbes v. Giuliani,
929 F. Supp. 662 (S.D.N.Y. 1996) 19

Meléndez-García v. Sánchez,
629 F.3d 25 (1st Cir. 2010) 12

Norfleet ex rel. Norfleet v. Arkansas Department of Human Services,
989 F.2d 289 (8th Cir. 1993) 12

Pitts v. Terrible Herbst, Inc.,
653 F.3d 1081 (9th Cir. 2011) 39

Puerto Rican Cabotage Antitrust Litig., In re,
269 F.R.D. 125 (D.P.R. 2010) 30

Reed v. Heckler,
756 F.2d 779 (10th Cir. 1985) 39

Risinger ex rel. Risinger v. Concannon,
201 F.R.D. 16 (D. Me. 2001).. 14

Roberts v. Rhode Island,
No. 99-CV-259, 2000 WL 33671759 (D.R.I. Jan. 6, 2000) 29, 31

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984)... 12

Rolland v. Patrick,
Civil Action No. 98-30208-KPN, 2008 WL 4104488 (D. Mass. Aug. 19, 2008).................... 30

Rosen v. Textron, Inc.,
369 F. Supp. 2d 204 (D.R.I. 2005) 29, 31

Rosie D. v. Romney,
410 F. Supp. 2d 18 (D. Mass. 2006).. 14

Ross v. RBS Citizens, N.A.,
667 F.3d 900 (7th Cir. 2012) 19

Sam M. ex rel. Elliott v. Carcieri,
608 F.3d 77 (1st Cir. 2010).. 4

Sam M. ex rel. Elliott v. Carcieri,
610 F. Supp. 2d 171 (D.R.I. 2009) 4, 5, 38

Sam M. ex rel. Elliott v. Chafee,
800 F. Supp. 2d 363 (D.R.I. 2011) .... passim

Stanley v. Illinois,
405 U.S. 645 (1972)... 12

Stewart v. Abraham,
275 F.3d 220 (3d Cir. 2001) 16

Swisher v. Brady,
438 U.S. 204 (1978).. 3, 36

Taylor ex rel. Walker v. Ledbetter,
818 F.2d 791 (11th Cir. 1987) 12

Wade v. Kirkland,
118 F.3d 667 (9th Cir. 1997) 37

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011).. passim

Weiss v. Regal Collections,
385 F.3d 337 (3d Cir. 2004) 39

West Virginia University Hospitals, Inc. v. Casey,
499 U.S. 83 (1991) 41

Woodall v. DSI Renal, Inc.,
No. 11-2590, 2012 WL 1038626 (W.D. Tenn. Mar. 27, 2012) 43

Yaffe v. Powers,
454 F.2d 1362 (1st Cir. 1972) 16, 33

Youngberg v. Romeo,
457 U.S. 307 (1982) 11, 12

Youngblood v. Family Dollar Stores, Inc.,
No. 09 Civ. 3176(RMB), 2011 WL 4597555 (S.D.N.Y. Oct. 4, 2011) 19

Yvonne L. ex rel. Lewis v. New Mexico Department of Human Services,
959 F.2d 883 (10th Cir. 1992) 12

Statutes

42 U.S.C. § 622 21

42 U.S.C. § 670 13

42 U.S.C. § 671 .... 13, 25

42 U.S.C. § 672 .... 13, 26

42 U.S.C. § 675 .... 13, 26, 28

42 U.S.C. § 1983 .... passim

Social Security Act § 471 23

R.I. Gen. Laws chapter 42-72.1 23

Rules

Federal Rule of Civil Procedure 23 .... passim

Federal Rule of Civil Procedure 30 .... 7, 41, 42

Regulations

R.I. Admin. Code 14-3-102:V-E 24

Other Authorities

Nagareda, Richard A.
Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97 (2009)................... 17

Newberg & Conte,
1 Newberg on Class Actions § 4.11 (1992) 34

Plaintiffs seek timely certification of a Rule 23(b)(2) class of foster children in the custody of the Rhode Island Department of Children, Youth and Families ("DCYF"). Now more than five and a half years after Plaintiffs filed their original Motion for Class Certification, and with the remaining individual Named Plaintiff children continuing to moot out, it is imperative that the Court address class certification "[a]t an early practicable time" before Plaintiffs' class claims are irreparably prejudiced. Fed. R. Civ. P. 23(c)(1)(A). Plaintiffs therefore respectfully request that (1) an immediate briefing schedule be set on the instant motion, so that Defendants have 14 days to file their Opposition and Plaintiffs have 7 days to file their Reply; (2) expedited pre-certification discovery be ordered as described in detail below; and (3) an evidentiary hearing date be scheduled for no later than May 15, 2013, so that the Court has the opportunity to determine class certification before additional Named Plaintiffs moot out.

PRELIMINARY STATEMENT

This 42 U.S.C. § 1983 civil rights action seeks injunctive and declaratory relief on behalf of a putative class of "all children who are or will be in the legal custody of the Rhode Island Department of Children, Youth and Families due to a report or suspicion of abuse or neglect" ("Plaintiff Children"). As set forth in the Second Amended Complaint (the "Complaint"), DCYF, as operated by the Defendant state officials, exposes Plaintiff Children to ongoing physical, psychological and emotional harm by failing to meet its constitutional and statutory obligations to Rhode Island's foster children. Plaintiffs thus seek declaratory and injunctive relief designed to remedy the specific system-wide deficiencies within Rhode Island's child welfare system that cause direct and immediate harm and risk of harm to the Named Plaintiffs and all Plaintiff Children.

Plaintiff Children seek class certification and appointment of the undersigned counsel as class counsel pursuant to Rules 23(a), (b)(2) and (g) of the Federal Rules of Civil Procedure. Courts across the country have routinely certified classes of foster children in similar reform litigation, including after the recent U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 54, 56 (3d Cir. 1994) (abuse of discretion not to certify Rule 23(b)(2) class of Philadelphia foster children seeking injunctive and declaratory relief to reform foster care system); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. 2011) (post-*Wal-Mart* denial of motion to de-certify Rule 23(b)(2) class of Massachusetts foster children seeking injunctive and declaratory relief to reform state foster care system); *D.G. ex rel. Strickland v. Yarbrough*, 278 F.R.D. 635, 638-39 (N.D. Okla. 2011) (post-*Wal-Mart* denial of motion to de-certify Rule 23(b)(2) class of Oklahoma foster children seeking injunctive and declaratory relief to reform state foster care system). This Court has already recognized potential common remedies in this case that make Rule 23(b)(2) certification appropriate here, such as setting limits on caseloads and requiring an increased number and array of available placements. *See Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 380, 389-90 (D.R.I. 2011) (Dkt. No. 101); *Wal-Mart*, 131 S. Ct. at 2557 (stating that the key to the Rule 23(b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." (internal quotation marks omitted)).

Plaintiffs also request that this Court issue its class certification order "[a]t an early practicable time," before Plaintiff Children are irreparably prejudiced by recurring mootness issues, now more than five and a half years after Plaintiff Children filed their original Motion for

Class Certification (Dkt. No. 2). Fed. R. Civ. P. 23(c)(1)(A). Ten Named Plaintiffs have already mooted out, including two in 2012. Two additional Named Plaintiffs will moot out this summer, on July 4 and August 10, 2013, respectively, and the three other remaining Named Plaintiffs are all freed for adoption – including one who is already in a pre-adoptive placement – and could have their adoptions finalized by Defendants at any time, mooting out their claims as well.

The Court has dismissed Named Plaintiffs who mooted out, regardless of their pending class claims, and subsequently denied as moot their pending class certification motion when Plaintiffs amended their original complaint to replace those Named Plaintiffs. Thus, Plaintiffs will suffer irreparable prejudice if determination of class certification is further delayed until after dispositive motions are decided as the Court has currently directed. As the Supreme Court has counseled, "[i]n cases . . . where mootness problems are likely to arise, district courts should heed strictly the requirement of Fed. R. Civ. P. 23(c)(1) that '*[a]s soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.'" *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (quoting precursor to current Rule 23(c)(1)(A)) (upholding Rule 23(b)(2) certification of class of minors in a § 1983 action for injunctive relief where the claims of all named plaintiffs were moot because of the time it took the district court to rule on class certification).

Plaintiffs respectfully request that (1) an immediate briefing schedule be set on the instant motion, so that Defendants have 14 days to file their Opposition and Plaintiffs have 7 days to file their Reply; (2) expedited pre-certification discovery be ordered as described in detail below; and (3) an evidentiary hearing date be scheduled for no later than May 15, 2013, so that the Court has the opportunity to determine class certification before additional Named Plaintiffs moot out on July 4, 2013, if not sooner.

PROCEDURAL HISTORY

This class action lawsuit was filed on June 28, 2007. Dkt. No. 1. On that same day, Plaintiffs filed a Motion for Class Certification. Dkt. No. 2. On October 2, 2007, Defendants moved to dismiss the complaint (Dkt. No. 25), and by the end of November 2007, both Plaintiffs' motion for class certification and Defendants' motion to dismiss were fully briefed. Dkt. Nos. 24, 36, 37, 43. On April 29, 2009, District Court Judge Ronald Lagueux granted Defendants' motion to dismiss on the ground that the Next Friends had no authority or standing to proceed in this case. *Sam M. ex rel. Elliott v. Carcieri*, 610 F. Supp. 2d 171, 173, 184-85 (D.R.I. 2009) (Dkt. No. 63). Judge Lagueux did not rule on Plaintiffs' then-pending motion for class certification. Plaintiffs appealed the dismissal order, and on June 18, 2010, the First Circuit reversed and remanded the case with directions to reinstate the complaint and to allow the Next Friends to proceed on behalf of the children. *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 94 (1st Cir. 2010).

After remand, Defendants again moved to dismiss (Dkt. No. 79), and on July 20, 2011, the Court issued a Memorandum and Order granting in part and denying in part Defendants' renewed motion to dismiss. *Sam M. ex rel. Elliott v Chafee*, 800 F. Supp. 2d 363 (D.R.I. 2011) (Dkt. No. 101). The Court recognized that Plaintiffs' motion for class certification had not been considered by Judge Lagueux and invited the parties "to submit new briefs in support of their respective positions, taking into consideration the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* . . . ." *Id.* at 372 n.15. Despite the pending Motion for Class Certification, however, the Court's Order dismissed five of the remaining seven Named Plaintiffs from the case, on the grounds that their individual claims had become moot upon adoption (three Named Plaintiffs had already mooted out for the same reason). *Id.* at 389-90; *Sam M.*, 610 F. Supp. 2d

at 175 (Dkt. No. 63). On August 11, 2011, the Court set deadlines for "[a]ny new briefs submitted in support of the parties' respective positions as to class certification," (Aug. 11, 2011 Docket Entry) but on August 15, 2011, changed course by requesting that no briefs be submitted and instead setting a date for a Rule 16 conference (Aug. 15, 2011 Corrective Docket Entry).

On January 31, 2012, following months of extensive but ultimately unsuccessful settlement negotiations, Plaintiffs and Defendants submitted proposed discovery plans to the Court, both of which set forth a schedule for renewed briefs on class certification. Decl. of Marcia Robinson Lowry (filed concurrently) (the "Lowry Decl.") ¶ 10. On February 17, 2012, the Court held a hearing on Plaintiffs' motion for leave to file a supplemental complaint which sought, *inter alia*, to add new Named Plaintiffs to replace those that had mooted out. At that hearing, the Court recognized that "mootness has always been an issue" because children age out, reunify with their families or are adopted. Hr'g Tr. 7:13-14, 8:19-9:11, Feb. 17, 2012, Dkt. No. 120. The Court also indicated that it would be removing the pending motion for class certification (Dkt. No. 2) from the docket. Lowry Decl. ¶ 11. On February 21, 2012, the Court issued a Text Order: "finding as moot [the] Motion to Certify Class." Feb. 21, 2012 Text Order.

On February 24, 2012, Plaintiffs filed the Second Amended Complaint (Dkt. No. 115), which, per the Court's direction, was limited to adding new Named Plaintiffs (Plaintiffs added five) to represent the class in this case.[1] During a telephone conference with the Court, and after Plaintiffs filed a Motion for Clarification (Dkt. No. 118), the Court confirmed that the previously pending motion for class certification was denied ("termination") "because there is now an Amended Complaint" so that "a new motion ought to be filed." Tel. Conf. Tr. 4:11-14, Mar. 13,

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[1] One of these replacement plaintiffs was removed by stipulation on July 31, 2012, after he was adopted. Dkt. No. 153. One of the two remaining original plaintiffs was dismissed by stipulation on October 1, 2012, after he reached the age of majority. Dkt. No. 173; Oct. 1, 2012 Text Order entering Dkt. No. 173.

2012, Dkt. No. 124. The Court indicated that it would not take up class certification until after dispositive motions on the substantive claims were decided. *Id.* at 4:18-24.

In the meantime, the parties proceeded with fact discovery. Beginning in March 2012, Plaintiffs served six requests for production of relevant documents and four sets of interrogatories, one of which included a related request for production of documents. Defendants served one request for production of documents and 11 sets of contention interrogatories, each of which included a related request for production of documents.

Plaintiffs' discovery requests included requests for evidence of Defendants' customs and policies as to caseworker staffing, training and caseloads; visitation; service delivery; placements; permanency planning; case plans; foster care maintenance payments; maltreatment of foster children; and other systemic practices that affect the Named Plaintiffs. Through the summer and early fall of 2012, Defendants responded to Plaintiffs' discovery requests, although the production of responsive materials was slow and incomplete. Eventually, Plaintiffs filed a motion to compel discovery responses on September 6, 2012. Dkt. No. 166. On October 23, 2012, Defendants moved for a protective order seeking to, among other things, "[l]imit the extent of discovery to the individual Named Plaintiffs . . . ." Dkt. No. 177 at 2. Subsequently, Plaintiffs filed their second and third motions to compel discovery (Dkt. Nos. 178 and 193), and Defendants filed numerous motions to compel discovery of their own. Dkt. Nos. 182, 225, 226, 227, 228, 229, 233, 234, 235, 236, 237.

Although the custom and policy evidence was sought by Plaintiffs to establish the Named Plaintiffs' case in chief on their individual § 1983 claims, on December 17, 2012, the Magistrate Judge granted in part Defendants' motion for a protective order, barring Plaintiffs from obtaining this evidence and holding that Plaintiffs are limited to receiving "nonprivileged information that

is relevant to the substantive claims of the individual named Plaintiffs and Defendants' defenses to such claims." Dkt. No. 230 at 2. The protective order also rejected "Plaintiffs' argument at this stage that their 'risk of harm' claims justify wide-ranging discovery of all children who have been in the legal custody of the Rhode Island child welfare system due to allegations of abuse or neglect." *Id.*[2] Plaintiffs appealed the order. Dkt. No. 240.

While Plaintiffs' appeal was pending, on January 9, 2013, the Magistrate Judge issued a Discovery Management Order that ordered the parties to meet and confer in an effort to resolve or narrow the disputes set out in the many pending discovery motions. Dkt. No. 253. The Discovery Management Order also required the parties to submit Discovery Status Reports to advise the Court of those issues that remained unresolved after the parties' discussions. The parties complied with this order, conferred with each other and filed their Discovery Status Reports on February 1, 2013. Dkt. Nos. 267 and 268. As those reports indicate, all of these discovery motions remain pending, at least in part.

On February 12, 2013, the District Court denied Plaintiffs' appeal of the protective order on the ground that "the focus of the litigation at this point is on the claims of the individual named Plaintiffs. Only after adjudication of dispositive motions as to those claims will the Court consider certification of a class." Dkt. No. 278.

Pursuant to the Amended Standard Pretrial Order entered by the Court on October 9, 2012, fact discovery was scheduled to close on February 15, 2013. Dkt. No. 176. In their respective Discovery Status Reports, both parties raised the issue of this rapidly approaching deadline, with Plaintiffs noting that some extension of fact discovery would be necessary, and

[2] Defendants also moved for a second protective order on November 15, 2012, seeking to prevent a Rule 30(b)(6) deposition concerning foster care maintenance payments. Dkt. No. 198. On January 4, 2013, the Magistrate Judge granted this motion. Dkt. No. 247. Plaintiffs have appealed this decision. Dkt. No. 263.

with Defendants seeking a Rule 16 conference. Dkt. No. 268 at 5; Dkt. No. 267 at 4. On February 11, 2013, the parties filed a joint motion to extend the fact discovery deadline and to schedule a Rule 16 conference. Dkt. No. 276. That motion stated that "the parties have numerous matters pending before the District Court related to fact discovery" and that "[t]he parties agree that there is discovery that cannot be completed before the current fact discovery deadline." *Id*. at 1. Having received no response from the Court, on February 15, 2013, the parties again moved jointly to extend the fact discovery deadline. Dkt. No. 281. As of the date of this filing, the Court has not taken any action with respect to either of the parties' joint motions, many discovery motions remain pending and fact discovery is incomplete.

Plaintiffs now respectfully file this Second Motion for Class Certification to prevent irreparable prejudice to the Plaintiff Children's class claims.

BACKGROUND FACTS AND LEGAL ISSUES

I. Defendants Cause Harm to Plaintiff Children in the Putative Class

Rhode Island has approximately 1,700 children in DCYF foster care custody. Lowry Decl. ¶ 12. As the legal custodians of these children, Defendants are required by federal law to protect their safety and well-being and provide mandated services. However, Plaintiff Children allege that they are all exposed to harm and/or the risk of harm in numerous ways while in DCYF custody, including:

- Plaintiff Children are placed in inappropriate placements, which are inadequately monitored to ensure their safety and where they are abused and neglected at one of the highest rates in the nation in violation of their substantive due process rights. *See* Complaint ¶¶ 5, 128-140.

- Plaintiff Children are separated from siblings, and are not provided regular visitation with siblings, causing their ties with their families to be strained or severed in violation of their First, Ninth and Fourteenth Amendment family association rights. *See id*. ¶¶ 141-43, 150-53.

- Plaintiff Children are placed with caretakers who are not provided federally mandated cost of care reimbursements in violation of their Adoption Assistance and Child Welfare Act of 1980 (AACWA) rights. *See id.* ¶¶ 215-17.

- Plaintiff Children are not provided federally mandated case plans in violation of their AACWA rights. *See id.* ¶¶ 154-58, 170.

These harms result from Defendants' failure to manage the workforce, resources and practices of DCYF. DCYF's chronic systemic failures include:

- DCYF caseworkers carry unmanageable caseloads and fail to visit Plaintiff Children to monitor and ensure their safety in their placements. *See id.* ¶¶ 5, 132, 186-200.

- DCYF fails to mandate and provide essential and effective training for its caseworkers and supervisors. *See id.* ¶¶ 109, 116, 186.

- DCYF fails to recruit, license and maintain an adequate number and array of safe and appropriate foster care placements. *See id.* ¶¶ 133-35, 203-08, 217.

- DCYF fails to provide foster care maintenance payments to caretakers that reflect the actual costs of care enumerated in AACWA. *See id.* ¶¶ 215-17.

- DCYF fails to assess Plaintiff Children's needs and permanency goals in required case plans to deliver needed services and achieve timely permanency. *See id.* ¶¶ 5, 154-85.

Plaintiffs have commenced this action to protect all of Rhode Island's foster children from these and other common systemic DCYF deficiencies and eliminate the harms and risks of harm to which they are being subjected.

II. Defendants Have Caused Harm to the Named Plaintiffs and Expose Them to Risks of Harm

Defendants' conduct with respect to each Named Plaintiff illustrates the harms faced by all children in DCYF foster care custody:

- **Cassie M.:** DCYF removed Cassie from her mother's home seven years ago after reports of physical and sexual abuse. Throughout Cassie's time in foster care, DCYF has failed to provide her with a safe, stable or permanent family. DCYF first inappropriately attempted reunification with Cassie's mother as well as her father, who had been incarcerated, had sexually abused Cassie's older sister and who was not allowed unsupervised contact with his daughters. DCYF next

separated Cassie from her sisters and placed her for nine months in a foster home that was under an active DCYF investigation and scheduled to have its foster care license revoked. Ten-year-old Cassie was then moved to an institution where she stayed for almost three years – including more than a year after her caseworker and supervisor agreed that she no longer needed institutional care. Despite Cassie's repeated requests to live with her sister, DCYF never placed the girls together. Although Cassie has been free for adoption for years, she is without any prospects for living with a permanent, loving family. *See* Complaint ¶¶ 20-33.

- **Jared C.:** Jared entered DCYF care with his brother over six years ago. Prior to the boys being brought into custody, DCYF substantiated three reports against their mother for neglect; yet, DCYF allowed Jared and his brother to remain in her home for several more years despite her continuing drug use. Jared was separated from his brother in 2008. The boys were never placed with their younger sister, who entered custody at a later date. Jared has experienced at least six placements, including one where he and his brother were sexually abused by their foster parents. Following this abuse, DCYF failed to provide appropriate mental health services for the boys for several months. *Id.* ¶¶ 34-45. As a result, according to Jared's current therapist, Jared is completely unable to discuss his past trauma and has made little progress in therapy. Ex. N to Defs.' Objection to Pls.' Mot. To Compel Access to the Named Pls. by their Next Friends & Counsel, Dkt. No. 243-15, filed under seal. DCYF next moved the young boys to a shelter, and ultimately to separate institutions, where the boys remained for years. Although both boys were freed for adoption in 2009, Jared was only recently moved into a pre-adoptive placement. *Id.*; *see* Complaint ¶¶ 34-45.

- **Terrence T.:** Terrence entered DCYF custody at age six with four of his six siblings. Upon entering care, Terrence was placed apart from his siblings with his godmother, who had a known criminal history and lacked a stable home. Terrence was physically abused in this home and was removed after his godmother was arrested for dealing drugs in Terrence's presence. DCYF then moved Terrence, who was in the first grade, into a residential treatment center, where he would remain for the next six years. In 2008, DCYF moved Terrence and one brother to California to live with an aunt whom they had never met. Although both boys had been diagnosed previously with serious mental health conditions, DCYF did not provide medical insurance and appropriate mental health services in this placement for several months. Terrence was removed from his aunt's home in 2009 and placed in a Rhode Island institution, where he attempted suicide. Upon information and belief, Terrence has not had regular contact with many of his siblings for years. DCYF has failed to provide him with consistent mental health care, and has isolated him from his biological family without any prospects for living with a permanent, loving family. *See* Complaint ¶¶ 46-56.

- **Tracy L.:** Tracy and her sister were allowed to remain in their parents' care for six months after DCYF found their home "unlivable" and filed a neglect petition against the parents. Tracy and her sister were finally removed in 2002 after

DCYF confirmed that the parents were physically abusing the girls. DCYF separated Tracy from her sister shortly after entering foster care. In spite of her abuse history and difficult behaviors, Tracy did not receive any mental health services until late January 2003, when she was admitted to a psychiatric hospital and disclosed even more severe physical and sexual abuse. In the following years, DCYF failed to provide adequate mental health services to stabilize Tracy and instead shuffled her through over 20 foster homes, residential treatment centers, shelters, group homes and psychiatric hospitals, sometimes out of state, all of which failed to meet her needs. Although she is free for adoption, DCYF has left Tracy in an institution, separated from her sister. *See id.* ¶¶ 57-68.

- **Danny B.:** Danny and his brother were allowed to remain in their mother's care for over a year after DCYF determined that their mother was abusing alcohol, failing to supervise the boys and living in a home that was unfit for human habitation. When DCYF finally removed the boys in 2005, it placed them in an unlicensed relative home without first performing a safety and background check. Within a week, the boys were separated and placed in a series of temporary, inappropriate placements. Danny was placed in the home of a foster parent with a history of abuse complaints dating back to 1999. Danny was ultimately sexually abused in this placement. Despite the abuse, and despite evidence that Danny's psychological condition was worsening, DCYF failed to provide Danny with timely mental health services to address his trauma. When his foster parent was unable to manage his abuse-reactive behaviors, Danny was placed in a group home at age six. While Danny has been free for adoption since 2010, he has been in a residential treatment facility where, upon information and belief, he remains today with no current prospect of growing up in a loving, permanent family home. *See id.* ¶¶ 83-95.

The experiences of these five Named Plaintiff children exemplify the harms that all Plaintiff Children are subjected to by the common deficiencies in DCYF's child welfare system. Additionally, all of these children are exposed to the same risks of harm.

III. Defendants' Actions and Inactions Violate the Constitutional and Statutory Rights of All Plaintiff Children

Defendants' specific constitutional and statutory obligations to Plaintiff Children include:

Substantive Due Process: The right to be protected from harm while in state custody under the due process clause of the Fourteenth Amendment. *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (due process clause guarantees mentally delayed plaintiffs' rights to safe

conditions of confinement and freedom from bodily restraint when involuntarily committed).[3] *See Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 368-69, 389 (D.R.I. 2011) (Dkt No. 101).

Substantive Due Process – State-Created Danger: The right, also pursuant to the due process clause of the Fourteenth Amendment, to be free from harm caused by Defendants' affirmative acts of placing Plaintiffs in situations known to be dangerous. *See Meléndez-García v. Sánchez*, 629 F.3d 25, 36 (1st Cir. 2010) (recognizing the "possibility that liability might arise [under the due process clause] where the state creates or substantially contributes to the creation of a danger" (internal quotation marks omitted)); *Sam M.*, 800 F. Supp. 2d at 369, 389.

Right to Family Association: The right not to be deprived of a child-parent or child-sibling family relationship, a right recognized to be among the liberty interests, privacy interests and associational rights conferred by the First, Ninth and Fourteenth Amendments. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 447-48 (1990) (holding that the Ninth and Fourteenth Amendments protect family integrity); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984) (reiterating long-standing recognition that Bill of Rights protects family relationships against unjustified interference by the state); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing right to family integrity grounded in part on Ninth and Fourteenth Amendments); *Sam M.*, 800 F. Supp. 2d at 369, 389.

Federal Statutory Rights: The rights to timely and adequate case plans and to foster care maintenance payments to foster care providers with whom a child is placed that cover the actual

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[3] The holding in *Youngberg* has been applied to children in foster care. *See, e.g.*, *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 291-92 (8th Cir. 1993); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 891-94 (10th Cir. 1992); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794-95 (11th Cir. 1987) (en banc); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 159-63 (D. Mass. 2011); *Eric L. ex rel. Schierberl v. Bird*, 848 F. Supp. 303, 307 (D.N.H. 1994).

costs of delineated expenses to care for the child, arising from AACWA, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 670 *et seq*., and regulations promulgated thereunder. *See* 42 U.S.C. §§ 671(a)(1), 671(a)(11), 671(a)(16), 672(a)(1), 675(4)(A); *Sam M.*, 800 F. Supp. 2d at 369, 390.

Plaintiffs have brought this action because Defendants have violated and are continuing to violate these constitutional and statutory rights, which harm and threaten to harm every member of the putative class of Plaintiff Children.

ARGUMENT

I. As Numerous Courts Have Held in Similar Cases, This Action Meets All Rule 23 Requirements for Class Certification

The Federal Rules of Civil Procedure provide for class certification if the four requirements of Rule 23(a) and one of the requirements of Rule 23(b) are satisfied. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(a)'s four requirements for class certification are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Where all four requirements of Rule 23(a) are met, certification is proper under Rule 23(b)(2) if, in addition, "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).

Plaintiffs in this case seek certification under Rules 23(a) and 23(b)(2) of a class consisting of "all children who are or will be in the legal custody of the Rhode Island Department of Children, Youth and Families due to a report or suspicion of abuse or neglect." Courts in the First Circuit have routinely certified Rule 23(b)(2) classes in cases, like this one, alleging systemic violations of federal constitutional and statutory law. *See, e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288 (D. Mass. 2011) (certifying Rule 23(b)(2) class); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. 2011) (re-affirming certification post-*Wal-Mart* of Rule 23(b)(2) class of "all children who are now or will be in the foster care custody of the Massachusetts Department of Children and Families as a result of abuse or neglect"); *Colon v. Wagner*, 462 F. Supp. 2d 162, 174 (D. Mass. 2006) (certifying Rule 23(b)(2) class of current and former recipients of emergency shelter benefits alleging that state's termination of benefits violated due process clause); *Risinger ex rel. Risinger v. Concannon*, 201 F.R.D. 16, 19-23 (D. Me. 2001) (certifying Rule 23(b)(2) class of children alleging that state failed to provide in-home mental health services for which they were eligible under federal law); *Eric L. v. Bird*, CIV. No. 91-376-M, 1993 WL 764420, at *1 (D.N.H. Dec. 16, 1993) (certifying Rule 23(b)(2) class of New Hampshire children who are subjects of abuse or neglect complaints or petitions); *see also Lynch v. Dukakis*, 719 F.2d 504, 506 n.1 (1st Cir. 1983) (while not explicitly citing Rule 23(b)(2), noting certification of class of "[a]ll children subject to protective intervention by agencies of the Commonwealth of Massachusetts under the foster family home care system . . . and all members of the natural and foster families of such children" in a lawsuit challenging systemic violations of children's federal statutory rights); *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 22 (D. Mass. 2006) (while not explicitly citing Rule 23(b)(2), recognizing certification of

class of Massachusetts children with serious emotional disturbances seeking injunctive relief for the state's failure to provide services required by Medicaid Act).

The overwhelming weight of authority in other Circuits likewise supports certifying Rule 23(b)(2) class actions like this one challenging systemic violations of foster children's rights under federal law.[4] *See DG ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188, 1192, 1194 (10th Cir. 2010) (Rule 23(b)(2) class of children in Oklahoma foster care system); *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 375, 378-79 (2d Cir. 1997) (Rule 23(b)(2) subclasses of children in New York City foster care system and children not in foster care at risk of abuse and neglect); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 54, 56 (3d Cir. 1994) (Rule 23(b)(2) class of children in Philadelphia foster care system).[5]

As in these cases, because the Plaintiff class in this lawsuit also meets all of the requirements of Rules 23(a) and 23(b)(2), Plaintiffs request that this Court certify the class.

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[4] In *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), a case decided post-*Wal-Mart*, the Fifth Circuit vacated a district court's decision to certify a Rule 23(b)(2) class based solely on the pleadings and remanded for more "rigorous analysis." Here, Plaintiffs have provided evidence beyond the pleadings and are seeking additional pre-class certification discovery and an evidentiary hearing in this Motion.

[5] *See also D.G. ex rel. Strickland v. Yarbrough*, 278 F.R.D. 635, 636, 639 (N.D. Okla. 2011) (confirming Rule 23(b)(2) certification of a class of "all children who are or will be in the legal custody of the Oklahoma Department of Human Services (1) due to a report or suspicion of abuse or neglect; or (2) who are or will be adjudicated deprived due to abuse or neglect"); *Dwayne B. ex rel. Stempfle v. Granholm*, No. 06-13548, slip op. at 1-2 (E.D. Mich. Feb. 15, 2007) (certifying class of "all children who are now or will be in the foster care custody of Michigan's Department of Human Services") (Lowry Decl. Ex. 1); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 299-302 (N.D. Ga. 2003) (certifying class of "[a]ll children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS"); *Jeanine B. ex rel. Blondis v. Thompson*, 877 F. Supp. 1268, 1288 (E.D. Wis. 1995); *David C. ex rel. Brown v. Leavitt*, No. 93-C-206 W, 1993 WL 764518, at *2 (D. Utah May 7, 1993); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 994 n.28 (D.D.C. 1991). *But see Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 466 (D. Neb. 2007).

II. The Class Meets the Numerosity, Commonality, Typicality and Adequacy Requirements of Rule 23(a)

A. The Class Is So Numerous that Joinder Is Impracticable

The proposed Class now numbers approximately 1,700 abused and neglected children (Lowry Decl. ¶ 12) and exceeds the size of many classes certified in the First Circuit, easily meeting the requirement that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The First Circuit has suggested that a class of 40 is sufficient to meet the requirement, citing with approval Third Circuit precedent that "'if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.'" *García-Rubiera v. Calderón*, 570 F.3d 443, 460 (1st Cir. 2009) (quoting *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)); *see also Adver. Specialty Nat'l Ass'n v. Fed. Trade Comm'n*, 238 F.2d 108, 119 (1st Cir. 1956) (finding that more than 300 class members "appears a sufficient number to fall within the accepted legal test of the 'impracticability' of joining them as respondents"); *Gordon v. Corporate Receivables*, No. 09-230S, 2010 WL 376386, at *1-2 (D.R.I. Jan. 27, 2010) (Almond, Mag.) (finding numerosity satisfied with putative class of 40 individuals).

Joinder is impracticable here not only because of the number of children in the proposed class but also because children enter and exit foster care every day. Where, as here, membership of the class is knowable at a particular time but changes over time, joinder is less practical. *See Adver. Specialty Nat'l Ass'n*, 238 F.2d at 119 (finding of numerosity "strengthened" when class members "were not fixed in number, but changed from year to year"). Precise enumeration of the members of a putative class is unnecessary for the certification of Rule 23(b)(2) classes, whose members "are often incapable of specific enumeration." *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (internal quotation marks omitted). The proposed class is clearly defined

but its membership is inherently fluid, making joinder impracticable and certification appropriate.

B. There Are Multiple Questions of Fact and Law Common to All Class Members

The proposed class also meets the commonality requirement of Rule 23(a)(2). As the U.S. Supreme Court recently re-iterated in *Wal-Mart*, commonality requires only a single question of fact or law common to all members of the class, and certification is appropriate where that single common question can "generate common answers" and resolve central issues to the case. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51, 2556 (2011) (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Plaintiff Children here are challenging common conditions and deficiencies in a unitary regime and are all subject to the same harms and risks of harm resulting from DCYF's violations of law. The weight of authority recognizes that the commonality requirement is satisfied in cases like this one seeking systemic reforms on behalf of classes of foster children. As the District of Massachusetts recently recognized, "the unreasonable *risk* of harm created by these alleged systemic failures within [the state child welfare agency] and applicable to the entire Plaintiff class is sufficient to satisfy the requirement of commonality." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 295 (D. Mass. 2011); *see also Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011) (denying decertification request post-*Wal-Mart* and finding that allegations of "specific and overarching systemic deficiencies within [the state child welfare agency] . . . , rather than the discretion exercised by individual case workers, are the alleged causes of class members' injuries" and "[t]hese systemic shortcomings provide the 'glue' that unites Plaintiffs' claims").

Unlike in *Wal-Mart*, where the employee-plaintiffs failed to identify a "common mode of exercising discretion" providing the necessary "glue" to hold together the allegedly discriminatory reasons for the millions of individual employment decisions at issue, *Wal-Mart*, 131 S. Ct. at 2552, 2554, the overarching DCYF practices listed below directly jeopardize the safety and well-being of every member of the class who is in DCYF custody. *See D.G. ex rel. Strickland v. Yarbrough*, 278 F.R.D. 635, 638-39, 644-45 (N.D. Okla. 2011) (common questions included whether the Oklahoma child welfare agency subjected foster children in its custody to impermissible risk and level of abuse and neglect in care, and whether defendants systematically failed to monitor children in their custody, which was the necessary "glue holding the alleged reason for [plaintiffs' harms] together" and making the case capable of class-wide resolution (quoting *Wal-Mart*, 131 S. Ct. at 2552)). Thus, the Tenth Circuit held that commonality was satisfied by the common questions of whether defendants risked harm to Oklahoma's foster children due to a "policy or practice of failing to adequately monitor the safety of plaintiff children," and whether the "alleged policies or practices violate plaintiffs' . . . right to be reasonably free from harm . . . while in state custody." *DG ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188, 1195-96 (10th Cir. 2010) (quoting *D.G.*, 278 F.R.D. at 636, 644) (internal quotation marks omitted) ("Though each class member may not have actually suffered abuse, neglect, or the risk of such harm, Defendants' conduct allegedly poses a risk of impermissible harm to all [foster] children . . . .").

Similar to the Tenth Circuit decision in *DG*, the Second Circuit affirmed a finding of commonality for a class of foster children where Defendants' actions and inactions "are not isolated or discrete instances but, rather, form a pattern of behavior that commonly affects all of the proposed class members." *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 377-78 (2d

Cir. 1997) (quoting *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 690-91 (S.D.N.Y. 1996)) (internal quotation marks omitted) (upholding certification of class of "[a]ll children who are or will be in the custody of the New York City Administration for Children's Services, and those children who . . . are or will be at risk of neglect or abuse" and remanding for creation of subclasses). The Third Circuit has similarly held that, because "the commonality standard requires only that a putative class share either the injury or the immediate threat of being subject to the injury," plaintiff foster children had plainly satisfied the commonality requirement. *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 54, 60 (3d Cir. 1994) (abuse of discretion not to certify class of "all children in Philadelphia who have been abused or neglected and are or should be known to the Philadelphia Department of Human Services," and all children in its custody (internal quotation marks omitted)). While these Circuit decisions addressed Rule 23(a)(2) commonality prior to *Wal-Mart*, they are premised on the fact that all of the members of each of the classes were being harmed or placed at imminent risk of harm from the respective defendants' illegal systemic practices – exactly the "glue" that *Wal-Mart* and Rule 23(a) require.[6]

[6] Post-*Wal-Mart*, numerous other courts have certified classes after finding common issues applicable to all class members. *See, e.g.*, *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909-10 (7th Cir. 2012) (distinguishing *Wal-Mart* and certifying class of 1,100 employees where plaintiffs challenged employers' unofficial policy of violating wage laws and their claim "require[d] no proof of individual discriminatory intent"); *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 701-02 (4th Cir. 2011) (holding that "[h]ere, unlike *Wal-Mart*, there is no dispute that a uniform . . . obligation[] exists" and that it "applies to all plaintiffs"); *Avilez v. Pinkerton Gov't Servs.*, 286 F.R.D. 450, 469 & n.18 (C.D. Cal. 2012) (characterizing *Wal-Mart* as "limited to the facts in that case" and "highly distinguishable" from the plaintiffs' claim of a "uniform, non-discretionary on-duty meal break policy"); *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 WL 689169, at *2 (N.D. Ill. Mar. 2, 2012) (distinguishing *Wal-Mart* where plaintiffs alleged a common policy of unlawful overtime practices and the "'plaintiffs' . . . claim requires no proof of individual discriminatory intent'" (quoting *Ross*, 667 F.3d at 909)); *DL v. District of Columbia*, 277 F.R.D. 38, 46 (D.D.C. 2011) (certifying class where plaintiffs alleged common injury from "'systemic failures' within defendants' education system" and distinguishing *Wal-Mart* because "Defendants' liability in this case does not hinge on their state of mind"); *Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ. 3176(RMB), 2011 WL 4597555, at *4 (S.D.N.Y. Oct. 4, 2011)

Multiple common questions of fact exist among the members of the putative Plaintiff class of foster children at issue here that are capable of generating common answers, including:

(a) Whether DCYF has a system-wide practice of maintaining caseloads for DCYF caseworkers that are too high so that caseworkers are unable to adequately monitor Plaintiff Children, including conducting regular visits (Complaint ¶¶ 5, 128-32, 186-200);

(b) Whether DCYF provides adequate training to its caseworkers to ensure professional decision-making and adherence to policy (*see id.* ¶¶ 109, 116, 186);

(c) Whether DCYF fails to maintain an adequate number and array of placements to provide Plaintiff Children safe and appropriate foster care placements (*see id.* ¶¶ 5, 133-43);

(d) Whether DCYF fails to place siblings together or provide for regular siblings visitation when siblings are placed apart (*see id.* ¶¶ 141-43, 150-53);

(e) Whether DCYF has a system-wide policy of failing to provide required foster care maintenance payments to Plaintiff Children's caretakers that reflect the actual costs of care under the statute (*see id.* ¶¶ 215-17); and

(f) Whether DCYF has a system-wide practice of failing to ensure that Plaintiff Children are provided with required case plans setting forth steps necessary to meet service needs and achieve permanency goals (*see id.* ¶¶ 157, 170).

These common questions are discussed in sequence below.

1. Common Caseload Question

Beyond the detailed allegations in the Complaint, there is evidence that DCYF caseloads are too high to ensure adequate monitoring and the safety and well-being of Plaintiff Children. According to the Child Welfare League of America's (CWLA) professional standards, caseworkers should have caseloads that range from 12 to 15 children in order to be able to fulfill

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("Unlike the claims in *Wal-Mart*[,] Plaintiffs' [New York Labor Law] claims do not require an examination of the subjective intent behind millions of individual employment decisions; rather, the crux of this case is whether the company-wide policies, as implemented, violated Plaintiffs' statutory rights." (internal quotation marks omitted)); *Delagarza v. Tesoro Ref. & Mktg. Co.*, No. C-09-5803 EMC, 2011 WL 4017967, at *8 (N.D. Cal. Sept. 8, 2011) (certifying class where, unlike *Wal-Mart*, plaintiffs allege "a specific set of practices" that generally deprives all of them of off-duty meal breaks without compensation).

their responsibilities. CWLA Standards of Excellence for Family Foster Care Services § 3.48, Lowry Decl. Ex. 2. DCYF, however, has documented an October 7, 2012 statewide average of 23.5 children per caseworker (DCYF Caseload Statistics as of 10/07/12, Lowry Decl. Ex. 3). In fact, two out of four DCYF Regions report individual caseloads as high as 35 and 229 children, respectively. *Id.* at 000137589. The average caseloads in Regions 1 and 4 – which have 71% of all children in DCYF custody – are 25.9 children and 29.0 children, respectively. *Id.*

According to Rhode Island's Child and Family Services Review (the "CFSR" is a periodic federal review of state child welfare systems to ensure conformity with some child welfare standards) Round 2 Statewide Assessment, dated March 2010, staffing issues are preventing DCYF from providing families with services in a timely manner. R.I. DCYF CFSR Statewide Assessment, March 2010, Lowry Decl. Ex. 4, at 000091570. For example, caseworker workloads make it difficult to complete service plans in a timely and family-centered manner. *Id.* at 000091656.

Likewise, federal CFSR reviewers established in September 2010 that DCYF caseworkers only complied with the federal monthly visitation standard, 42 U.S.C. § 622, in 60% of cases (Final Report, R.I. CFSR, Sept. 2010, Lowry Decl. Ex. 5, at 000003240-41), and federal fiscal year 2011 data documents that 42% of children in care were not visited monthly. Child Welfare Outcomes Report Data Custom Data Builder: Caseworker Visits for Children in Foster Care, 2011, Lowry Decl. Ex. 6, at PLTF0029343.

Federal data also establishes that in federal fiscal year 2011, the percentage of children in foster care maltreated by a foster care provider in Rhode Island was 1.23%, the third highest percentage of the 48 states and other jurisdictions that reported this information. In 2010 the percentage was 0.97%; in 2009 the percentage was 1.35%; in 2008 the percentage was 0.72%; in

2007 the percentage was 1.33%. Since 2007, Rhode Island has been among the 6 worst states and other reporting jurisdictions on this maltreatment measure and has always failed to meet the federal standard. Child Maltreatment 2011, Lowry Decl. Ex. 7, at PLTF0030090.

An injunction setting limits on caseloads – a potential remedy that this Court has recognized in this action, *see Sam M.*, 800 F. Supp. 2d at 380, 389, and which is exactly the type of common injunctive relief sought by Plaintiff Children here – has been found post-*Wal-Mart* to be at least one common "answer" to the contention that defendants have a system-wide practice "common to all plaintiffs" of failing to monitor children in foster care. *D.G.*, 278 F.R.D. at 639.

2. Common Training Question

There is also evidence that DCYF training is inadequate to ensure professional decision-making and adherence to policy sufficient to maintain the safety and well-being of Plaintiff Children. CWLA's professional standards establish that "[t]he family foster care agency should provide thorough orientation and preservice training for its new social workers before they begin to carry out their responsibilities with children and their families." CWLA Standards of Excellence for Family Foster Care Services § 3.45, Lowry Decl. Ex. 2. Child welfare agencies should also:

> provide social workers with a thorough inservice training program that helps them maintain and expand the knowledge and skills necessary to fulfill their responsibilities. . . . Training should be regularly scheduled, with caseload coverage provided to ensure worker availability and participation. Inservice training and supervision should be integrated and should mutually reinforce the other.

Id. § 3.52.

According to Rhode Island's federal CFSR, dated September 2010, reviewers found that ongoing training requirements are not monitored consistently and only 27.7% of DCYF caseworkers completed ongoing training requirements during the review period. Final Report,

R.I. CFSR, Sept. 2010, Lowry Decl. Ex. 5, at 000003267. DCYF itself documented that in calendar year 2011 over 46% of its child protective investigators, social workers and their supervisors and administrators had not completed training. DCYF Report 300: Worker Training Hours, 2011, Lowry Decl. Ex. 8; DCYF Policy & Procedure 400.0000, Lowry Decl. Ex. 9.

This common question of fact also has an available common answer: an injunction mandating minimum training for caseworkers and other social work staff responsible for the monitoring and well-being of Plaintiff Children, which this Court has also recognized as a potential remedy in this case. *See Sam M.*, 800 F. Supp. 2d at 380, 389.

3. Common Placement Array Question

Likewise, there is evidence that DCYF has failed to develop an adequate array and types of placements sufficient to maintain the safety and well-being of Plaintiff Children. Because DCYF fails to license an adequate number of foster family homes, DCYF places approximately one-third of all children in foster care in a shelter or institution, and DCYF places young children in institutions at rates far higher than the national average, despite the importance of placing foster children in family-like settings. *See* Complaint ¶¶ 136-40. DCYF's placement shortage is compounded by the massive backlog in its process for licensing new family foster homes. *See id*. ¶¶ 203-08. Plaintiff Children are harmed and exposed to risk of harm as a result. *See id*. ¶¶ 137-40, 203, 206-08.

Professional standards, including Social Security Act § 471(a)(10) and Rhode Island General Laws chapter 42-72.1, mandate that all foster homes for children must be licensed. *See also* DCYF Policy 900.0020, Lowry Decl. Ex. 10. DCYF policy requires a non-relative foster home to be licensed before any children are placed in the home, but a relative foster home may have children placed for up to six months before a license is granted. *Id.* at 000009811; DCYF Policy and Procedure 900.0025, Lowry Decl. Ex. 11, at 000009762. According to DCYF

reports, for each month from January through August 2012, there were between 36 and 41 (relative and non-relative) foster homes with licenses pending over 6 months, with 43 to 51 children placed in those homes in violation of DCYF policy. DCYF Report 496: Children in Unlicensed Placements – Home Providers, Jan.-Aug. 2012, Lowry Decl. Ex. 12, at 000095015, 032, 055, 073, 089, 104, 121, 131. Additionally, for each month during that period, there were 9 to 14 foster homes with inactive, expired, withdrawn or denied licenses, with 13 to 21 children placed in those homes in violation of DCYF policy. *Id.* at 000095022, 039, 046, 062, 080, 095, 111, 138. As of March 31, 2012, at least 42 non-relative foster care providers with pending initial licensing applications had Plaintiff Children already placed with them in violation of DCYF policy. DCYF Report 77: Fact Sheet Children Served Month Ending 3/31/12, Lowry Decl. Ex. 13; Savage Dep. Tr., Sept. 19, 2012, Lowry Decl. Ex. 14, 209:21-214:5. Additionally, according to DCYF reports, for each month from January through April 2012, there were between 20 and 78 children placed with unlicensed private providers and between 1 and 13 children placed in residential facilities pending contract in violation of DCYF policy. DCYF Report 27: Children in Unlicensed Placements, Jan.-Apr. 2012, Lowry Decl. Ex. 15, at 000082271, 309, 349, 390; DCYF Report 106: Unduplicated Count of Children by Living Arrangement, Jan.-Apr. 2012, Lowry Decl. Ex. 16; DCYF Rule 102: Child Placing Regulations, R.I. Admin. Code 14-3-102:V-E.

Defendants have also admitted that they do not limit the placement of young children in shelters. Savage Dep. Tr. 173:2-10, Sept. 19, 2012, Lowry Decl. Ex. 14. Indeed, the percentage of children under 12 years old placed in a group care setting was 11.8% in federal fiscal year 2011, with Rhode Island reporting the highest percentage of the 52 states and other jurisdictions

that reported this information since 2008. Child Welfare Outcomes Report Data Custom Data Builder: Outcome Measure 7.1, 2008-2011, Lowry Decl. Ex. 17.

This common question of fact also has an available common answer: an injunction to increase the number and array of appropriate placements available to Plaintiff Children, which this Court has recognized as a potential remedy in this case, *see Sam M.*, 800 F. Supp. 2d at 380, 389, as well as a limitation on the use of shelters as placements for very young children.

4. Common Sibling Relations Question

There is also evidence that Defendants routinely fail to place siblings together or provide for regular sibling visitation when siblings are placed apart. Federal law requires that "reasonable efforts shall be made to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement . . . and in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings." 42 U.S.C. § 671(a)(31). According to CWLA professional standards, "[s]iblings should be placed separately only if placement together would be contrary to the developmental, treatment, and safety needs of a given child. If siblings must be placed with separate foster families, frequent and regular ongoing contact between the children should be maintained." CWLA Standards of Excellence for Family Foster Care Services § 2.30, Lowry Decl. Ex. 2.

Defendants have admitted, however, that Named Plaintiff Jared C. was never placed with his sister because *no* placement for three siblings was available. Zolnierz Dep. Tr. 51:13-25, 53:14-25, Dec. 11, 2012, Lowry Decl. Ex. 18, filed under seal. According to Rhode Island's federal CFSR, dated September 2010, of the cases reviewed, 40% of children had visits with their siblings in foster care less than once per month. Final Report, R.I. CFSR, Sept. 2010,

Lowry Decl. Ex. 5, at 000003227. Rhode Island's undated Draft CFSR Program Improvement Plan for 2010 acknowledged that the 2010 CFSR onsite record review identified the concern that the frequency and quality of sibling visitation was "insufficient" to meet the needs of children. R.I. CFSR Program Improvement Plan 2010 Draft, Lowry Decl. Ex. 19, at 000083676. Defendants admit that they do not even have the capacity to track the frequency with which siblings in foster care are placed together or the frequency of sibling visitation. Saunders Dep. Tr. 124:19-22, 132:8-11, Apr. 27, 2012, Lowry Decl. Ex. 20.

This common question of fact also has an available common answer: an injunction mandating the prioritization of sibling placements and the enforcement of a minimum of monthly sibling visitation when siblings must be placed apart.

5. Common Maintenance Payments Question

There is also evidence that Defendants do not make foster care maintenance payments sufficient "to cover the cost" of caring for each child in foster care as required by AACWA. 42 U.S.C. § 675(4)(A); 42 U.S.C. § 672. Rhode Island's standard daily board rate[7] for a 0 to 3-year-old child[8] is $15.21 (Foster Parent Rates, Farrish Dep. Ex. 112, Lowry Decl. Ex. 21), which is $12.75 or 45.6% less than the United States Department of Agriculture's ("USDA") 2011

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[7] Rhode Island gives foster parents both a standard daily board rate as well as clothing allowances for foster children in their care, which are distributed three times a year in the following increments: $100 for children ages 0 to 3-years-old, $150 for children ages 4 to 11-years-old and $250 for youth 12-years-old and older. The total Rhode Island standard daily board rates that are described herein include both the daily board rates and the total clothing allowances for each age range divided by 365, as provided by DCYF's Chief Financial Officer Margaret Farrish at her December 11, 2012 deposition and attached to the Lowry Decl. as Exhibit 21.

[8] The United States Department of Agriculture ("USDA") estimates daily expenditures for children aged 0-2, 3-5, 6-8, 9-11, 12-14 and 15-17. For purposes of comparison to the DCYF rate for children aged 0-3, an average of the estimates for children aged 0-2 and 3-5 was calculated. Expenditures on Children by Families, 2011, Lowry Decl. Ex. 22, at PLTF0029918-19.

estimated daily expenditures on a child in the urban Northeast[9] (Expenditures on Children by Families, 2011, Lowry Decl. Ex. 22, at PLTF0029919) and $7.98 or 34.4% less than the USDA's 2011 estimated daily expenditures on a child in the United States[10] (*id.* at PLTF0029918). Rhode Island's standard daily board rate for a 4 to 11-year-old child[11] is $14.87 (Foster Parent Rates, Farrish Dep. Ex. 112, Lowry Decl. Ex. 21), which is $13.14 or 46.9% less than the USDA's 2011 estimated daily expenditures on a child in the urban Northeast (Expenditures on Children by Families, 2011, Lowry Decl. Ex. 22, at PLTF0029919) and $8.35 or 36% less than the USDA's 2011 estimated daily expenditures on a child in the United States (*id.* at PLTF0029918). Rhode Island's standard daily board rate for youth ages 12-years-old and up[12] is $17.84 (Foster Parent Rates, Farrish Dep. Ex. 112, Lowry Decl. Ex. 21), which is $13.27 or 42.7 less than the USDA's 2011 expenditures on a child in the urban Northeast (Expenditures on Children by Families, 2011, Lowry Decl. Ex. 22 at PLTF0029919) and $6.58 or 27% less than the USDA's 2011 expenditures on a child in the United States (*id.* at PLTF0029918).

This common question of fact also has an available common answer: an injunction mandating minimum foster care maintenance payments that cover the cost of care for children in placement as required by AACWA.

6. Common Case Planning Question

Likewise, there is evidence that Defendants routinely fail to ensure that case plans, with mandated elements, are completed every six months for each child in foster care as required by

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[9] The estimated expenditures for the urban Northeast are for a family making less than $59,690 per year and exclude health care costs. *Id.* at PLTF0029919.

[10] The estimated expenditures for the United States are for a family making less than $59,410 per year and exclude health care costs. *Id.* at PLTF0029918.

[11] For purposes of comparison to the DCYF rate for children aged 4-11, an average of the USDA estimates for children aged 3-11 was calculated. *Id.* at PLTF0029918-19.

[12] For purposes of comparison to the DCYF rate for children aged 12 and up, an average of the USDA estimates for children aged 12-17 was calculated. *Id.*

federal law. 42 U.S.C. § 675. According to a DCYF Administrative Review Unit review sheet for the period February 1, 2012 through April 30, 2012, service plans were written in a timely manner and included measurable behavior change outcomes in only 391 out of 607 sample files (64.4%). DCYF Report 199: Administrative Service Plan Review – Period: 02/01/2012-04/30/2012, Lowry Decl. Ex. 23, at 000082673).

This common question of fact also has an available common answer: an injunction mandating compliance with case planning requirements.

7. Common Questions of Law

There are also a number of questions of law common to all class members, including whether these identified systemic deficiencies and failures in DCYF's foster care system violate Plaintiff Children's federal constitutional and statutory rights as recognized by this Court (1) to be free from harm and imminent risk of harm while in state custody under the due process clause of the Fourteenth Amendment; (2) to family association under the First, Ninth and Fourteenth Amendments; (3) to foster care maintenance payments that cover the cost of care for children in placement as required by AACWA; and (4) to timely and adequate case plans as required by AACWA. *See* Complaint ¶¶ 218-30; *Sam M.*, 800 F. Supp. 2d at 389-90 (refusing to dismiss constitutional and federal statutory claims).

These common questions of law affect the entire class of Plaintiff Children, and violations of these constitutional and statutory rights can be resolved with the class-wide injunctive relief sought by Plaintiffs, including, for example, enforcing lower caseloads, an increased array of foster care placements and foster care maintenance payments and case plans that meet the statutory requirements.

C. The Claims of the Named Plaintiffs Are Typical of the Claims of the Class

The Named Plaintiffs' claims are typical of the claims of all children in the putative class, since their claims "arise[ ] from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory." *García-Rubiera v. Calderón*, 570 F.3d 443, 460 (1st Cir. 2001) (alteration in original) (internal quotation marks omitted); *accord Rosen v. Textron, Inc.*, 369 F. Supp. 2d 204, 208 (D.R.I. 2005). "'The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees.'" *Roberts v. Rhode Island*, No. 99-CV-259, 2000 WL 33671759, at *2 (D.R.I. Jan. 6, 2000) (Lisi, C.J.) (quoting *Baby Neal ex rel. Kanter*, 43 F.3d 48, 57 (3d Cir. 1994) (finding named plaintiff foster children's claims typical of claims of absentees because all arise from same systemic failures)).

The typicality requirement of Rule 23(a)(3) is satisfied here because the five remaining Named Plaintiffs identify "specific systemic failures that expose the entire Plaintiff class to an unreasonable risk of harm." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011). For example, as alleged in the Complaint, the abuse suffered by the Named Plaintiffs, and the high rate of maltreatment of class members in general, results from, among other things, caseworkers carrying unmanageable caseloads that prevent them from adequately visiting and monitoring the safety of children in their placements, and DCYF's failure to adequately train its caseworkers. *See* Complaint ¶¶ 5, 39-41, 49, 51, 90, 128-132, 186-95, 200. DCYF's failure to recruit, license and maintain an adequate array of safe and appropriate foster placements, its failure to appropriately match children to foster placements and its failure to adequately support foster parents has harmed the Named Plaintiffs and class members alike. *See id*. ¶¶ 5, 40-42, 61-

66, 87, 91-92, 133-53, 184-85. Likewise, class members and Named Plaintiffs alike are denied federally-required foster care maintenance payments and case plans. *See id*. ¶¶ 5, 154-58, 215-17.

As a matter of law, while Defendants may have harmed Plaintiff Children in different ways and to varying degrees, this does not negate the Named Plaintiffs' typicality because the Named Plaintiffs and all putative class members are subject to the same deficient, agency-wide, policies and practices that inevitably lead to harm. As the Tenth Circuit found in a similar foster care reform suit, "typicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances." *DG ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (finding that "[t]he harm and threat of harm suffered by the Named Plaintiffs as a result of [the defendants'] allegedly deficient monitoring practices is typical of the harm and threat of harm suffered by all children in the class because all foster children are subject to [the defendants'] challenged, agency-wide monitoring policies"); *see also Baby Neal*, 43 F.3d at 63 (finding typicality when "[a]t any one time, the plaintiffs do not suffer from precisely the same deficiency, but they are all alleged victims of the systemic failures"); *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 132 (D.P.R. 2010) (finding typicality, "[a]lthough the exact details of the individual contracts and shipping terms vary," because plaintiffs share the same legal theory and "typicality is not tantamount to identicality, and the Court need not ascertain whether all Plaintiffs are situated in exactly the same manner as each other in order to find typicality").

Typicality also does not require that the interests and claims of all Named Plaintiffs and class members be identical in a civil rights class action like this one. *See, e.g.*, *Rolland v. Patrick*, Civil Action No. 98-30208-KPN, 2008 WL 4104488, at *5 (D. Mass. Aug. 19, 2008)

(typicality satisfied even though "individual class members may have somewhat different needs, or may have entered the nursing homes through different processes, or may be entitled to or need different services" (internal quotation marks omitted)). The Named Plaintiffs' claims are also typical because they are based on the same legal theories: deprivation of the same federal rights from the operation of the same unitary policies and/or customs. *See Rosen*, 369 F. Supp. 2d at 208 ("Similarity of legal theory may satisfy the typicality requirement even in the face of factual distinctions."). Thus, the legal theories of the Named Plaintiffs will not conflict with those of the class. *See Roberts*, 2000 WL 33671759, at *2.

Accordingly, Named Plaintiffs satisfy the typicality requirement of Rule 23(a)(3).

D. The Named Plaintiffs Will Adequately Represent the Members of the Proposed Class

The Named Plaintiffs "will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), because their request for broad systematic reforms does not conflict with the interests of any of the class members, and because they are represented by highly qualified and experienced counsel who are able to conduct this litigation vigorously. *See Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985); *Rosen v. Textron, Inc.*, 369 F. Supp. 2d 204, 216 (D.R.I. 2005).

Named Plaintiffs seek declaratory and injunctive relief ordering Defendants to implement systemic reforms that will provide them and the entire Plaintiff Class with the protection, care, treatment and services to which each member of the class is legally entitled. Because the relief sought by the Named Plaintiffs coincides with the relief sought for the Class as a whole, "[t]his circumstance accords a congruence of interest between the class and individual claims, and the named representative[s'] self interest is advanced by a vigorous pursuit of the class claims." *DeGrace v. Rumsfeld*, 614 F.2d 796, 810 (1st Cir. 1980); *see also Connor B. ex rel. Vigurs v.*

Patrick, 272 F.R.D. 288, 297 (D. Mass. 2011) (finding adequacy where the "named Plaintiffs' interests are entirely consistent with those of the class"); *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) ("[Where] Plaintiffs seek broad based relief which would require the child welfare system to dramatically improve the quality of all of its services . . . the interests of the class members are identical."). Relief for the Named Plaintiffs will accord relief to all of the abused and neglected children in Rhode Island's foster care system, and vice versa.

In addition, Plaintiffs have retained experienced and competent counsel who will more than "fairly and adequately protect the interests of the class," as required by Rule 23(a)(4). Plaintiffs are represented by Rhode Island attorney John Dineen; attorneys employed by the nonprofit organization Children's Rights; and the national law firm Weil, Gotshal & Manges LLP.

Rhode Island attorney John Dineen has previously litigated constitutional claims on behalf of foster children in Rhode Island, serving as co-counsel in *Office of Child Advocate v. Lindgren*, No. 1:86-cv-00723-L (D.R.I. 1986), challenging DCYF's practice of placing children in its custody in night-to-night placements. Lowry Decl. ¶ 4. Children's Rights' attorneys have served as class counsel on much of the major child-welfare litigation in the United States. *Id.* ¶¶ 6-7. The attorneys at Children's Rights have many years of experience litigating similar class actions across the country, asserting constitutional and statutory claims on behalf of children in foster care to obtain system-wide injunctive and declaratory relief. *Id.* Weil, Gotshal & Manges LLP is one of the leading private law firms in the country, and Weil's attorneys bring a wealth of experience in all areas of complex civil litigation. *Id.* ¶ 5.

Prior to filing this action and during the pendency of this litigation, Plaintiffs' counsel conducted an in-depth investigation of all aspects of the Rhode Island child welfare system's

operation and its treatment of children. *Id.* ¶ 9. Counsel spent hundreds of hours meeting with sources and stakeholders and compiling and analyzing data. *Id.* Counsel thoroughly researched all of Plaintiff Children's legal claims. *Id.*

Counsel's combined experience, knowledge, resources and dedication unquestionably satisfy the adequacy requirement for class certification under Rule 23(a)(4). *See Connor B.*, 272 F.R.D. at 297 (finding Children's Rights' attorneys and a national litigation law firm will "more than 'fairly and adequately protect the interests of the class'" (quoting Fed. R. Civ. P. 23(a)(4))).

III. Class Certification Is Warranted Under Rule 23(b)(2)

In addition to satisfying the four requirements of Rule 23(a), the putative Class meets the criteria set out in Rule 23(b)(2), which provides for class certification 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).

The First Circuit has found Rule 23(b)(2) to be "uniquely suited to civil rights actions in which the members of the class are often incapable of specific enumeration." *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (internal quotation marks omitted); *see Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011) ("Rule 23(b)(2) is 'uniquely suited to civil rights action[s].'" (alteration in original) (quoting *Yaffe*, 454 F.2d at 1366)); *Hawkins v. Comm'r of the N.H. Dep't of Health & Human Servs.*, No. Civ. 99-143-JD, 2004 WL 166722, at *4 (D.N.H. Jan. 23, 2004) ("Classes certified under Rule 23(b)(2) 'frequently serve as the vehicle for civil rights actions and other institutional reform cases,' including cases alleging deficiencies in government administered programs . . . ." (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994))); *see also Baby Neal*, 43 F.3d at 59 ("[T]he injunctive class provision [of Rule 23(b)(2)] was 'designed specifically for civil rights cases seeking broad

declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.'" (quoting Newberg & Conte, 1 Newberg on Class Actions § 4.11, at 4-37 (1992))). As the *Wal-Mart* Court recently reiterated in highlighting the distinction between injunctive and declaratory relief permissible under Rule (b)(2) and the inapplicability of Rule 23(b)(2) in cases involving individualized awards of monetary damages: "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (internal quotation marks omitted).

Plaintiffs seek final declaratory and injunctive relief from Defendants' systemic failures, including their failure: to assign manageable caseloads to DCYF caseworkers; to monitor and ensure the safety of children in DCYF custody; to license and maintain an appropriate array of safe placements for foster children; to maintain sibling relationships; to reimburse foster care providers for the costs of providing care; and to provide required case plans. Complaint ¶¶ 5, 127-217. These and the other systemic failures set forth in the Complaint affect all members of the Class, and the declaratory and injunctive relief Plaintiffs seek to address these failures will thus have class-wide scope and effect. *See Connor B.*, 272 F.R.D. at 297 (finding that where "Plaintiffs have proposed several forms of injunctive relief that would benefit the entire class, including stricter limits on caseworker caseloads and increased visitation by caseworkers of children in foster homes," certification of a class of Massachusetts foster children under Rule 23(b)(2) was appropriate). Indeed, this Court has already recognized that injunctive relief such as requiring lower caseloads, improved caseworker training and an increased array of placements options does not directly implicate individual cases but would assist in DCYF's ability to meet

its legal duties in all cases. *See Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 380, 389 (D.R.I. 2011).

Taken together, the fact that Defendants' acts and omissions are generally applicable to Plaintiff Children and the purely declaratory and injunctive nature of the relief sought in this civil rights action compel class certification under Rule 23(b)(2).

IV. Plaintiffs' Counsel Will Fairly and Adequately Represent the Interests of the Class and Should Be Appointed Class Counsel

Plaintiffs' counsel's breadth and depth of civil rights and class action experience, along with their extensive investigation into the facts and law of this case and their ability to commit the necessary time and resources to prosecute this action, eminently qualify them to "fairly and adequately represent the interests of the class" as class counsel.[13] Fed. R. Civ. P. 23(g)(1)(B). First, counsel have identified and thoroughly investigated all claims in this action. Lowry Decl. ¶ 9. Second, counsel have extensive experience in handling class actions, other complex litigation, and claims of the type asserted here on behalf of large classes of children in foster care who have sought the type of injunctive relief requested here. *Id.* ¶¶ 6-7. Third, counsel have a comprehensive knowledge of the applicable law, based both on current legal research and on the experience of attorneys from Children's Rights, who have served as class counsel on much of the major child-welfare litigation in this country. *Id.* ¶¶ 6-9. Finally, counsel has committed sufficient resources to prosecute this action in a thorough and expeditious manner, having assembled a strong and well-resourced legal team. *Id.* ¶¶ 3, 9.

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[13] In making this determination, the Court is guided by four considerations: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Because Plaintiffs' counsel clearly satisfy the standard for appointment of class counsel contained in Rule 23(g)(1), this Court should appoint Plaintiffs' counsel as class counsel in this action.

V. The Court Should Rule on Plaintiffs' Second Motion for Class Certification Without Delay To Avoid Irreparable Prejudice to Plaintiff Children

A. Rule 23(c)(1)(A) Requires a Prompt Determination of Class Certification Where As Here Recurring Mootness Problems Are Inherent to the Class and Threaten Irreparable Prejudice

Now more than five and a half years after Plaintiff Children filed their original Motion for Class Certification, the Court has confirmed it intends to defer any class certification determination until after dispositive motions due in October 2013 are decided, and has barred Plaintiffs from obtaining any class-related discovery. *See* Mem. & Order, Dec. 17, 2012, Dkt. No. 230; Order, Feb. 12, 2013, Dkt. No. 278. Plaintiffs, however, will be irreparably prejudiced if their Second Motion for Class Certification is not heard "[a]t an early practicable time" as required by Rule 23(c)(1)(A), before additional Named Plaintiffs moot out. As the Supreme Court has noted, "[i]n cases . . . where mootness problems are likely to arise, district courts should heed strictly the requirement of Fed. R. Civ. P. 23(c)(1) that '*[a]s soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.'" *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (quoting precursor to current Rule 23(c)(1)(A)) (upholding Rule 23(b)(2) certification of class of minors in a § 1983 action for injunctive relief where the claims of all named plaintiffs were moot by the time the district court ruled on class certification). The same mootness principles apply under current Rule 23(c)(1)(A). *See Olson v. Brown*, 594 F.3d 577, 579 (7th Cir. 2010) (citing *Swisher v. Brady*, 438 U.S. at 213 n.11) (reversing district court's denial of class certification after named plaintiff prisoner was transferred to another facility, thereby mooting his claims challenging

various jail procedures, finding that the case "fits within the exception to the mootness doctrine carved out for inherently transitory cases").

While courts have recognized that the merits of individual claims may, under appropriate circumstances, be addressed before class certification as this Court currently intends to do, they have been careful to limit this to cases where there is no prejudice to plaintiffs. *See, e.g.*, *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 (D.C. Cir. 2001) (holding that "where the plaintiffs are not prejudiced . . . a district court does not abuse its discretion by resolving the merits before considering the question of class certification"); *BookLocker.com, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89, 97 n.3 (D. Me. 2009) ("'[A]bsent prejudice to the plaintiff, a court may decide a defendant's [dispositive motion] in a putative class action before taking up the issue of class certification'" (alteration in original) (quoting *Good v. Altria Grp., Inc.*, 231 F.R.D. 446, 447 (D. Me. 2005))); *Evans v. Taco Bell Corp.*, No. Civ. 04CV103JD, 2005 WL 2333841, at *4 n.6 (D.N.H. Sept. 23, 2005) ("It is well settled that, absent prejudice to the plaintiff, a court may decide a defendant's motion for summary judgment in a putative class action before taking up the issue of class certification.").

As the Second Circuit recognized in *Comer v. Cisneros*, 37 F.3d 775, 797-99 (2d Cir. 1994), when plaintiffs' claims are "acutely susceptible to mootness" because "while the harm remains constant, those who suffer from the harm often change identity," it is inappropriate to dismiss civil rights class claims due to mootness. Indeed, the appellate court stated in that case that "[i]t is unfortunate that the district court took so long to rule on the question of class certification . . . ." *Id.* at 797; *see also Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (holding that where claims of county jail inmates were inherently transitory, it was inappropriate

for the court to stage summary judgment before class certification because the claim "cries out for a ruling on certification as rapidly as possible").

Here, the prejudice to Plaintiff Children of not having their class certification motion considered without further delay is substantial, real and irreparable because they are members of an inherently transitory class with members coming in and out of Defendants' custody daily.

Indeed, ten Named Plaintiffs have already mooted out, having been adopted (nine) or having reached the age of majority (one), two of them since the Second Amended Complaint was filed in 2012. *See Sam M. ex rel. Elliott v. Carcieri*, 610 F. Supp. 2d 171, 175 (D.R.I. 2009); *Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 389-90 (D.R.I. 2011); Stipulated Order, July 31, 2012, Dkt. No. 153; Stipulated Order, Sept. 28, 2012, Dkt. No. 173; Oct. 1, 2012 Text Order Entering Dkt. No. 173; Lowry Decl. ¶ 13. Of the remaining five Named Plaintiffs, two will turn 18 years old and age out of Defendants' care and custody this summer on July 4 and August 10, 2013 (Lowry Decl. ¶¶ 14-15), mooting out their claims well before dispositive motions are ever decided under the current Pretrial Order (*see* Am. Standard Pretrial Order, Oct. 9, 2012, Dkt. No. 176 (ordering that dispositive motions be filed by October 16, 2013)). The other three Named Plaintiffs are all freed for adoption – indeed, one was recently placed in a pre-adoptive placement – and DCYF could have them adopted at any time, thus mooting out their claims as well. Lowry Decl. ¶¶ 16-17. Whereas the current Named Plaintiffs are representative members of a putative class of foster children that is by definition transient and fluid, and Defendants' actions determine Plaintiffs' class membership, there is a high risk that Named

Plaintiffs will continue to moot out over time, prejudicing Plaintiff Children's class claims and their ability to ever have them be resolved on the merits.[14]

As this Court made clear in dismissing all but two Named Plaintiffs in 2011, the Court will not allow named plaintiffs to continue as class representatives after their individual claims become moot, even if those claims become moot while a class certification motion is pending.[15] *Compare Sam M.*, 800 F. Supp. 2d at 372-73 (refusing to follow persuasive authority in similar class action cases, including of the Third Circuit, that allow named plaintiff members of a putative class of foster children to pursue pending class certification despite the mootness of their individual claims), *with Bond v. Fleet Bank (RI), N.A.*, No. Civ.A 01-177 L, 2002 WL 31500393, at *3 (D.R.I. Oct. 10, 2002) (Hagopian, Mag.), *adopted by* Order, Nov. 21, 2002, ECF No. 51 (Lagueux, J.) ("[A] class action may endure even though the named plaintiff's claims have become moot, as long as the motion for class certification is pending at the time that mootness

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[14] Indeed, many courts, including the Supreme Court, have expressed concerns about defendants' ability to avoid a class action by strategically "picking off" named plaintiffs prior to class certification. *See, e.g.*, *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (finding that plaintiff's claims were "acutely susceptible to mootness in light of [the defendant's] tactic of picking off lead plaintiffs . . . to avoid a class action" (alteration in original) (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)) (internal quotation marks omitted)); *Weiss*, 385 F.3d at 344 ("[A]llowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims . . . ."); *Reed v. Heckler*, 756 F.2d 779, 786 (10th Cir. 1985) (relating class claims back to the complaint where named plaintiffs' claims had all been mooted "by purposeful action of the defendants").

[15] Plaintiffs had argued that the claims of these five Named Plaintiffs should not be dismissed as moot because of the "inherently transitory" exception to the mootness doctrine as it applies to class actions. Pls.' Mem. of Law in Objection to Defs.' Mot. To Dismiss, Dkt. No. 80, at 67-71; Hr'g Tr., 31:8-33:3, 34:15-35:1, 37:2-10, May 6, 2011. The Court rejected these arguments.

overtakes the plaintiff's claims." (citing *Holmes v. Pension Plan of Bethlehem Steel Corp*., 213 F.3d 124, 135 (3d Cir. 2000))). Thus, if all of the Named Plaintiffs' individual claims moot out before class certification, Plaintiff Children are likely to have their class claims dismissed by this Court. Meanwhile, if Plaintiffs file an amended complaint to again add new Named Plaintiffs with live claims to replace those that moot out and preserve class claims, this second class certification motion could be denied as moot, further delaying any determination on class certification, unless the Court proceeds as requested. *See* Feb. 21, 2012 Text Order (terminating class certification motion as moot). The Plaintiff Children are thus trapped in a never-ending cycle where class certification will never be considered until dispositive motions on the individual claims of the Named Plaintiffs are decided, but such dispositive motions themselves will never be decided because of the continual mooting out of the claims of the individual Named Plaintiffs.

Even if not all of the Named Plaintiffs moot out before a class certification decision, Plaintiff Children will still be severely prejudiced. First, it is important for there to be multiple named plaintiffs to ensure that those plaintiffs represent all of the claims and harms alleged. Furthermore, all the time, effort and cost that have now been expended for Named Plaintiff discovery, and any dispositive motion practice on the claims of each Named Plaintiff who then moots out before class certification is decided, will be for naught where, as here, the Court will not preserve their class claims.

Indigent Plaintiffs have already expended considerable time and resources in Named Plaintiff-specific discovery. Simply reviewing the voluminous DCYF case files for the Named Plaintiffs – more than 45,000 pages – has consumed approximately 400 work hours. Lowry Decl. ¶ 18. Plaintiffs have disclosed one expert who is reviewing these files at a total cost of

approximately $30,000, a heavy expense that is unrecoverable even should Plaintiffs prevail. Lowry Decl. ¶ 19; *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991) (holding that "§ 1988 conveys no authority to shift expert fees" to the losing party in a § 1983 civil rights litigation). Plaintiffs have also noticed one Rule 30(b)(6) deposition on behalf of each of the five Named Plaintiffs, three depositions of DCYF senior managers with personal knowledge of the Named Plaintiffs' cases and an additional Rule 30(b)(6) deposition focused on the Named Plaintiffs' foster care maintenance payments, and have subpoenaed a treating therapist of a Named Plaintiff. Lowry Decl. ¶ 20. Based on the time and expense of the two Named Plaintiff depositions already taken, it is estimated that the eight remaining Named Plaintiff-related depositions will take a minimum of approximately 400 hours (time spent on reviewing the necessary documents, preparing for the depositions and traveling to and attending the depositions). Lowry Decl. ¶ 21. The transcription expenses alone for these depositions are estimated to be more than $14,500, and deposition-related travel adds further expense. *Id*. Finally, Plaintiffs have invested over $2,400 and approximately 330 hours on the issue of access between the Named Plaintiffs and the psychological expert they have retained. Lowry Decl. ¶ 22.

Defendants, too, have invested significant resources in Named Plaintiff-related discovery. Defendants claim that they have spent 375 hours simply printing the screenshots from the Named Plaintiffs' computerized case files and another 680 hours identifying and printing licensing files related to the Named Plaintiffs' placements. Defs.' Mot. for a Protective Order Pursuant to Fed. R. Civ. P. 26, Dkt. No. 177, at 53. Every time Defendants produce new files, they reportedly must engage in the "labor-intensive and time-consuming process" of redacting confidential information, a process that the state claims has placed an "unprecedented" demand on

"[v]irtually the entire support staff of the Department of [the] Attorney General's Civil Division" and has required the state to hire additional employees. *Id.* at 53. Defendants have also expended considerable time and money preparing for depositions specific to the Named Plaintiffs. Defendants themselves have recognized that Rule 30(b)(6) depositions are "no ordinary deposition[s]," but ones requiring additional time and expense, (Defs.' Objection to Pls.' Appeal of Mag. J. Almond's Mem. & Order, Dkt. No. 270, at 11), and have already produced ten witnesses just for the two Named Plaintiff depositions that have already taken place. Defendants have even sought to block the foster care maintenance payment-related deposition as unduly burdensome due to the time and effort required to prepare for it. Defs.' Objection to Pls.' Appeal of Mag. J. Almond's Mem. & Order, Dkt. No. 270; Pls.' Discovery Status Report, Dkt. No. 268, at 4-5 & n.8.

Such time and expense by both parties will be largely wasted should class certification be delayed until after additional Named Plaintiffs moot out and are dismissed from the case. Moreover, should an additional Amended Complaint be necessary to add Named Plaintiffs with live claims, the parties will be back to square one on discovery on those individual claims, further delaying an efficient resolution of both individual and class claims.

B. Expedited Pre-Class Certification Discovery Should Be Ordered

Plaintiffs are currently barred from class-wide discovery. *See* Mem. & Order, Dec. 17, 2012, Dkt. No. 230, at 1 n.1 ("[D]iscovery on class certification issues is stayed until after the Court rules on dispositive motions."); *see also id.* at 2 (limiting discovery to "nonprivileged information that is relevant to the substantive claims of the individual named Plaintiffs and Defendants' defenses to such claims" and denying any "wide-ranging discovery of all children who have been in the legal custody of the Rhode Island child welfare system due to allegations of abuse or neglect"); Order, Feb. 12, 2013, Dkt. No. 278 ("[T]he focus of the litigation at this

point in time is on the claims of the individual named Plaintiffs."). Should the Court require additional support for class commonality and typicality beyond Plaintiffs' detailed pleadings and the evidence provided herein under the "rigorous analysis" standard recently articulated by the Supreme Court, Plaintiff Children will require and are entitled to pre-certification discovery. *See* Fed. R. Civ. P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (finding that parties seeking class certification must "affirmatively demonstrate" compliance with Rule 23(a) and that "sometimes" this may require a court "to probe behind the pleadings" (citation omitted) (internal quotation marks omitted)); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 299 (S.D.N.Y. 2012) (collecting cases and discussing "the importance of adjudicating a class motion only after class-related discovery is complete, discovery that often overlaps substantially with the merits"); *Woodall v. DSI Renal, Inc.*, No. 11-2590, 2012 WL 1038626, at *9 (W.D. Tenn. Mar. 27, 2012) ("Whether the requirements of Rule 23 are satisfied cannot be resolved on the pleadings alone. Fact-finding is required."); *Burton v. District of Columbia*, 277 F.R.D. 224, 230 (D.D.C. 2011) ("[P]re-certification discovery should ordinarily be available where a plaintiff has alleged a potentially viable class claim . . . .").

Since timely consideration of class certification is required by Rule 23(c)(1)(A), this Court should order expedited pre-certification discovery that would require Defendants to produce policy and custom evidence relevant to establishing common class questions of fact and typicality. In order to expedite such discovery, Plaintiffs propose that the following limited subset of previously propounded discovery requests for common system-wide evidence that are the subject of the Court's current Protective Order now be allowed (*see* Lowry Decl. Ex. 24 for a detailed description of the requests and their current status):

- Caseloads: First RFP #17, Third RFP #6
- Caseworker training: First RFP #12, Second RFP #15
- Caseworker visitation: First RFP #22
- Placement Array: First RFP #38, First RFP #54, Second RFP #13
- Monitoring of Foster Care Placements: First RFP #56, Third RFP #5
- Abuse and Neglect in Care: First FRP #61
- Service Delivery: First RFP #14
- Sibling Separation: First RFP #23, First RFP #45
- Case Plans: First RFP #31
- Foster Care Maintenance Payments: First RFP #48, First RFP #49
- Requests spanning multiple common policies, practices and customs: First RFP #24, Second RFP #9, Second RFP #17, Second RFP #22, Sixth RFP #1

Supplementation of nine key DCYF reports that Defendants ceased producing to Plaintiffs in 2012 should also be ordered:

- SQR Report #27, "Children in Unlicensed Placements"
- SQR Report #77, "Fact Sheet: Children Served"
- SQR Report #199, "Administrative Service Plan Review: Determination Sheet Question and Answers"
- SQR Report #259, "CPS Statistics"
- SQR Report #433, "Children in Episodes"
- SQR Report #493, "Administrative Service Plan Review"
- SQR Report #496, "Children in Unlicensed Placements - Home Providers Inactive/Expired OR Withdrawn/Denied; and Children in Unlicensed Placements - Home Providers Pending License over 6 Months"
- SQR Report #536, "Caseworker Visits"
- SQR Report #583, "Children with No Face-to-Face Contact Documented"

Such discovery should be produced by April 15, 2013 for Plaintiffs to make meaningful use of the information at the hearing on this Motion.

CONCLUSION

This action, which seeks only injunctive and declaratory relief on behalf of a class of Rhode Island foster children, satisfies all of the requirements for class certification under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. Whereas the Named Plaintiffs will continue to moot out over time, Plaintiffs respectfully request that this Court enter an order, "[a]t an early practicable time" pursuant to Rule 23(c)(1)(A), certifying this action as a class action for all purposes, with the Class defined as: "all children who are or will be in the legal custody of the Rhode Island Department of Children, Youth and Families due to a report or suspicion of abuse or neglect." Plaintiffs request that the certification order also appoint Plaintiffs' counsel as class counsel pursuant to Rule 23(g). With time being of the essence, Plaintiffs respectfully request that (1) an immediate briefing schedule be set on the instant motion, so that Defendants have 14 days to file their Opposition and Plaintiffs have 7 days to file their Reply; (2) expedited pre-certification discovery be ordered as described in detail above; and (3) an evidentiary hearing date be scheduled for no later than May 15, 2013, so that the Court has the opportunity to determine class certification before additional Named Plaintiffs moot out.

DATED: February 26, 2013

RESPECTFULLY SUBMITTED:

/s/ *Marcia Robinson Lowry*

MARCIA ROBINSON LOWRY (Bar No. 1187053 (NY); admitted *pro hac vice*)
MIRIAM INGBER (Bar No. 4417606 (NY); admitted *pro hac vice*)
ADAM DEMBROW (Bar No. 3960556 (NY); admitted *pro hac vice*)
CHILDREN'S RIGHTS
330 Seventh Avenue, Fourth Floor
New York, NY 10001
Phone: (212) 683-2210
Facsimile: (212) 683-4015
Email: mlowry@childrensrights.org

JOHN W. DINEEN (Bar No. 2346)
305 South Main Street
Providence, RI 02903
Phone: (401) 223-2397
Facsimile: (401) 223-2399
Email: jwdineen1@yahoo.com

JARED BOBROW (Bar No. 133712 (Cal.); admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Phone: (650) 802-3000
Facsimile: (650) 802-3100
Email: jared.bobrow@weil.com

Attorneys for Plaintiffs

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 26, 2013, I electronically filed the foregoing document with the United States District Court for the District of Rhode Island, and it is available for viewing and downloading from the ECF system for all counsel of record. I further certify that on this day I caused to be served, via ECF, a copy of said document to the attorneys of record listed below:

Via ECF:

Brenda D. Baum, Esq.
Assistant Attorney General
R.I. Department of the Attorney General
150 South Main Street
Providence, RI 02903-2907
Phone: (401) 274-4400 x 2294
Facsimile: (401) 222-3016
Email: bbaum@riag.ri.gov

Neil F.X. Kelly, Esq.
Assistant Attorney General
R.I. Department of Attorney General
150 South Main Street
Providence, RI 02903-2907
Phone: (401) 274-4400
Facsimile: (401) 222-2995
Email: nkelly@riag.ri.gov

Kevin Aucoin, Esq.
Acting Deputy Director
R.I. Department of Children, Youth & Families
101 Friendship Street
Providence, RI 02903-3716
Phone: (401) 528-3570
Facsimile: (401) 525-3566
Email: kevin.aucoin@dcyf.ri.gov

James R. Lee, Esq.
Assistant Attorney General
R.I. Department of the Attorney General
150 South Main Street
Providence, RI 02903-2907
Phone: (401) 274-4400
Facsimile: (401) 222-2995
Email: jlee@riag.ri.gov

/s/ *Marcia Robinson Lowry*

MARCIA ROBINSON LOWRY (Bar No. 1187053 (NY); admitted *pro hac vice*)
CHILDREN'S RIGHTS
330 Seventh Avenue, Fourth Floor
New York, NY 10001
Phone: (212) 683-2210
Facsimile: (212) 683-4015
Email: mlowry@childrensrights.org