UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CASSIE M., by Next Friend Kymberli Irons; ANDREW C., by Next Friend Gregory C. Elliott; MATTHEW R., by Next Friend Gregory C. Elliott; for themselves and those similarly situated*,	)	
Plaintiffs,	)	
v.	)	
GINA M. RAIMONDO, in her official capacity as Governor of the State of Rhode Island; ELIZABETH ROBERTS, in her official capacity as Secretary of the Executive Office of Health & Human Services; and KEVIN AUCOIN, in his official capacity as Acting Director of the Department of Children, Youth & Families,	)	**Class Action** **Civil Action No. 1:07-cv-00241-S-PAS**
Defendants.	)	

*pseudonyms are used for all minor named plaintiffs.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' THIRD MOTION FOR CLASS CERTIFICATION AND REQUEST FOR HEARING

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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 ("DCYF") due to a report or suspicion of abuse or neglect." As set forth in the Third Amended Complaint ("Third Am. Compl."), (ECF No. 539), DCYF, as operated by the Defendant state officials, exposes the putative Class ("Plaintiff Children") to ongoing physical and emotional harm by failing to meet its fundamental constitutional and statutory obligations to Rhode Island's foster children. Plaintiffs seek declaratory and injunctive relief to remedy specifically identified, system-wide deficiencies within Rhode Island's child welfare system that place the Named Plaintiffs and all children in DCYF custody at a common, ongoing, and unreasonable risk of serious harm.

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. Numerous courts across the country have certified classes of foster children in similar institutional reform litigation, including in cases commenced after the U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (upholding certification of Rule 23(b)(2) class of foster children alleging "central and systemic failures" of child welfare system); *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); *M.D. v. Perry*, 294 F.R.D. 7 (S.D. Tex. 2013) (post-*Wal-Mart* order certifying pursuant to Rule 23(b)(2) one general class and three subclasses of Texas foster children); *see also 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. 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). In line with this precedent, this Court previously has identified possible injunctive remedies that would be uniformly applicable to all Plaintiff Children here on a class-wide basis, such as setting limits on caseworker caseloads and requiring the development of an increased number and array of licensed foster care placements. *See Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 380, 389-90 (D.R.I. 2011) (ECF No. 101); *see also 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)).[1]

As set forth below, this action satisfies all requirements for class certification under Federal Rule of Civil Procedure 23. Accordingly, this Court should issue an order certifying this

[1] Though Plaintiffs first moved for class certification in 2007 (ECF No. 2) and again in 2013 (ECF No. 287), this Court has never decided the issue. Since 2007, the claims of fourteen Named Plaintiffs have become moot, substantially prejudicing Plaintiffs. Specifically, on April 29, 2009, Judge Lagueux dismissed the claims of Named Plaintiffs Briana H., Alexis H. and Clare H. on mootness grounds after they were adopted. ECF No. 63 at 7. On July 20, 2011, Chief Judge Lisi ordered that the claims of Named Plaintiffs Sam M., Tony M., Caesar S., Deanna H. and Michael B. had been rendered moot by their adoptions, and these plaintiffs were dismissed from the suit. ECF No. 101 at 13. On July 31, 2012, the court entered a stipulation dismissing the claims of Named Plaintiff Alex C. following his adoption. ECF No. 153 at 1. On October 1, 2012, the court entered a stipulation dismissing the claims of Named Plaintiff David T. because he had reached the age of majority. ECF No. 173, granted by Text Order. On May 3, 2013, the parties stipulated to dismiss Jared C. in light of his adoption. ECF No. 312, granted by Text Order on May 7, 2013. On August 19, 2013, the court dismissed the claims of Terrence T. after he aged out of custody. ECF No. 366 at 1. Finally, the claims of Named Plaintiff Tracy L. became moot when she reached the age of 18 on August 10, 2013. Text Order, Dec. 10, 2013. On August 28, 2015, the court entered a stipulation dismissing the claims of Named Plaintiff Danny B. following his adoption. ECF No. 530. Following a successful appeal and the filing of a Third Amended Complaint, Plaintiffs now renew their class certification motion and request that this Court issue an order "[a]t an early practicable time" following a period of class certification discovery. Fed. R. Civ. P. 23(c)(1)(A).

case as a class action, 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," and appointing undersigned counsel to represent them as class counsel.

EXECUTIVE SUMMARY

I. Specifically Identified, System-Wide Policies and Practices Place Plaintiff Children at Common Risk of Harm

Rhode Island has approximately 1,800 children in DCYF foster care custody. (Regina Costa Testimony Slides, Nov. 2014, Bartosz Decl. Ex. 1, at slide 10). As legal custodian of these children, Defendants are required by federal law to protect their safety and well-being. Defendants, however, have not built the basic infrastructure and core systems required to fulfill their obligations. As a result, Plaintiffs are exposed to a common risk of harm—not from individual lapses in judgment by disparate DCYF workers, but from system-wide structural deficiencies that universally affect every member of the Class. Plaintiffs have identified the specific policies and "pattern[s] or practice[s] of agency action or inaction" that cause the class members' constitutional and statutory injuries, *see M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012):

- DCYF caseworkers carry unmanageable caseloads that prevent them from regularly visiting Plaintiff Children and otherwise performing their duties to ensure Plaintiff Children's safety in their placements. *See* Third Am. Compl. ¶¶ 68-84.
- DCYF licensing workers carry unmanageable caseloads that prevent them from processing applications and otherwise performing their duties to ensure safe and appropriate placements for Plaintiff Children. *See id.* ¶¶ 85-95.
- DCYF child maltreatment investigators carry unmanageable caseloads that prevent them from conducting adequate and timely investigations necessary to protect Plaintiff Children. *See id.* ¶¶ 96-101.

- DCYF fails to recruit, license, and maintain an adequate number and array of safe and appropriate foster care placements, particularly foster homes, to meet the needs of Plaintiff Children. *See id*. ¶¶ 85-95, 106-12.

- DCYF fails to provide timely and complete case plans for Plaintiff Children as required under federal statutory mandates. *See id*. ¶¶ 126-130.

- DCYF fails to provide foster care maintenance payments that reflect the actual costs for all items enumerated in the Adoption Assistance and Child Welfare Act of 1980 (AACWA). *See id*. ¶¶ 131-38.

These policies and practices expose all Plaintiff Children to common harms and unreasonable risk thereof:

- Plaintiff Children suffer and are placed at unreasonable risk of physical and psychological harms, including an alarming rate of maltreatment in foster care, in violation of their Fourteenth Amendment substantive due process rights. *See id*. ¶¶ 102-105.

- Plaintiff Children are placed in unlicensed, overly restrictive, or otherwise inappropriate placements that are unable to meet their psychological, developmental, and well-being needs in violation of their Fourteenth Amendment substantive due process rights. *See id*. ¶¶ 89, 91, 106-20.

- Plaintiff Children are unnecessarily separated from siblings and deprived of regular visitation with their siblings and their biological parents, causing harm to their familial bonds in violation of their First, Ninth, and Fourteenth Amendment family association rights. *See id*. ¶¶ 121-25.

- Plaintiff Children are not provided timely case plans with all federally required elements, in violation of their AACWA rights. *See id*. ¶¶ 126-30.

- Plaintiff Children are placed with caretakers who are not provided federally mandated cost of care reimbursements in violation of their AACWA rights. *See id*. ¶¶ 131-38.

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

II. Defendants' System-Wide Policies and Practices Have Harmed the Named Plaintiffs and Continue To Expose Them to Risks of Harm

Defendants' conduct with respect to each Named Plaintiff illustrates the common and

typical exposure to harm experienced by all children in DCYF foster care custody:

- **Cassie M.:** DCYF removed Cassie from her mother's home nine years ago after reports of physical and sexual abuse. While in state custody, Cassie has been placed in numerous, often inappropriate placements, including one foster home that was under an active DCYF investigation and scheduled to have its foster care license revoked. Cassie first entered an institution at age 10, and remained in institutional settings for years, including more than one year after DCYF determined that she needed a family setting. Although Cassie entered foster care along with two sisters, she has never been placed with either of them, despite her repeated requests and the lack of any documented reason for their separation. *See* Third Am. Compl. ¶¶ 19-29.

- **Andrew C.:** Andrew entered state care due to neglect after his mother experienced a psychotic episode. He was initially placed with his younger sister in a foster home, where he remained stable for over three years. In 2014, DCYF moved Andrew into an inappropriate foster home over the objections of Andrew's clinicians, service providers, and school. That foster mother proved unable to handle Andrew's needs and he was soon hospitalized. Andrew was subsequently placed in a group care setting where he was sexually abused by older boys on a school bus. Andrew remains in a group care setting today, separated from his sister. *See id.* ¶¶ 30-38.

- **Matthew R.:** Matthew entered state custody three years ago due to neglect. He has been separated from his two siblings since coming into care. Matthew was initially placed in a kinship foster home where a registered sex offender was living. He was later placed in a foster home with two older boys where he bonded with the foster parents. After Matthew disclosed that one of the boys was subjecting him to forceful sexual conduct, the other boys were removed from the home. The foster parents were subsequently indicated for neglect, although DCYF later overturned this finding. Matthew was moved to a different foster home placement, where he remains today. *See id.* ¶¶ 39-48.

The experiences of these three Named Plaintiff children exemplify the harms to which all Plaintiff Children are exposed as a result of the common deficiencies in DCYF's child welfare system. Additionally, all of these children are exposed to the same risks of harm, identified above, flowing from Defendants' systemic and uniform policies and practices.

ARGUMENT

III. Standard for Class Certification and Scope of Plaintiffs' Claims

A. Rule 23 Requirements

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, 613 (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).

It is Plaintiffs' burden to demonstrate that all Rule 23 requirements for class certification are met here. In adjudicating this motion, this Court must conduct a "rigorous analysis" to determine whether Plaintiffs have met their burden. *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citing *General Telephone of Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). Because class certification issues may be enmeshed with merits issues, "[f]requently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."

Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184, 1195 (2013) (citing *Wal-Mart*, 131 S. Ct. at 2552 n.6)).

B. Contours of Plaintiffs' Legal Claims

As set forth in the Third Amended Complaint, Defendants' system-wide policies and practices violate the Plaintiffs' federal constitutional and statutory rights and subject each class member to common harms and risks of harm. To aid the court in its rigorous analysis, Plaintiffs summarize the scope of these rights below.

1. Substantive Due Process

Plaintiffs allege that Defendants violate their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 196-200 (1989) (children in foster care custody are in a "special relationship" with state triggering Due Process protections of Fourteenth Amendment). Plaintiffs' Substantive Due Process claim has survived a previous motion to dismiss. *Sam M.*, 800 F. Supp. 2d at 369, 389. Like persons who are involuntarily committed, foster children have a Due Process right to "reasonable care and safety" in custody. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). This includes the right to freedom from physical and psychological harm,[2]

[2] *See, e.g., Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 842 (9th Cir. 2010) (recognizing "a foster child's liberty interest in social worker supervision and protection from harm" and "reasonable safety and minimally adequate care"); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (recognizing right to "adequate medical care, protection and supervision" in foster care); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (recognizing "right to be reasonably safe from harm" while in foster care); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) ("right to be free from the infliction of unnecessary harm to children in state-regulated foster homes"); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 33 (S.D. Tex. 2013) (recognizing that "[c]hildren in the State's care have a right to be free from an unreasonable risk of harm that would compromise their personal security" and that "[t]his substantive due process right 'encompasses a right to protection from psychological as well as physical abuse" (citation omitted)); *Connor B. ex rel. Vigurs v. Patrick*, 985 F. Supp. 2d 129, 158-59 (D. Mass. 2013) (holding substantive due process rights to include: "(1) 'a living environment that protects foster children's physical, mental and emotional safety and well-being'; (2) 'services necessary to prevent foster children from deteriorating or being harmed physically, psychologically, or otherwise while in government custody'; (3) 'treatment and care consistent with the purpose of the assumption of custody by DCF'; (4) 'be maintained in custody [no] longer than is necessary'; (5) 'receive care, treatment and services determined and provided through the exercise of accepted professional judgment'; and (6) 'be placed in the least

including the right to services to prevent deterioration in care.[3] It also includes the right to freedom from *unreasonable risk* of harm, which itself provides an independent basis for liability.[4] As the Southern District of Texas stated, children "do not need to wait to suffer an actual harm in order to obtain relief"; exposure to an unreasonable risk of harm is itself a "legal injury" that merits relief even where the risk has not been actualized. *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013). Courts have further specified that foster children's right to freedom from harm and risk of harm encompasses rights to placement in an appropriate setting[5] and to timely and adequate investigations into maltreatment allegations.[6]

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restrictive placement according to a foster child's needs'").

[3] *See Xiong v. Wagner*, 700 F.3d 282, 294 (7th Cir. 2012) (Substantive Due Process right "includes 'the right to minimum acceptable standards of care and treatment for juveniles and the right to individualized care and treatment'" (citation omitted)); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (right to have the state "take steps to prevent the child from deteriorating physically or psychologically"); *Connor B.*, 985 F. Supp. 2d at 158-59; *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) ("right to be free from unreasonable and unnecessary intrusions into [children's] emotional well-being"), *cf. Youngberg*, 457 U.S. at 319 (recognizing involuntarily committed person's right to some degree of habilitative training necessary to protect liberty interests).

[4] *See Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 834 (1st Cir. 2015) (noting that "the plaintiffs [in this litigation] seek forward-looking injunctive relief rather than damages; thus, their flagship substantive due process claim turns primarily on whether DCYF's policies and customs subject them to an unreasonable risk of future harm"); *D.G. v. Devaughn*, 594 F.3d 1188, 1196-98 (10th Cir. 2010) (constitutional injury to children in foster care could include not just actual abuse and neglect, but impermissible risk of harm or abuse and neglect due to alleged systemic failures of child welfare agency); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013); *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 295 (D. Mass. 2011); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989). This includes freedom from "an unreasonable risk of harm that would compromise their personal security or deprive them of reasonably safe living conditions" *M.D.*, 294 F.R.D. at 33; *see also Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc); *see also Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) (finding risk of harm sufficient for constitutional claim, noting that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them").

[5] *See, e.g., Xiong*, 700 F.3d at 293 (7th Cir. 2012) ("The Fourteenth Amendment guarantees that 'a child has a constitutional right to be placed in a safe and secure foster home.'" (citation omitted)); *Connor B.*, 771 F. Supp. 2d 142, 161 (D. Mass. 2011) ("right to a living environment that protects foster children's physical, mental, and emotional safety and well being"); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 953 (M.D. Tenn. 2000) ("right to be placed in the least restrictive, most appropriate, family-like setting while in state custody . . . [and] right to receive care, treatment and services consistent with accepted, reasonable professional judgment"); *Marisol A.*, 929 F. Supp., at 675-77 (S.D.N.Y. 1996) (right to "appropriate conditions and duration of foster care," including "safe and appropriate placements"); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991) (finding Due Process violation where "[t]he facts of this case establish beyond any doubt that defendants have failed to protect these plaintiffs from harm—whether physical, psychological, or emotional—by failing to place plaintiffs appropriately"); *M.D.*, 294 F.R.D. at 33 (S.D. Tex. 2013) (right to be "free from an unreasonable risk of harm that would . . . deprive [children in state custody] of reasonably safe living conditions"); *Johnson v. Collins*, 58 F. Supp. 2d 890, 904 (N.D. Ill. 1999) (recognizing "a clearly established substantive due process right to suitable foster care placement, which includes the right to adequate supervision and physical safety"), *vacated on other grounds*, 5 F. App'x 479 (7th Cir. 2001).

[6] *Henry A. v. Willden*, 678 F.3d 991, 1001 (9th Cir. 2012) (citing *Hernandez*); *Hernandez v. Tex. Dep't of Protective*

2. Family Associational Rights

Plaintiffs allege that Defendants violate their right to family association under the First, Ninth, and Fourteenth Amendments to the U.S. Constitution. Likewise, this claim has previously been tested and survived a motion to dismiss. *Sam M.*, 800 F. Supp. 2d at 369, 389. A child has a cognizable federal constitutional liberty interest in family association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (First Amendment protects familial association because "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (Ninth and Fourteenth Amendments protect familial association); *Rivera v. Marcus*, 696 F.2d 1016, 1026 (2d Cir. 1982) ("The courts have long recognized that children possess certain liberty rights and are entitled to due process protection of these rights," including "preserving the integrity and stability of their extended family"). Numerous federal courts have found that this right is implicated when a state foster care system denies a child meaningful contact with their siblings and biological parents. *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989) (sibling relationships are protected under right established in *Roberts*); *Behm v. Luzerne Cty. Children & Youth Policy Makers*, 172 F. Supp. 2d 575, 586 (M.D. Pa. 2001) (foster children and their biological mother's claim that state agency "routinely restrict[ed]—or altogether forb[ade]—visits among family members" clearly stated a First Amendment claim); *see also Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 164 (D. Mass. 2011) (right to familial association is implicated when state foster care system "inhibits interactions" and denies "any meaningful contact" between foster

and Regulatory Servs., 380 F.3d 872, 881 (5th Cir. 2004) (holding allegations of child welfare agency ignoring suspected physical abuse in a foster home was adequate to state a claim under Substantive Due Process clause); *Connor B.*, 985 F. Supp. 2d at 158-59; *Connor B.* 278 F.R.D. at 35 (finding that commonality was established where plaintiffs provided detailed allegations of a "failure to properly investigate reports of neglect and abuse"); *D.G.*, 278 F.R.D at 641, 644-46 (citing data on flawed investigations as evidence of state agency's failure to monitor and noting "improved investigatory techniques and reporting" as potential class-wide remedy").

children and their parents and siblings); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 296 (N.D. Ga. 2003) ("The constitutional right to family integrity encompasses the right of children in foster care to have meaningful contact with their siblings and parents."); *Eric L. v. Bird*, 848 F. Supp. 303, 306-07 (D.N.H. 1994) (finding complaint adequately stated a claim for failure to provide required measures to maintain family integrity); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 956 (M.D. Tenn. 2000) (denying motion to dismiss foster children's family association claims under First and Ninth Amendment). Plaintiffs need not show that the deprivation of their family relationship(s) was permanent or total in order to show a violation. *Doe v. Dickenson*, No. CV-07-01998-PHX-GMS, 2009 WL 1211812, at *9-*10 (D. Ariz. Apr. 30, 2009).

3. AACWA Statutory Rights

Finally, Plaintiff Children allege violations of their rights under the federal AACWA statute and the regulations promulgated thereunder. 42 U.S.C. §§ 670 *et seq*. 45 C.F.R. §§ 1355–57. These rights include: the right to timely written case plans containing mandated elements and the right of each Plaintiff Child to foster care maintenance payments paid to the foster parents or foster care providers with whom the child is placed that cover the actual cost of, and the cost of providing, enumerated items. 42 U.S.C. §§ 671(a)(1), 671(a)(11), 671(a)(16), 672(a)(1), 675(4)(A); 45 C.F.R. §§ 1355.20, 1356.21(f)-(g), 1356.21(m)(1). Plaintiffs' statutory claims also have survived a motion to dismiss, this Court having determined that Plaintiffs possess a private right of action to enforce DCYF's obligations under the pertinent statutory provisions. *Sam M.*, 800 F. Supp. 2d at 369, 383-90.

4. Policy or Custom Requirement

Because Plaintiffs have sued the Defendants in their official capacities, Plaintiffs must

also show that at least one policy or custom of Defendants and their agencies played a part in the violation of Plaintiffs' constitutional rights. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). These policies and customs resulting in harm to the Plaintiff Class are identified with particularity in section IV.B.1 and IV.B.2, *infra.*

IV. Plaintiffs Meet the Criteria for Class Certification Under Rule 23(a)

A. The Class Is So Numerous that Joinder Is Impracticable

The proposed Class now numbers approximately 1,800 abused and neglected children (Costa Testimony Slides, Nov. 2014, Bartosz Decl. Ex. 1, at slide 10), clearly 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 acknowledged that a class of 40 is sufficient to meet the numerosity 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)); *Gordon v. Johnson*, 300 F.R.D. 31, 35 (D. Mass. 2014).

Moreover, 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. 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). And 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 v. Fed. Trade Comm'n*, 238 F.2d 108, 119 (1st Cir. 1956) (finding of numerosity "strengthened" when class members "were not fixed in

number, but changed from year to year"). 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 reiterated in *Wal-Mart*, commonality requires only a single question of fact or law common to all members of the class. Certification is appropriate where that single common question can "generate common answers apt to drive the resolution of the litigation"—that is, where the answer will "resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke." *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2550-51 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). "In other words, the commonality requirement is met where the 'questions that go to the heart of the elements of the cause of action' will 'each be answered either "yes" or "no" for the entire class' and 'the answers will not vary by individual class member.'" *Garcia v. E.J. Amusements of New Hampshire, Inc.*, --F. Supp. 3d ---, No. 13-12536-PBS, 2015 WL 1623837, at *5 (D. Mass. Apr. 13, 2015), (quoting *Donovan v. Philip Morris USA, Inc.*, No. 06-12234-DJC, 2012 WL 957633, at *21 (D. Mass. Mar. 21, 2012)).

Plaintiff Children are challenging system-wide deficiencies in Rhode Island's child welfare regime. Far from merely alleging "violation[s] of the same provisions of law," *Wal-Mart*, 131 S. Ct. at 2551, Plaintiffs have identified specific common policies and practices at DCYF that result in common harms to the class, as set forth below. Each of these unitary policies and practices operates identically on all putative Class members and, therefore, this Court can adjudicate Plaintiffs' challenges to their constitutional validity in a single stroke. Thus, each policy and practice provides sufficient "glue" to bind the class members together for common

resolution of their claims. *Compare Wal-Mart*, 131 S. Ct. at 2552, 2554 (where plaintiffs alleged common discretionary policy but failed to offer proof of "a common mode of exercising discretion," there was no "glue" to bind class), *with Parsons v. Ryan,* 754 F.3d 657, 679 (9th Cir. 2014) (finding each of 10 specific policies and practices affecting prisoner class "affords a distinct basis for concluding that members of the putative class satisfy commonality, as all members of the class are subject identically to those same policies and practices, and the constitutionality of any given policy and practice with respect to creating a systemic, substantial risk of harm to which the defendants are deliberately indifferent can be answered in a single stroke").

Any differences in the actual harms suffered by the class members do not defeat commonality because they do not "impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *supra*). Since *Wal-Mart*, Circuit courts have consistently certified classes where a defendant's unitary policy or course of action impacted all class members—even where class members were harmed in different ways, and even where some class members suffered only a risk of future harm. *See, e.g.*, *Sullivan v. D.B. Investments*, 667 F.3d 273, 297-99 (3d Cir. 2011) (affirming certification of settlement class harmed by defendant's "common course of conduct"); *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 701-02 (4th Cir. 2011) (upholding certification where "unlike *Wal-Mart*, there is no dispute that a uniform . . . obligation[] exists" and that it "applies to all plaintiffs"); *In re Deepwater Horizon*, 739 F.3d 790, 810-11 (5th Cir. 2014) ("[T]he legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects . . . are diverse."); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, 678 F.3d 409, 421 (6th Cir. 2012) (affirming certification of

class of washing machine purchasers based on common product defect of fostering mold growth despite fact that some purchasers had not yet experienced mold growth), *vacated and remanded*, 133 S. Ct. 1722 (Mem. 2013), *aff'd*, 722 F.3d 838 (6th Cir. 2013); *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d. 360, 374-75 (7th Cir. 2015) (upholding certification based on overtime policy applicable to all class members even though some class members may not have worked overtime); *Parsons,* 754 F.3d at 676-78 (9th Cir. 2014) (upholding certification of Rule 23(b)(2) prisoner class based on prison policies and practices exposing all inmates to "substantial risk of harm," even though that risk "may ultimately result in different future harm for different inmates—ranging from no harm at all to death").

Furthermore, even "subjective, discretionary decisions can be the source of a common claim . . . if all decision-makers exercise discretion in a common way because of a company policy or practice, or if all decision-makers act together as one unit." *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 438 (7th Cir. 2015) (certifying class of teachers subject to discrimination from three-step policy where second and third steps were discretionary but first step was not); *see also Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013) ("[W]here subjective discretion is involved, *Wal-Mart* directs courts to examine whether 'all managers [] exercise discretion in a common way with [] some common direction'") (*quoting Wal-Mart,* 131 S. Ct. at 2554), *cert denied,* -- U.S. ---, 134 S. Ct. 2871 (2014); *Floyd v. City of New York*, 283 F.R.D. 153, 172-75 (2d Cir. 2012) (distinguishing "exercise of judgment in implementing a centralized *policy*" in stop-and-frisk case from "exercise of discretion in formulating a local store policy or practice" in *Wal-Mart*) (emphasis in original); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488-92 (7th Cir. 2012) (reversing denial of certification and finding commonality where plaintiffs

demonstrated "implementing [of] uniform polic[ies] established by top management" even though policies permitted a "measure of discretion" to managers).

Within the child welfare context, courts before and after *Wal-Mart* have regularly found that claims like those the Plaintiffs bring here raise common questions suitable for class treatment.

Three Circuit courts have found commonality in cases brought by foster children for systemic relief. In *D.G. v. DeVaughn*, the Tenth Circuit found that commonality was satisfied by the common questions of whether defendants had 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." *D.G. v. DeVaughn*, 594 F.3d 1188, 1195-96 (10th Cir. 2010) (quoting *D.G. v. Yarborough*, 278 F.R.D. 635, 636, 644) (internal quotation marks omitted). Similarly, the Second Circuit has affirmed a finding of commonality for a class of foster children where Defendants' actions and inactions were "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, 690-93 (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 likewise 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 subjected to the same child welfare policies 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 Department's custody (internal quotation marks omitted)).

While these Circuit decisions predate *Wal-Mart*, they are all premised on the fact that all 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.

Post-*Wal-Mart*, the Fifth Circuit suggested in *M.D.* that evidence of the state's unitary course of conduct in failing to "(1) maintain sufficient licensing standards for its placements, (2) maintain an adequate number and array of placements, or (3) employ a sufficient number of caseworkers" on a system-wide basis could support class treatment. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 848 n.7 (5th Cir. 2012). Following this guidance on remand, the district court in *M.D.* found common questions arising from the state's uniform practices of assigning excessive caseworker caseloads and providing inadequate monitoring, oversight, and diversity of foster care placements, and from the common harm and risk of harm alleged to result. *M.D. x rel. Stukenberg v. Perry*, 294 F.R.D. 7, 35-36, 39, 44, 52-53. The district court wrote that "whether these policies subject class members to an unreasonable risk of harm, and whether that risk is so unreasonable as to rise to a constitutional violation, can be proven on the basis of class-wide evidence without individualized inquiries." *M.D.*, 294 F.R.D. at 44-45.

In a similar case, reaffirmed post-*Wal-Mart*, the District of Massachusetts recognized that "the unreasonable risk of harm created by the[] 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. at 295 (emphasis removed); *see also Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. at 34 (denying decertification request post-*Wal-Mart*). The plaintiffs in that case alleged common harm and risk of harm from overburdened caseworkers and inadequate investigations, placement array, and case plans.

As in these prior cases, multiple common questions of fact here exist among the members of the putative Plaintiff Class that are capable of generating common answers, including:

(a) Whether Defendants have a policy or custom of assigning excessive caseloads to child welfare caseworkers such that these workers cannot adequately ensure children's safety and well-being (*See* Third Am. Compl. ¶¶ 68-84, 102-05);

(b) Whether Defendants have a policy or custom of assigning excessive caseloads to licensing unit staff such that these workers cannot adequately ensure children's safety and well-being (*see id.* ¶¶ 85-95, 102-05);

(c) Whether Defendants have a policy or custom of assigning excessive caseloads to child maltreatment investigators such that these workers cannot adequately ensure children's safety and well-being (*see id.* ¶¶ 96-105);

(d) Whether Defendants have a policy or custom of failing to maintain an adequate statewide placement array that facilitates placement of Plaintiff Children in the least restrictive and most family-like settings suited to their needs in compliance with federal law, and avoids unnecessary placement in institutional and group facilities that may cause significant harm to children's health and well-being (*see id.* ¶¶ 106-20);

(e) Whether Defendants have a policy or custom of failing to ensure that Plaintiff Children are provided with timely case plans containing federally mandated elements as required by the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, and relevant federal regulations (*see id*. ¶¶ 126-30); and

(f) Whether Defendants have a policy or custom of failing to provide adequate foster care maintenance payments as required by the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, and relevant federal regulations (see id. ¶¶ 131-38).

These common questions are discussed in detail in the sections that follow.[7]

[7] Plaintiffs herein present evidence on the common questions that was adduced in investigation and prior to formal discovery. As the parties advised this Court at a status conference held following remand from the First Circuit, they contemplate undertaking a defined period of discovery on class certification issues before fully briefing Plaintiffs' Rule 23 motion and submitting it for a rigorous analysis. Plaintiffs will submit a supplemental brief following this

1. Common Questions Regarding Excessive Caseloads

a. Whether Defendants have a policy or custom of assigning excessive caseloads to child welfare caseworkers such that these workers cannot adequately ensure children's safety and well-being

In their Third Amended Complaint, Plaintiffs present a common question that is essential to their Substantive Due Process and familial association claims: Do Defendants routinely overwhelm Family Service Unit (FSU) caseworkers, one of the critical safety mechanisms for children in DCYF's custody, with excessive caseloads to the point that Plaintiff Children are placed at an unreasonable risk of serious harm? *See* Third Am. Compl. ¶¶ 68-84. The Court can determine whether this is true—and Plaintiffs present substantial evidence that it is—for the entire class in one stroke. Numerous courts, post-*Wal-Mart*, have recognized that allegations regarding unmanageable caseloads satisfy the commonality prong of Rule 23. *See M.D.*, 675 F.3d at 847 (5th Cir. 2012) (noting that commonality "could conceivably be based on an allegation that the State engages in a pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency, such as insufficient staffing"); *D.G. v. Yarbrough*, 278 F.R.D. 635, 639 (N.D. Ok. 2011); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. at 33-34 (denying Defendants' motion for decertification, following *Wal-Mart*, and reiterating that allegations of "specific and overarching systemic deficiencies within DCF," including high caseworker caseloads, are sufficient for commonality purposes); *M.D. v. Perry*, 294 F.R.D. at 44 (S.D. Tex. 2013) ("To what extent caseworkers are overworked, whether this overwork is significant enough to subject the members of the General Class to an unconstitutionally unreasonable risk of harm, and whether the State has sufficient mechanisms in place to mitigate those risks are the issues central to the Plaintiffs' claim. Resolving them will

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class certification discovery.

determine the validity of the common General Class Fourteenth Amendment claim in 'one stroke.'"); *cf. Parsons v. Ryan*, 754 F.3d 657, at 679 (finding one-stroke commonality where "plaintiffs allege that they are placed at risk of serious harm by a policy and practice of severe under-staffing across all [Arizona Department of Corrections] medical care facilities").

(1) Evidence that caseworkers are routinely overworked

DCYF FSU caseworkers are responsible for completing tasks that are necessary for ensuring child safety and well-being. These include monitoring the physical and mental health of children in foster care, conducting quality face-to-face visits with children every month, identifying and coordinating family preservation services and family visits, monitoring the child's interaction with foster and biological parents, developing and updating service plans for the child, and forming a relationship with that child. (DCYF Policy 700.0020, Bartosz Decl. Ex. 3, DCYF Policy 700.0030, Bartosz Decl. Ex. 4, DCYF Policy 700.0075, Bartosz Decl. Ex. 5, DCYF Policy 700.0165, Bartosz Decl. Ex. 6). By completing these tasks, FSU caseworkers act as the Department's smoke alarm that detects potential safety and well-being dangers for each child. As recited below, however, Plaintiffs present substantial evidence that DCYF routinely assigns its caseworkers unmanageable caseloads that leave them unable to perform this function. *See* Third Am. Compl. ¶¶ 68-84.

(a) Internal and external reviews of DCYF have found that caseloads are too high

Defendants admitted in both rounds of the federal Child and Family Service Reviews (in 2003 and again in 2010) that excessive caseloads hinder DCYF workers' ability to provide services. (2003 Statewide Assessment, Bartosz Decl. Ex. 28, at PLTF0003655; 2010 Child and Family Services Review Statewide Assessment, Bartosz Decl. Ex. 29 at PLTF0013735, PLTF0013821; Confidential Work Papers, Bartosz Decl. Ex. 30 [filed under seal], at

000083800). Numerous state and private bodies have similarly warned that caseworker caseloads are unacceptably high, including a state child fatality review panel, the President of the Rhode Island Alliance of Social Service Employees, the Annie E. Casey Foundation, the Rhode Island Child Advocate, the Governor's Resource Team, and the Senate Task Force. *See* Report of Child Fatality Panel, *In the Matter of T.J.*, Oct. 31, 2005, Bartosz Decl. Ex. 31; Lynn Arditi, *Alarms Raised Over DCYF Staffing Load*, PROVIDENCE JOURNAL, Sept. 22, 2012, Bartosz Decl. Ex. 72; October 2014 Casey Foundation Presentation, Bartosz Decl. Ex. 33, at 19; Costa Testimony Slides, Nov. 2014, Bartosz Decl. Ex. 1, at slide 3; Costa Written Testimony, Bartosz Decl. Ex. 2, at 2; Governor's Resource Team Executive Report, Jan. 2015, Bartosz Decl. Ex. 35, at 12; Senate Task Force Report, 2015, Bartosz Decl. Ex. 36, at 9. The State Child Advocate, for example, warned in November 2014 that "[h]igh caseloads for the [DCYF] workers and supervisors create excessive and oftentimes unattainable demands on the staff." (Costa Written Testimony, Bartosz Decl. Ex. 2, at 9).

Significantly, DCYF's own workers report being overburdened. As of May 2014, only 38 percent of casework supervisors rated their units as adequately staffed, 66 percent of caseworkers reported that their caseloads were unmanageable, and 90 percent of caseworkers reported that the resulting burnout and turnover was hurting children and families. (Annie E. Casey Foundation Report, May 2014, Bartosz Decl. Ex. 32, at 23).

(b) DCYF Has Not Conducted a Workload Study

Recognizing the fundamental, systemic importance of maintaining an adequately staffed child welfare workforce, standards published by the Council on Accreditation (COA) and the Child Welfare League of America (CWLA) state that child welfare agencies should undertake a study to determine and set an appropriate workload standard for their caseworkers. (COA

Standards for Family Foster Care and Kinship Care § 19.07, Bartosz Decl. Ex. 15; CWLA Standards of Excellence for Services for Abused or Neglected Children and their Families, § 5.9, Bartosz Decl. Ex. 26). Such a study is critical to ensuring that caseworkers are able to monitor and protect the children for whom they are a first line of defense. Defendants have not, however, undertaken a workload study. (Fogli-Terry Dep. Tr. July 25, 2012, Bartosz Decl. Ex. 37 [filed under seal], at 55:24-56:12).

(c) Caseloads Exceed Professional Standards

In the absence of a workload study, Defendants have failed to otherwise limit the caseloads of their caseworkers to manageable levels. COA and CWLA standards both prescribe a maximum caseload of 15 children per caseworker.[8] (COA Standards for Family Foster Care and Kinship Care § 19.07, Bartosz Decl. Ex. 15; CWLA Standards of Excellence for Services for Abused or Neglected Children and their Families, § 5.9, Bartosz Decl. Ex. 26). COA standards further state that caseloads should not exceed eight children with special therapeutic needs. (COA Standard for Family Foster Care and Kinship Care §19.07, Bartosz Decl. Ex. 15). Departing from these standards, DCYF does not limit the caseload size of its child welfare workers. (R.I. Title IV-B Annual Progress and Services Report – 2012, Issued June 2013, Bartosz Decl. Ex. 38 at 88; *see also* Agreement between the State of Rhode Island and Rhode Island Alliance of Social Service Employees, Bartosz Decl. Ex. 73, at 000037944-45; Fogli-Terry Dep. Tr. July 25, 2012, Bartosz Decl. Ex. 37 [filed under seal], at 69:7-70:2). While DCYF "strives to maintain a caseload of 14 families," each of which can, and often does, have more

[8] The Rhode Island Legislature has recognized that COA publishes nationally-accepted standards for child welfare. R.I. Gen. Law § 42-72-5.3, Bartosz Decl. Ex. 12.

than one child,[9] "there is no required caseload limit." (R.I. Title IV-B Annual Progress and Services Report – 2012, Issued June 2013, Bartosz Decl. Ex. 38 at 88).

DCYF's own data reports confirm that caseworker caseloads are far higher than nationally recognized standards. The most recent data now available to Plaintiffs, for August 2015, show that 61 percent of caseworkers carried a caseload of at least 25 children—that is, a caseload at least 50 percent higher than the highest national standard—and nearly every caseworker last month (96 percent) was assigned a caseload that exceeded the maximum prescribed by professional standards. (Report 164A for August 2015, Bartosz Decl. Ex. 39 [filed under seal] at 4000002192-207).

(d) Overloaded Caseworkers Fail to Visit Children Regularly

Faced with unmanageable caseloads, DCYF caseworkers are unable to perform tasks that are critical to ensuring child well-being and to protecting children from harm, including adequate face-to-face visitation. Federal law, professional standards, and DCYF's own policy require that caseworkers meet face to face with Plaintiff Children at least once per month, and that the majority of caseworkers visit foster homes at least monthly. (2012 ACF Program Instruction, Bartosz Decl. Ex. 71, at 2; COA Standards for Family Care and Kinship Care § 12.01, Bartosz Decl. Ex. 18; CWLA Standards of Excellence for Family Foster Care Services § 2.55, Bartosz Decl. Ex. 22; DCYF Policy 700.0165, Bartosz Decl. Ex. 6).

But DCYF's caseworkers are failing to make these visits at startling rates. In its 2010 Statewide Assessment for the Second Round CFSR, DCYF admitted that "[h]igher caseloads make it difficult to meet all of the time frames" for monthly visitation. (2010 Statewide

[9] In August 2015, for example, a DCYF report notes that a caseworker was carrying a caseload of 14 families—meeting the unenforceable goal set by the agency. (DCYF Report No. 164A, Bartosz Decl. Ex. 39 [filed under seal], at 4000002192 (Aug. 2, 2015)). Her child-caseload, however, is listed as 29—nearly *twice* the highest limit set by professional standards. *Id*.

Assessment, Bartosz Decl. Ex. 29, at PLTF0013797-98). The 2010 CFSR found that in only 77.5 percent of the cases reviewed were the frequency and quality of caseworker-child visits sufficient to ensure adequate monitoring of the child's well-being and to promote attainment of case goals. (CFSR Final Report, Sept. 2010, Bartosz Decl. Ex. 40, at 50). As of FFY 2013, according to the most recent federal data available, DCYF made only 81 percent of the required monthly visits—far short of the 90 percent federal standard (to become 95 percent in FFY 2015). (Child Welfare Outcomes Rhode Island State Page 2013, Bartosz Decl. Ex. 78). DCYF policy also allows Child Support Technicians ("CSTs") to complete the mandated monthly visits with children, (2010 Statewide Assessment, Bartosz Decl. Ex. 29, at PLTF0013796), despite the fact that CSTs do not have the same training, education, and experience as caseworkers. (Organizational Structures Handbook, Bartosz Decl. Ex. 41, at 000003095-96).

(2) Evidence of Resulting Risks of Harm to Children

When excessive caseloads permeate a child welfare system, children are left poorly monitored and served, and reliant on a revolving door of overwhelmed caseworkers. Dependent on a system with such a fundamental failing, all children in DCYF custody are exposed to an unreasonable risk of harm.

(a) Children Suffer High Rates of Maltreatment

Illustrating the gravity of this risk, federal and state data show that for years children have suffered abuse or neglect while in DCYF's custody at an alarming rate. Since Plaintiffs initiated this lawsuit approximately eight years ago, an average of three children per month in Rhode Island foster care have suffered abuse or neglect.[10] Children in DCYF's custody were exposed to

[10] This figure is derived from the total number of children in Rhode Island foster care during each year divided by the percentage of unique children subject to maltreatment that year, averaged across eight years since FFY 2007. Child Welfare Outcomes Report for FY 2010-2014, Bartosz Decl. Ex. 45; Child Welfare Outcomes Rhode Island State Page 2013, Bartosz Decl. Ex. 78; Child Welfare Outcomes Report 2009-2012, Bartosz Decl. Ex. 77; Child Welfare

482 confirmed allegations of maltreatment in only six years, between 2006 and 2012, (Defendants' Answers to Plaintiffs' First Set of Interrogatories (1d), Bartosz Decl. Ex. 42 at 6, and the state reported 71 incidents of children in foster care suffering abuse or neglect in Federal Fiscal Year ("FFY") 2013 alone. (CFSR Round 3 May ACF Workbook chart "Maltreatment in foster care" and "Recurrence of maltreatment," Bartosz Decl. Ex. 43, at 9-10).

Rhode Island routinely reports one of the highest rates of maltreatment of children in foster care in the country, far exceeding federal standards. In FFY 2013, 1.13 percent of children in DCYF foster care suffered abuse or neglect at least once over the year, three times the federal standard of 0.32 percent and the second highest rate in the country. (Child Welfare Outcomes Data, Maltreatment in Foster Care 2010-2013, Bartosz Decl. Ex. 44). Preliminary data for FFY 2014 indicate that the rate of maltreatment increased to 1.19 percent that year, over three and a half times the federal standard. (Child Welfare Outcomes Report for FY 2010-2014, Bartosz Decl. Ex. 45). Since the federal government began tracking maltreatment rates in foster care 13 years ago, Rhode Island has never come close to meeting the federal standard—reporting rates at between two and over four times the federal standard for over a decade. (Child Maltreatment 2004, Bartosz Decl. Ex. 75, Child Maltreatment 2008, Bartosz Decl. Ex. 76; Child Maltreatment 2013, Bartosz Decl. Ex. 54).

(b) Children's Family Relationships Are Disrupted

Further, overburdened caseworkers are unable to ensure that children are maintaining family relationships while in foster care. DCYF policy acknowledges that "[i]t is important for children, parents and siblings to have contact as soon as possible after placement, and continued

Outcomes Report 2008-2011, Bartosz Decl. Ex. 74; and Child Welfare Outcomes Report 2006-2009, Bartosz Decl. Ex. 61.

as frequently as possible," (Child and Family Visitation Practice Guide, Bartosz Decl. Ex. 46, at 000303236), and that in particular, "[s]iblings placed separately require regular, on going contact" (DCYF Policy 700.0085, Bartosz Decl. Ex. 7). Federal law and professional standards require frequent and regular visitation or other interaction between siblings who are placed apart in care unless contrary to their best interests. (42 U.S.C. § 671(a)(31); CWLA Standards of Excellence for Family Foster Care Services § 2.30, Bartosz Decl. Ex. 20). Yet DCYF has a practice of failing to facilitate regular visitation between the Plaintiff Children and their siblings and biological parents. According to the 2010 federal CFSR, in the cases reviewed, only 60% of eligible children had visits with their siblings in foster care at least once per month. (CFSR Final Report, Sept. 2010, Bartosz Decl. Ex. 40, at 37). The 2010 CFSR further identified visits with siblings and biological parents as an "area needing improvement." (CFSR Final Report, Sept. 2010, Bartosz Decl. Ex. 40, at 37). Rhode Island's 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 children's needs. (R.I. CFSR Program Improvement Plan 2010 Draft, Bartosz Decl. Ex. 47 [filed under seal], 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, rendering competent management of performance on this critical practice area impossible. (Saunders Dep. Tr. Apr. 27, 2012, Bartosz Decl. Ex. 48 at 124:19-22, 132:8-11).

(3) A Common Remedy Exists

The state's common practice of burdening caseworkers with excessive caseloads places all members of the Plaintiff Class at unreasonable risk of harm, in violation of their Due Process and Family Associational rights. Plaintiffs have identified a common remedy that will cure these

violations in one stroke: an injunction requiring Defendants to ensure that qualified professionals conduct a workload study and to implement its results in order to assure that FSU workers are provided sufficient time and opportunity to complete their required functions. Third Am. Compl. IX.

b. Whether Defendants have a policy or custom of assigning excessive caseloads to licensing unit staff such that these workers cannot adequately ensure children's safety and well-being

Plaintiffs raise a similar common question as to whether DCYF routinely overloads its licensing workers such that they cannot adequately ensure the safety of foster care placements, exposing all members of the Plaintiff Class to risk of harm. This question gets to the heart of Plaintiffs' Substantive Due Process claim—whether Defendants' policy or practice results in unconstitutional harm—and it can be answered "yes" or "no" for all class members at once. Plaintiffs have presented substantial evidence that the licensing workers are overloaded and that this practice puts children at unreasonable risk of harm. Courts have recognized that such an allegation meets the commonality burden of Rule 23. *See, e.g.*, *M.D.*, 294 F.R.D. at 48-49, 53 (common questions of insufficient "monitoring, licensing, and oversight of licensed foster care placements" based in part on unmanageable licensing workloads); *cf. M.D.*, 675 F.3d at 848 n. 7 (suggesting state's failure to "maintain sufficient licensing standards" may provide a common question supporting certification); *Connor B.*, 272 F.R.D. at 295 (common allegation of "inadequate . . . supervision of foster parents"); *D.G.*, 278 F.R.D. at 639 (common question of insufficient monitoring practices, evidenced in part by emergency shelter practices); *Marisol A.*, 126 F.3d at 376-77 (affirming common question of "inadequate . . . supervision of foster parents").

(1) Evidence of a Common Policy of Overloading Licensing Workers

(a) DCYF Does Not Analyze or Limit Licensing Workloads

Professional standards promulgated by the National Association for Regulatory Administration require that agency regulatory units have processes for developing and implementing "a staffing plan that takes into account effective workloads and supervisory/managerial span of control." (Recommended Best Practices for Human Care Regulatory Agencies, *The Nara Vision Series, Part I*, First Edition, Bartosz Decl. Ex. 49, at 6-7).

DCYF has made no attempt to determine through a workload study or other analysis how many cases each licensing worker can reasonably handle or the time that each license requires. (Fogli-Terry Dep. July 25, 2012, Bartosz Decl. Ex. 37 [filed under seal], at 55:24-56:12). Additionally, DCYF places no upper limit on the number of cases a licensing worker can carry. (R.I. Title IV-B Annual Progress and Services Report – 2012, Issued June 2013, Bartosz Decl. Ex. 38 at 88).

(b) Overloaded Licensing Workers Cannot Timely Process Applications

With no limit on caseloads, DCYF's overburdened licensing workers historically have been unable to timely process licenses and renewals, creating a backlog of hundreds of applications. (Steve Peoples, *Senate study calls for improvements to DCYF services,* PROVIDENCE JOURNAL, Feb. 13, 2008, Bartosz Decl. Ex. 50). This backlog can extend an applicant's time for licensing by weeks or months and limits the number of appropriately vetted foster placements available for children.

(c) DCYF Regularly Resorts to Unlicensed Placements

With high caseloads impeding a timely licensing process, DCYF regularly resorts to placing children in unlicensed placements, in violation of professional standards, law, and policy. Professional standards and applicable laws, including Social Security Act § 471(a)(10) and

Rhode Island General Laws Chapter 42-72.1 (Bartosz Decl. Ex. 14), mandate that all foster homes for children must be licensed. *See also* DCYF Policy 900.0020, Bartosz Decl. Ex. 9; COA Standards for Family Foster Care and Kinship Care § 6.01, Bartosz Decl. Ex. 17 (requiring licensing of foster homes); CWLA Standards of Excellence for Residential Services, § 4.3 and CWLA Standards of Excellence for Child Care, Development and Education Services, § 5.21, Bartosz Decl. Ex. 24 and 25 at PLTF0032660, PLTF0031921-22 (requiring licensing of agencies providing residential services); CWLA Standards of Excellence for Family Foster Care Services, § 3.36, Bartosz Decl. Ex. 23, PLTF0032132-33 (relicensing for foster parents); CWLA Standards of Excellence for Kinship Care Services, § 2.35, Bartosz Decl. Ex. 21, PLTF0032397 (licensing of kinship homes). 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. (DCYF Policy 900.0020, Bartosz Decl. Ex. 9, at 000009811; DCYF Policy 900.0025, Bartosz Decl. Ex. 8, at 000009762). Additionally, pursuant to DCYF rules, private child placing agencies (CPAs) contracted with DCYF may only refer and place children in licensed child care programs, licensed foster homes, or approved adoptive homes. (DCYF Rule 102, R.I. Admin. Code 14-3-102:V-E, Bartosz Decl. Ex. 13). These rules are designed to protect children by ensuring the safety of placements.

Yet, DCYF routinely places and allows CPAs to place children in unlicensed homes and facilities in violation of these requirements. For example, DCYF reports indicate that as of April 1, 2012, 73 children were placed in unlicensed non-relative foster homes and an additional 86 children were placed in unlicensed group home, shelter, and private agency placements. (DCYF Report No. 27, April 1, 2012, Bartosz Decl. Ex. 51 [filed under seal] (159 children in such placements)). Together, these children represented 13% of all children in foster care on that date.

(*Id.*; *see also* DCYF Report No. 261, April 2, 2012, Bartosz Decl. Ex. 60 [filed under seal] (1,145 children in foster care)). For each month between January and August 2012, 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. (DCYF Report No. 496, Bartosz Decl. Ex. 62, at 000095022, 039, 046, 062, 080, 095, 111, and 138). These placements in violation of applicable standards, laws, and policies, expose children to unreasonable safety risks.

(2) Evidence of Common Harms Resulting to the Plaintiff Class

DCYF's deficient practice regarding licensing caseloads subjects the Plaintiff Class to serious harms including maltreatment in care and inappropriate placements ill-matched to children's needs. The regular use of unlicensed placements, which have not been screened and vetted and which are not adequately monitored, exposes all children to a risk of abuse or neglect in care. Evidence of maltreatment is discussed in detail in section IV.B.1.a.(2)(a) *supra.* The backlog of applications puts more pressure on an already strained placement array, leading workers to place children in the next available bed rather than the best placement that can meet the child's needs. As a result, children frequently end up in inappropriate placements, including group care placements when they require a family setting. Evidence of inappropriate placements and their resulting psychological and emotional harm to children is discussed in IV.B.2.a.(2)(a) *supra.*

(3) A Common Remedy Exists

The state's common practice of overburdening licensing workers places all members of the Plaintiff Class at unreasonable risk of harm in violation of their due process rights. A uniform remedy exists that will bring relief to all Class members without the need for individualized inquiries: an injunction requiring Defendants to ensure that qualified professionals conduct a

workload study for DCYF's licensing workers and to implement its results. Third Am. Compl. IX(d)(2).

c. Whether Defendants have a policy or custom of assigning excessive caseloads to child maltreatment investigators such that these workers cannot adequately ensure children's safety and well-being

Plaintiffs also present a common question of whether DCYF routinely assigns its Child Protective Services (CPS) investigators excessive and unmanageable caseloads, placing Plaintiff Children at an unreasonable risk of serious harm. *See* Third Am. Compl. ¶¶ 96-101. Whether Defendants have a policy or custom of so overburdening CPS investigators is a question capable of a class-wide, one-stroke answer. And, as with FSU caseloads, Plaintiffs present substantial evidence that unmanageable CPS caseloads place Plaintiff Children at an unreasonable risk of harm. Courts have recognized that such an allegation meets the commonality burden of Rule 23. *See Connor B.* 278 F.R.D. at 35 (denying motion to decertify and finding commonality established, post-*Wal-Mart*, where plaintiffs provided detailed allegations of systemic "failure to properly investigate reports of neglect and abuse"); *M.D.*, 294 F.R.D. at 48-53 (finding commonality established for issue of whether investigator caseloads placed children in foster care at an unconstitutional risk of harm).

(1) Evidence that Defendants Routinely Overburden CPS Investigators

DCYF's CPS Division is responsible for investigating allegations of child abuse and neglect, including for children in foster care. Historically, DCYF has designated two investigators in particular—so-called "institutional investigators"—to investigate allegations of maltreatment in foster care, though it has been routine practice for DCYF to assign general staff investigators to these cases when the institutional investigators are unavailable. (Fogli-Terry Dep. Tr. July 24, 2012, Bartosz Decl. Ex. 65 [filed under seal], at 69:5-70:5). Investigators are

responsible for numerous tasks, including locating subjects of reports, working to contact maltreatment reporters, interviewing appropriate parties, documenting observations, and reaching determinations. (DCYF Policy 500.0095, Bartosz Decl. Ex. 10, and DCYF Policy 500.0110, Bartosz Decl. Ex. 11).

(a) DCYF Has Not Conducted a CPS Workload Study

Recognizing the importance of sound investigation practice, professional standards provide that child welfare agencies should undertake studies to establish workload standards for investigators. CWLA standards, for example, require that child welfare agencies assess the time required for investigative functions and establish workload standards "that make it possible for [CPS] staff members to complete required tasks and activities." (CWLA Standards of Excellence for Services for Abused or Neglected Children and Their Families, § 5.9, Bartosz Decl. Ex. 26). COA standards similarly prescribe that agencies should annually undertake workload assessments. (COA Standards of Human Resources Management § 2.01, Bartosz Decl. Ex. 19). As with FSU workers, however, DCYF has not conducted a workload study for its CPS investigators within the relevant past. Further, DCYF does not generally limit the workloads of its institutional investigators, regardless of their case size. (Fogli-Terry Dep. Tr. July 24, 2012, Bartosz Decl. Ex. 65 [filed under seal], at 99:10-15).

(b) Investigation Caseloads Exceed Professional Standards

Unsurprisingly, agency data reports show that CPS investigators routinely carry excessive caseloads that far exceed professional standards. COA and CWLA standards state that investigators should carry no more than 12 active investigations. (COA Standards of Child Protective Services § 14.05, Bartosz Decl. Ex. 16; CWLA Standards of Excellence for Services for Abused or Neglected Children and Their Families, § 5.9, Bartosz Decl. Ex. 26). Yet between

February and August 2012, the most recent data now available to Plaintiffs, the majority of CPS investigators carried 30 or more investigations over the month—over twice the maximum caseload set by current CWLA and COA standards. (DCYF Report No. 259, Feb. to Aug. 2012, Bartosz Decl. Ex. 59 [filed under seal]).

(c) Investigations Are Not Adequately Conducted

Burdened with such excessive caseloads, CPS investigators are unable to conduct investigations adequately. DCYF data reports, for example, indicate that investigators are frequently unable to complete investigations on time. From January 2010 through April 2012, between 94 and 202 abuse and neglect investigations exceeded the DCYF-set time limits. (DCYF Report No. 259, Jan. 2010 to April 2012, Bartosz Decl. Ex. 57 [filed under seal]). In August 2012 alone, 135 investigations were listed as overdue. (DCYF Report No. 259, Aug. 2012, Bartosz Decl. Ex. 58 [filed under seal]). Another DCYF management report lists, as of January 30, 2013, 419 CPS investigations as overdue—52 of which were assigned to the two institutional investigators alone. (DCYF Report No. 160, January 30, 2013, Bartosz Decl. Ex. 53 [filed under seal]). The *degree* to which investigations are overdue is similarly shocking—on January 30, 2013, one institutional investigator was listed as carrying investigations that were 98, 136, 138, 254, 452, 776, 1286, and 1423 days overdue. (DCYF Report No. 160, Jan. 30, 2013, Bartosz Decl. Ex. 53 [filed under seal]).

(2) Evidence of Resulting Harms and Risks of Harm for Children

Adequate investigative practice is a key component of the safety net for children in foster care. When this practice breaks down, children are left at serious risks of substantial harm, including maltreatment while in poorly monitored foster care placements. As discussed above, federal and state data show that children in DCYF foster care are indeed subjected to abuse or

neglect with stunning frequency. *See* section IV.B.1.a(2)(a) *supra.* Moreover, when allegations of abuse or neglect are inadequately investigated, DCYF cannot timely and effectively identify and address the treatment needs of the children who are the subjects of those reports.

(3) A Common Remedy Exists

The state's common practice of overburdening CPS investigators places all members of the Plaintiff Class at unreasonable risk of harm, in violation of their due process rights. A uniform remedy exists that will bring relief to all Class members without the need for individualized inquiries: an injunction requiring Defendants to ensure that qualified professionals conduct a workload study for DCYF's CPS investigators and to implement its results. Third Am. Compl. IX(d)(2).

2. Common Question Regarding Placement Array

a. Whether Defendants have a policy or custom of failing to maintain an adequate statewide placement array

Plaintiffs further raise a common question as to whether DCYF fails to maintain a placement array able to meet the placement needs of all Plaintiff Children. Plaintiff Children have a Substantive Due Process right to placement in the least restrictive, most family-like environment that meets their needs. (*See supra* at 8, n.5). This common question addresses issues central to Plaintiffs' Due Process claim, including whether the array is deficient pursuant to a policy or custom and whether Plaintiff Children suffer a Constitutional harm as a result, and can be answered "yes" or "no" for all putative Class members. As a result, this question provides the "glue" to bind the Class. Numerous courts have recognized that such an allegation meets the commonality burden of Rule 23. *See, e.g.*, *M.D.*, 294 F.R.D. at 48, 53-55 (common question of whether state maintains an inadequate placement array resulting in inappropriate placements and sibling separation); *Baby Neal,* 43 F.3d at 62 (finding commonality based in part on common

"scarcity of properly trained foster parents" and failure to provide class members with "appropriate placements"); *cf. Connor B.*, 272 F.R.D. at 295 (common allegations of "shuttling of children among multiple placements" and "inability to secure appropriate placements for adoption").

(1) Evidence of a Common Practice of Failing to Maintain an Adequate Placement Array

Substantial evidence indicates that DCYF fails to maintain an adequate number and mix of placements to meet the recognized needs of Plaintiff Children.

(a) DCYF Does Not Analyze Its Statewide Placement Needs

It is axiomatic that in order to develop and maintain an array of foster care placements calibrated to meet the needs of its service population, DCYF must first assess the aggregate needs presented by children in foster care. However, DCYF has never conducted a comprehensive, statewide needs assessment to identify the locations and types of placements needed to meet the needs of children in care. DCYF also does not forecast placement needs on any regional or aggregate basis. The agency does not maintain a report of the actual number of children in its custody who need each foster care placement type or a report on the number of vacant beds available for children in custody either at each foster care provider or in the aggregate. (Defs.' Am. Answers to Pls.' 2d Interrogs., Bartosz Decl. Ex. 63, at 14-15; Saunders Dep. Tr. Sept. 19, 2012, Bartosz Decl. Ex. 66, at 20:09-21:01). Neither does the agency keep aggregate data on how many children were referred to a foster home but placed into another placement because a foster home was not available. (Saunders Dep. Tr. Sept. 19, 2012, Bartosz Decl. Ex. 66, at 17:21-25, 18:07-18). As a result of these practices, DCYF cannot know the full scope of its placement needs and cannot effectively plan to meet them.

(2) Evidence of an Inadequate Placement Array and Resulting Harms to the Plaintiff Class

The state's failure to maintain an adequate placement array is manifest in at least two practices that harm children: inappropriate placements, including non-therapeutic group care placements; and unnecessary separation of sibling groups.

(a) Over-Institutionalization and Other Inappropriate Placements

A chronic and critical lack of foster family homes pushes children who need families into group homes and other inappropriate institutional settings.

Over ten years ago, DCYF told the federal government that a "serious lack of foster family homes" had resulted in a "demand for and use of all other placement options," primarily group care settings. (2003 Statewide Assessment, Bartosz Decl. Ex. 28, at PLTF0003627). In 2013, DCYF's then-Director Janice DeFrances admitted that the state still "desperately" needed more family placements and other supports necessary to move children out of institutions. (Mar. 28, 2013 Hearing of the House Committee on Finance, Bartosz Decl. Ex, 67, PLTF0033957-58, at 14). In each month between January 2, 2012 and March 2, 2012, DCYF caseworkers reported 42 to 46 children whose foster care placements were "unsafe, overly restrictive, or ineffective in meeting the child's needs." (DCYF Report No. 199, Administrative Service Plan Review, Jan. 2012-Mar. 2012, Bartosz Decl. Ex. 55 [filed under seal], at 000115103, 132, 161).

Also in 2013, the Child Advocate acknowledged that there are "long periods of time where children are waiting for appropriate placements." (Mar. 28, 2013 Hearing, Bartosz Decl. Ex. 67, PLTF0033957-58, at 44). One year later, the Child Advocate testified once more to the legislature about the continuing "crisis" of "extremely limited [placement] resources." (Costa Written Testimony, Nov. 2014, Bartosz Decl. Ex. 2, at 8). This characterization is apt, as in the last three years the number of licensed non-relative foster homes has plummeted by

approximately 31 percent. (Fact Sheet, Children Served Month Ending June 2012 and June 2015, Bartosz Decl. Ex. 52 [filed under seal], at 4000000003, 4000000039). The Child Advocate further testified that due to the lack of placement resources, young children entering care have even been forced to stay overnight in DCYF offices when no placement could be found. (Costa Testimony Slides, Nov. 2014, Bartosz Decl. Ex. 1, at slide 12).

Statewide statistics show the impact of the deficient placement array. According to DCYF, the agency places approximately one-third of all children in out-of-home care in a congregate care setting—an enormously high percentage compared to the rest of the nation. *See* DCYF Report No. 77, Bartosz Decl. Ex. 52 [filed under seal]. DCYF also places young children in institutions at rates far higher than the national average. (Child Welfare Outcomes Report 2009-2012, Bartosz Decl. Ex. 77). Despite the critical importance of placing young children with families, Defendants have admitted that they have no policy or practice limiting the placement of young children in shelters. (Savage Dep. Tr. Sept. 19, 2012, Bartosz Decl. Ex. 64, at 173:2-10).

Inappropriate placements, including non-therapeutic placements in group care, are damaging to children's development and may subject them to emotional harm and trauma. (Annie E. Casey Foundation, Every Kid Needs a Family, 2015, Bartosz Decl. Ex. 34, at 1-5). These concerns are even more salient for young children.

(b) Unnecessary Sibling Separation

Due to the insufficient placement array, Defendants regularly separate siblings in care who otherwise could be placed together. In 2010 the state itself identified a "lack of placement resources to accommodate sibling groups" as a factor contributing to the high rate of separation. (2010 Statewide Assessment, Bartosz Decl. Ex. 29, at PLTF0013770; CFSR Final Report, Sept. 2010, Bartosz Decl. Ex. 40, at 34-35). Last year, the Child Advocate testified to the state

legislature that "limited resources in the foster care system" continue to result in "[s]eparation of siblings who come into care." (Costa Testimony Slides, Nov. 2014, Bartosz Decl. Ex. 1, at slide 11). Both the 2004 and 2010 CFSR federal reviews identified placement with siblings as an area needing improvement, indicating the long-standing and persistent nature of the problem. The Rhode Island Child Welfare Institute has acknowledged that it can be very difficult to reconnect siblings after they are placed apart. (Rhode Island Child Welfare Institute, 2006, Bartosz Decl. Ex. 68, at 000002570). Unnecessary sibling separation violates federal law and professional standards, which require reasonable efforts to place siblings together unless contrary to their best interests. (42 U.S.C. § 671(a)(31) ("[R]easonable efforts shall be made to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement . . . ."); CWLA Standards of Excellence for Family Foster Care Services § 2.30, Bartosz Decl. Ex. 20, at 40 (CWLA standard stating that "[s]iblings should be placed separately only if placement together would be contrary to the developmental, treatment, and safety needs of a given child")).

(3) A Common Remedy Exists

The state's common practice of failing to maintain an adequate placement array subjects all children in the Plaintiff Class to harm and unreasonable risk of harm, in violation of their due process rights. A uniform remedy exists that will bring relief to all Class members without the need for individualized inquiries: an injunction requiring Defendants to ensure that qualified professionals conduct and to implement the results of a statewide placement needs assessment, Third Am. Compl. § IX(d)(3), and a limitation on the use of shelters as placements for very young children. The needs assessment would enable the state to increase the number and array of appropriate placements available to Plaintiff Children.

3. Common Questions about Plaintiffs' AACWA Statutory Claims

a. Whether Defendants have a policy or practice of failing to timely provide children in foster care with adequate case plans

Whether Defendants have a policy or practice of failing to timely provide children in foster care with adequate case plans is a question "common to the class." Fed. R. Civ. P. 23(a)(2). This question is central to Plaintiffs' case plan claim under AACWA.

As a condition of receiving funding under AACWA, Rhode Island is required to provide timely written case plans to every eligible child in foster care. 42 U.S.C. § 671(a)(1), (16). These case plans must be created within 60 days of the child's entry into foster care, 45 C.F.R. § 1356.21(g)(2), and must be reviewed at least once every six months, 42 U.S.C. § 675(5)(B), (6). A child's case plan must also encompass a statutorily mandated list of information, 42 U.S.C. § 675(1), (5)(A). Plaintiffs allege that Defendants fail to fulfill these obligations. Third Am. Compl. ¶¶ 146–147. Determining whether Defendants have a policy or practice of failing to timely provide these case plans thus "resolve[s]" an "issue central" to Plaintiffs' case plans claims in "one stroke," satisfying Rule 23(a)(2). *See Wal-Mart*, 131 S. Ct. at 2551.[11]

Numerous courts have recognized that such an allegation meets the commonality burden of Rule 23. *See, e.g.*, *Baby Neal*, 43 F.3d at 53, 62, 65 (reversing a district court for, in part, refusing to certify a class of foster children with case plan claims under AACWA); *Connor B.* 272 F.R.D. at 292, 298 (certifying a class of children in foster care that alleged, among other things, failure to adequately provide case plans under AACWA), *aff'd on reh'g*, 278 F.R.D. at 33-34 (D. Mass. 2011) (affirming certification after the Supreme Court's decision in *Wal-Mart*); *Kenny A.*, 218 F.R.D. at 291-92, 300, 305 (similarly certifying a class of children in foster care

[11] The District Court in this case has already determined that children have a private right of action to enforce this federal right. (Mem. and Order 57, July 20, 2011, ECF No. 101.)

that alleged defendants failed to adequately provide case plans under AACWA).

(1) Evidence of Deficient Case Plan Practice

Plaintiffs present substantial 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 federal law. According to a DCYF Administrative Service Plan Review of the period from February through April 2015, over 55% of service plans reviewed from Region 1 were untimely or did not have measurable behavior change outcomes. (DCYF Administrative Service Plan Review, Period 02/01/2015 – 04/30/2015, Bartosz Decl. Ex. 56 [filed under seal], at 4000003467). Region 1 is the most populous of the four geographic regions into which DCYF services are divided. In Region 2, over 70% of the reviewed service plans were untimely or lacked measurable behavior change outcomes. (*Id.* at 4000003474). This figure was over 34% in Region 3 and over 52% in Region 4. (*Id.* at 4000003480 (Region 3), 4000003488 (Region 4)).

This failure has persisted in Rhode Island for a long time. Federal CFSR reviews of DCYF practice in 2004 and again in 2010 found that DCYF failed to substantially comply with the requirement that eligible children have a written case plan that met federal law requirements. (CFSR Final Report, Sept. 2010, Bartosz Decl. Ex. 40, at 47-48, 64-65).

(2) A Common Remedy Exists

The state's common practice of failing to provide children with case plans that comply with AACWA requirements violates the statutory rights of all Class members. A uniform remedy exists that will bring relief to all Class members in one stroke: an injunction requiring DCYF to provide adequate and timely case plans for children and adequate timely service plans for their parents. Third Am. Compl. § IX(d)(5).

b. Whether Defendants have a policy or custom of failing to provide adequate foster care maintenance payments

Whether Defendants have a policy or custom of making foster care maintenance payments sufficient to cover the cost of caring for children in foster care is also a question "central to the validity" of Plaintiffs' statutory claims. *Wal-Mart*, 131 S. Ct. at 2551. Under AACWA, Rhode Island must make foster care maintenance payments for all eligible children in foster care. 42 U.S.C. § 671(a)(1). These maintenance payments must cover the cost of "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." 42 U.S.C. §§ 672, 675(4)(A). The state must also pay for "[l]ocal travel associated" with providing these items. 45 C.F.R. § 1355.20.[12]

DCYF makes foster care maintenance payments to all children in foster care. These payments are intended to fulfill Rhode Island's obligations under the foster care maintenance payment provisions of the Adoption Assistance and Child Welfare Act. As a result, if Defendants have a policy or custom of making maintenance payments that fail to cover the cost of the items listed above, it will "resolve" an "issue central to" Plaintiffs' foster care maintenance payment claims under AACWA in "one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

Courts have recognized that an allegation of a policy of inadequate foster care maintenance payments meets the commonality burden of Rule 23. *See, e.g.*, *Kenny A.*, 218 F.R.D. at 303, 305 (simultaneously certifying a class of children in foster care and allowing plaintiffs to add a maintenance payment claim under AACWA); *Connor B.*, 272 F.R.D. at 292,

[12] The District Court in this case has already determined that children have a private right of action to enforce this federal right. (Mem. and Order 57, July 20, 2011, ECF No. 101.)

298 (D. Mass. 2011) (certifying a class of children in foster care alleging, among other things, that defendants failed to pay adequate foster care maintenance payments (*see Connor B.,* 771 F. Supp. 2d at 172 (explicitly acknowledging plaintiffs' private right of action for foster care maintenance payments))); *cf. BLH ex rel. Hensley v. Koller*, No. 7:11-cv-02827-GRA, 2012 WL 3581175, at *2-3 (D.S.C. Aug. 17, 2012) (certifying a class alleging inadequate adoption assistance payments under AACWA), *rev'd on other grounds sub nom. Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013).

(1) Evidence of Deficient Foster Care Maintenance Payments

Plaintiffs present substantial evidence that Defendants' maintenance payments are insufficient to cover the costs of items enumerated in AACWA. First, DCYF has not raised its payment rates for generic and kinship foster care since 2001. (Savage Dep. Tr. June 7, 2013, Bartosz Decl. Ex. 69, at 58:4-19 (testifying as a 30(b)(6) designee on foster care maintenance payments).)[13] This means that the value of these payments has decreased by more than 25% because of inflation alone.[14] *Cf. Cal. Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017, 1023 (9th Cir. 2009) (finding that California violated AACWA's maintenance payment requirement because, by failing to adjust for inflation, its payments covered only 80% of the required costs).

Second, the standard daily board rate paid by Rhode Island falls well short of the costs of caring for a child. The United States Department of Agriculture's 2013 estimates for the daily

[13] See "Questions about Foster Care, Rhode Island DCYF," Bartosz Decl. Ex. 70, also at http://www.dcyf ri.gov/questions/foster_care_questions.php (listing current foster care maintenance payments at the same level as at the time of trial).

[14] Bureau of Labor Statistics, Consumer Price Index Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1&year1=2001&year2=2015. A dollar in 2001 had the same buying power as $1.35 today.

amount a middle-income, two-parent family in the urban Northeast spends on their children are compared to Rhode Island's standard daily board rate in the table below.

Child Age	**USDA Estimate[15]**	**RI Board Rate[16]**
2	$38.38	$14.39
9	$39.92	$13.64
16	$45.32	$15.79

Even after adjusting for other subsidies and costs included in the USDA estimates that are outside of AACWA-covered costs, Rhode Island's standard daily board rates fall well below USDA estimates. Third Am. Compl. ¶ 134.

Finally, the state's own Senate Task Force on the Department of Children, Youth, and Families and the Family Networks assessed Rhode Island's foster care maintenance payment rates in its January 2015 report and concluded that the rates are inadequate and need to be raised. (Senate Task Force Report, Jan. 2015, Bartosz Decl. Ex. 36, at 13).

(2) A Common Remedy Exists

The question of whether DCYF's foster care maintenance payments are adequate to meet AACWA requirements is common to all members of the Class. A uniform remedy exists that will bring relief to all Class members in one stroke: an injunction requiring DCYF to determine and pay foster care maintenance payments that fully cover the costs that must be covered under 42 U.S.C. § 675(4)(A). Third Am. Compl. § IX(d)(6).

[15] Expenditures on Children by Families, USDA 2013, Bartosz Decl. Ex. 27, at 27.
[16] Senate Task Force Report, Jan. 2015, Bartosz Decl. Ex. 36, at 12-13; DCYF Website, http://www.dcyf ri.gov/questions/foster_care_questions.php, Bartosz Decl. Ex. 70.

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 under Rule 23(a)(3) because 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. 2009) (alteration in original) (internal quotation marks omitted) (citations omitted); *see also* 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.13 (3d ed. 1992); *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) (quoting *Baby Neal*, 43 F.3d at 57, 63); (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 Named Plaintiffs identify "specific systemic failures that expose the entire Plaintiff class to an unreasonable risk of harm." *Connor B.*, 272 F.R.D. at 297. For example, as alleged in the Third Amended 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, licensing workers, and investigators carrying unmanageable caseloads that prevent them from adequately visiting and monitoring the safety of children in their placements. *See* Third Am. Compl. ¶¶ 4-5, 35, 37, 39, 42-43, 47, 68-84, 96-101. 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*. ¶¶ 4-5, 21-25, 28, 32-35, 37, 39, 45, 47, 106-130. Likewise, Class members and Named Plaintiffs alike are denied federally-required foster care maintenance payments and case plans. *See id*. ¶¶ 4-5, 26, 28, 126-138.

The typicality requirement is easily met in cases like this one in which all putative class members are subject to the same deficient, agency-wide policies and practices that inevitably lead to harm. Typicality does not require that the interests of all class members be identical. *See, e.g.*, *Rolland v. Patrick*, Civ. 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)). 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." *D.G.*, 594 F.3d at 1199 (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"); *Baby Neal*, 43 F.3d, 63 (3d Cir. 1994) (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 [plaintiffs'] 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").

In sum, the Named Plaintiffs' claims are typical because they are each based on the same legal theories: deprivation of the same federal rights from the operation of the same unitary policies and customs. *See Rosen*, 369 F. Supp. 2d at 208.

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

Named Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The First Circuit divides the adequacy prong into two showings: "The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985); *see also Trombley v. Bank of Am. Corp.*, No. 08-cv-456-JD, 2013 WL 5153503, at *4 (D.R.I. Sept. 12, 2013) ("To satisfy the adequacy requirement, the plaintiffs must show that the representatives' interests will not conflict with the class members' interests and that plaintiffs' counsel is qualified and able to represent the class." (citation omitted)). Rule 23 does not require a "perfect symmetry of interest" and "'[o]nly conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.'" *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quoting 1 William B. Rubenstein, Newberg on Class Actions § 3.58 (5th ed. 2012)); *see Matamaros* ("Put another way, to forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole."). Plaintiffs meet this test.

First, there exists no conflict among the Named Plaintiffs and any of the class members in this litigation. Named Plaintiffs seek declaratory and injunctive relief for statewide, systemic reforms in DCYF foster care. This relief will benefit the Named Plaintiffs and the entire Plaintiff

Class of which they are members by ensuring that these children receive the protection and care afforded to them by the U.S. Constitution and federal statute. Far from conflicting, the Named Plaintiffs' interests in this litigation are "entirely consistent with those of the class." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011); *see also Marisol A.*, 126 F.3d at 378 ("[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.").

Second, Plaintiffs' counsel are qualified, experienced, and will continue to vigorously conduct this litigation. Plaintiffs are represented by attorneys employed by Children's Rights, by Rhode Island attorney John Dineen, and by the national law firm Weil, Gotshal & Manges LLP.

Children's Rights attorneys have served as class counsel on much of the major child-welfare reform litigation. (Bartosz Decl. ¶¶6-8). "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." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. at 297; *see* Bartosz Decl. ¶¶ 6-8. Rhode Island attorney John Dineen has previously litigated many constitutional claims, including on behalf of children in Rhode Island foster care, serving as co-counsel in *Office of Child Advocate v. Lindgren*, 296 F. Supp. 2d 178 (D.R.I. 2004), challenging DCYF's practice of placing children in its custody in night-to-night placements. Dineen is also local counsel in the pending *Inmates of the Boys' Training School v. Lindgren*, No. 71-CV-4529 (D.R.I. filed January 06, 1998), and was sole plaintiff's counsel in *Ferdinand v. DCF*, 768 F. Supp. 401 (D.R.I. 1991). (Bartosz Decl. ¶ 4). 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. (Bartosz Decl. ¶ 5).

Prior to filing, Plaintiffs' counsel conducted a thorough investigation of all aspects of the Rhode Island child welfare system and the treatment and well-being of children in DCYF custody. (Bartosz Decl. ¶¶ 10-11). Over the course of more than eight years of investigation and litigation, counsel has spent hundreds of hours meeting with stakeholders and sources, compiling and analyzing data, preparing court filings and conducting this litigation through a trial and two appeals. (Bartosz Decl. ¶¶ 10-11). Counsel have thoroughly researched all of Plaintiffs' legal claims, and are prepared to continue to fund this litigation through trial. (Bartosz Decl. ¶ 11).

Counsel's combined experience, knowledge, resources, and dedication 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 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))).

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

In addition to satisfying the four prongs of Rule 23(a), the putative Class meets the criteria for certification under Rule 23(b)(2). That is, Plaintiffs have demonstrated that "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 that Rule 23(b)(2) is "uniquely suited to civil rights actions . . . ." *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (internal quotation marks omitted); *see also, e.g., Reid v. Donelan*, 297 F.R.D. 185, 193 (D. Mass. 2014) (noting that "civil rights actions . . . , where a party charges that another has engaged in unlawful behavior towards a defined

group, are 'prime examples' of Rule 23(b)(2) classes" (citing *Amchem*, 521 U.S. at 614; *Hawkins ex rel. 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))). As the Court in *Wal-Mart* affirmed, "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). The instant litigation fits perfectly within Rule 23(b)(2)'s scope.

This case concerns department-wide deficiencies in Rhode Island foster care that harm and place at an unreasonable risk of harm the entire Plaintiff Class. Plaintiffs seek only declaratory and injunctive orders that will "provide relief to each member of the class," *see Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011), by curing those deficiencies. Plaintiffs do not seek money damages nor do they seek individualized relief. *See Bond v. Fleet Bank (RI), N.A.*, No. Civ. A. 01-177 L, 2002 WL 31500393, at *9 (D.R.I. Oct. 10, 2002) ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)" (quoting *Bertozzi v. King Louie International Inc.*, 420 F. Supp. 1166, 1180-81 (D.R.I. 1976)). Instead, Plaintiffs seek detailed, systemic remedies that would require Defendants:

- to ensure that qualified professionals conduct an agency-wide workload assessment for FSU caseworkers and CPS investigators and to implement the findings of that study;

- to ensure that qualified professionals conduct a study on the resources and processes needed for adequate licensing of foster care placements and adequate investigations of licensing violations, and to implement those necessary steps within a defined timeframe;
- to prohibit the use of shelter placements for very young children (5 years and under);
- to ensure that qualified professionals conduct a study on the needs and steps necessary to develop an adequate array of foster care placements, and to implement those steps within a defined timeframe;
- to ensure that Defendants develop and implement policies for adequate visitation between parents and children and among siblings, at least one of whom is in foster care;
- to ensure that adequate and timely case plans are provided to all children and parents, as required by statute; and
- to provide adequate foster care reimbursement rates, as required by statute.

See Third Am. Compl. IX(a)-(g). This proposed relief is clearly of the common and injunctive nature contemplated by Rule 23(b)(2), as numerous courts have recognized. *See, e.g.*, *Connor B.*, 272 F.R.D. at 297 (finding Rule 23(b)(2) certification was warranted 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"); *M.D. v. Perry*, 294 F.R.D. 7, 47, 55 (S.D. Tex. 2013) (certifying classes under Rule 23(b)(2) where Plaintiffs' claims were susceptible to common, specific relief, including "setting maximum caseloads, hiring more caseworkers"; "an assessment by professionals in order to determine what needs to be done regarding monitoring and enforcement of minimum standards for licensed foster care placements and for those recommendations to be implemented"; and an "assessment and implementation with regards to the array of such placements"); *D.G. v. Devaughn*, 594 F.3d 1188, 1200 (10th Cir. 2010) (affirming decision that an "injunction setting limits on the caseloads of caseworkers and their supervisors set by COA and CWLA" and "an injunction mandating caseworkers monitor foster children by visiting them as frequently as set forth under COA and CWLA standards" satisfy Rule 23(b)(2)); *cf. Kenneth R. ex rel. Tri-Cty.*

CAP, Inc. v. Hassan, 293 F.R.D. 254, 270-71 (D.N.H. 2013) (certifying a class under Rule 23(b)(2) where Plaintiffs "submitted evidence to support their allegation that a systemic deficiency in the State's community-based mental health services system affects the class" of persons who were "unnecessarily institutionalized . . . or who are at serious risk of unnecessary institutionalization").[17] Indeed, this Court has already stated that injunctive relief such as lowered caseloads and an increased placement array does not directly implicate individual cases. *See Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 380, 389 (D.R.I. 2011).

The fact that fundamental failings within Rhode Island foster care are generally applicable to the Plaintiff Class and that Plaintiffs seek purely declaratory and injunctive relief in this civil rights action compels class certification under Rule 23(b)(2).

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. Plaintiffs therefore respectfully request that this Court enter an order 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"—and that the certification order appoint Plaintiffs' counsel as class counsel pursuant to Rule 23(g). Plaintiffs' further request that at the forthcoming case management conference, to be scheduled by the Court, deadlines be set for

[17] That mootness is a pressing concern among the individual Class members in this case further militates in favor of Rule 23(b)(2) certification. The First Circuit has indeed recognized that the "danger that the individual claim might be moot" is a factor supporting Rule 23(b)(2) certification. *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985); *see also Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 326-27 (D. Mass. 1997) ("The danger of mootness is great enough in the instant litigation to necessitate [Rule 23(b)(2)] class certification."); *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass. 2000) (finding Rule 23(b)(2) certification appropriate for class of certain Medicaid-eligible mentally retarded or developmentally disabled adults, in part because named plaintiffs may be expected to face the possibility of mootness because "the circumstances of both their personal situation and the situation of their elderly caregivers is so precarious").

(a) a period of discovery on class certification issues, (b) Plaintiffs' supplemental brief to follow discovery, (c) Defendants' response brief, (d) Plaintiffs' reply, and (e) a hearing on Plaintiffs' motion.

DATED: October 15, 2015

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CERTIFICATION OF FILING AND SERVICE

I hereby certify that on October 15, 2015, 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:

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