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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

WYATT B. and NOAH F. by their next friend Michelle McAllister; KYLIE R. and ALEC R. by their next friend Kathleen Megill Strek; UNIQUE L. by her next friend Annette Smith; SIMON S. by his next friend Paul Aubry; RUTH T. by her next friend Michelle Bartov; BERNARD C. by his next friend Ksen Murry; NAOMI B. by her next friend Kathleen Megill Strek; and NORMAN N. by his next friend Tracy Gregg, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KATE BROWN, Governor of Oregon in her official capacity; FAIRBORZ PAKSERESHT, Director, Oregon Department of Human Services in his official capacity; JANA MCLELLAN, Interim Director, Child Welfare in her official capacity; and OREGON DEPARTMENT OF HUMAN SERVICES,

Defendants.

No. 6:19-cv-00556-AA

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO MAKE MORE DEFINITE AND CERTAIN

Pursuant to FRCP 12(b)(6), FRCP 12(e)

Request for Oral Argument

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CERTIFICATE OF COMPLIANCE

In compliance with Local Rule 7-1, the parties made a good faith effort through telephone conferences to resolve the disputes that are the subject of these motions and have been unable to do so.

MOTIONS

The State of Oregon, by and through its Department of Human Services (DHS), Fariborz Pakeresht, in his official capacity as Director of DHS, Jana McLellan in her official capacity as Interim Director of Child Welfare at DHS, and Governor Kate Brown in her official capacity (collectively, "the State") respectfully submit the following FRCP 12 motions:

1. Motion to dismiss all claims for relief, based on *O'Shea* abstention under FRCP 12(b)(6);
2. Motion to dismiss the substantive due process claim for failure to state a claim pursuant to FRCP 12(b)(6) or, in the alternative, to make more definite and certain pursuant to FRCP 12(e) ;
3. Motion to dismiss the claim for violation of the Adoption Assistance and Child Welfare Act ("CWA") for failure to state a claim pursuant to FRCP 12(b)(6);
4. Motion to dismiss the 29 U.S.C. § 794 (Rehabilitation Act) and 42 U.S.C. § 12132 ("ADA") claims for failure to state a claim pursuant to FRCP 12(b)(6).

These motions are supported by the following memorandum of points and authorities, the declaration of Anna M. Joyce, and the exhibits thereto.

INTRODUCTION

The State shares plaintiffs' interest in improving Oregon's child welfare care system. Without question, it is a complex, challenging task. But for two separate, but related reasons, it is a task that must be left to Oregon's juvenile courts and state government. First, bedrock principles of federalism and comity mandate that this Court abstain from ongoing oversight of juvenile court proceedings. Second, the federal laws upon which plaintiffs premise their claims, including the Due Process Clause, provide few of the federal protections that the foster children here seek.

In contrast, the State of Oregon and Governor Brown have the authority to guarantee real protection for foster children and are working hard to overhaul the child welfare system. In addition, Oregon state courts have the ability and expertise to validate and enforce the broader rights and protections Oregon state law affords children in foster care. In light of those principles, this Court should abstain from considering the complaint's claims. Even if the claims fall within this Court's purview, the complaint contains legal deficiencies requiring either dismissal or narrowing of the alleged claims. The State, therefore, asks this Court to dismiss the complaint.

FACTUAL BACKGROUND

I. Oregon's child welfare system

Because understanding the role of the juvenile court is critical to demonstrating why this Court should abstain from considering this case, the State sets out the state regulatory framework in some detail. Oregon's child welfare system involves close collaboration between DHS and the juvenile courts from the moment that a child comes into care. A juvenile court must hold a hearing within 24 hours of a child being taken into DHS custody. ORS 419B.183. At that hearing, the court must initially make findings whether DHS made reasonable efforts to prevent or eliminate the need for removal of the child. ORS 419B.185. The juvenile court must also find that placement out of the home is in the best interests of the child. *Id.*

Within 60 days after DHS files a petition alleging that a child is within the jurisdiction of the juvenile court, the court must hold another hearing. ORS 419B.305. At that hearing, the juvenile court must determine whether to make the child a ward of the court and commit the child to the legal custody of DHS for placement and supervision. ORS 419B.328. Where the court determines it is in the best interest of the child to be placed in the legal custody of DHS, the court must make particular findings, including whether DHS made reasonable efforts to prevent or eliminate the need for removal and that DHS has made diligent efforts to place the child. *See* ORS 419B.337. In most cases, the court indicates a placement preference. *Id.* The court may also order DHS to be the guardian of the child. ORS 419B.373.

Once the juvenile court establishes jurisdiction and wardship, the juvenile court makes certain recommendations for DHS's initial plan. ORS 419B.343(1). The court may specify the particular care, supervision, and services to be provided by DHS, and may make an order regarding visitation of the child's parents or siblings. ORS 419B.337(2)(3). If, upon review of a placement or proposed placement, the court disagrees with DHS's case-planning decision, the court may order a specific type of placement (such as with the child's parents or relative, with a foster family, in a residential facility or group care). ORS 419B.349. If a child needs medical care or other special treatment by reason of a physical or mental condition, the juvenile court may indicate the general care it deems appropriate. ORS 419B.346.

Once DHS has created the plan for care or treatment of the child, it must provide a copy of the plan and timetable for its implementation to the juvenile court for review. *Id*. The court may also order specific examination or treatment, including specifying a hospital setting or mental health treatment program. DHS must implement these directives "in consultation with the court." ORS 419B.352. In those instances, DHS must notify the court when DHS implements the plan and annually update the court on DHS's progress. DHS must also notify the court of any revisions and provide additional progress reports at the court's request. ORS 419B.346.

Authority over the placement, care, services, and treatment of children in foster care resides with the juvenile court. Once the court makes its recommendations as to the placement, care, services, and treatment provided to the child—and has received DHS's plan to execute those recommendations—the court may direct a different placement. ORS 419B.349(1). Thereafter, the court exercises "continuing jurisdiction to protect the rights of the child[.]" *Id*. Every six months, DHS must file reports with the juvenile court containing specific information about the child, the agency's efforts to return the child home, and a proposed timetable for permanent resolution of the child's status. *See generally* ORS 419B.440-443. The juvenile court must hold a hearing on the agency's report in most circumstances (*e.g.*, where DHS seeks to change placement or return a child to their parents) and may hold a hearing in all others. ORS 419B.449(1). At that hearing, the juvenile court must make specific findings, including

why continued care is necessary, the expected timetable for permanency, the number of placements the child has had, schools attended, and the number of visits the child has had with caseworkers and family members and whether the frequency of these is in the child's best interests. *See* ORS 419B.449(2), (3). At each stage of the case, the child is represented by a court-appointed attorney who can seek appropriate orders or findings from the juvenile court related to placement or other aspects of the child's dependency status. ORS 419B.195.

Additionally, the juvenile court must conduct a permanency hearing at specified intervals and, once more, must make specific findings. ORS 419B.470, 476. At those hearings, the juvenile court reviews the child's permanency plan, evaluates DHS's efforts to advance that plan, and orders changes to the plan itself or to DHS's execution of the plan based on the court's findings and determinations. ORS 419B.476(2)(4)(e). If the child is 14 or older, the court must evaluate the child's plan to transition to adulthood and the adequacy of services provided for the child to achieve that goal and, again, order changes as the court deems fit.
ORS 419B.476(3)(4)(e). In short, the juvenile court is charged with evaluating the adequacy of—and ordering changes to—each child's placement, permanency plan, medical and mental health treatment, and services provided during the entirety of the time a child is in DHS custody.

II. The named plaintiffs

Plaintiffs are ten children in Oregon's foster care system. The complaint alleges that each has suffered physical, mental, emotional, and/or sexual abuse and neglect at the hands of their primary caretakers, necessitating their placement in foster care. (*E.g.*, Complaint ("Compl.") (Dkt. 1) ¶¶ 48, 67, 75, 95, 111, 128, 153-54.) Many of them further allege that they have suffered significant trauma and experience behavioral issues as a result of their experiences. (*Id*. ¶¶ 60-61, 68, 82, 86, 114, 132, 184.) And the complaint alleges that several plaintiffs have extreme behavioral issues that have resulted in placements in facilities that serve high-needs children and, in several cases, facilities that are out-of-state. (*Id*. ¶¶ 72, 85-88, 102, 122-23, 165, 194-95.)

III. The complaint's allegations and requested relief

The complaint alleges four claims for relief on behalf of all Oregon foster children, including three sub-classes (children with disabilities; youth who are transitioning into adulthood; and LGBTQ children): (1) violation of substantive due process by exposing foster children to unreasonable risks of harm through deliberate indifference; (2) violation of the CWA by failing to provide foster children with written plans and a case review system; (3) violation of the ADA by failing to provide children with disabilities an equal opportunity to access foster care services, including placement in the most integrated environment appropriate for the child's needs; and (4) violation of the Rehabilitation Act based on same theory as the ADA claim.

The complaint seeks relief directing DHS to (1) contract with an outside entity to complete needs assessment of foster care system and develop corrective plan; (2) provide written child-specific case plans and monitor compliance with same; (3) hire, train, and retain more qualified caseworkers; (4) reduce caseloads; (5) provide additional services to children with disabilities so they can be placed in the most integrated setting; (6) provide planning services to foster children transitioning to adulthood; and (7) ensure that all LGBTQ children receive placement and care that supports their sexual orientation and gender identity. In addition, plaintiffs request DHS to employ a third-party monitor to oversee the foregoing.

IV. Audits and actions already underway in Oregon

As plaintiffs themselves acknowledge, Oregon's state government is actively working to address those system challenges and improve outcomes for all Oregon foster children. The Oregon Secretary of State conducted an audit in 2018. (Compl. ¶ 209.) That audit made various recommendations to improve management within DHS, improve management of foster care (including recruitment and retention of foster parents), and address understaffing and high caseloads. (*Id*. ¶¶ 220-223.)

In response to the audit, DHS prepared a response, agreeing with the Secretary of State's recommendations. (Jan. 2018 Audit, attached to Decl. of Anna Joyce in Supp. of Mot. to

Dismiss ("Joyce Decl.") as Ex. 1.)[1] DHS described the steps that it would take to implement the recommendations and improve the child welfare system. (*Id.* at pp. 64-85.)

The Secretary of State completed a follow-up audit in 2019.[2] (June 2019 Audit, attached to Joyce Decl. as Ex. 2.) The follow-up audit concluded that DHS "made progress on all 24 recommendations from the original audit, fully implementing eight." (*Id.* at p. 2.)

Governor Brown has also acted to address specific gaps in the foster care system. On April 18, 2019, she issued Executive Order No. 19-03. (4/18/2019 Executive Order, attached to Joyce Decl. as Ex. 3.) In that order, Governor Brown acknowledged that the Child Welfare Program is understaffed, that the most suitable available placement for 80 high-needs youth was at facilities outside of Oregon, and that there are not enough foster home placements in Oregon. She ordered the creation of a Child Welfare Oversight Board ("Board") to serve as an advisor to the Governor on DHS's Child Welfare Program. (*Id.* at p. 1.) Governor Brown further ordered creation of a management team to implement her directives, directives that will be based on the Board's recommendations. Together, the management team and Board will make and implement recommendations at DHS related to: (1) out-of-state foster care placements; (2) building capacity for both therapeutic and general foster care; (3) developing adequate in-home capacity for children of color and with intellectual and developmental disabilities, and for LGBTQ+ youth; and (4) developing recommendations to address workforce challenges in providing services to foster children. (*Id*. at p. 2.)

LEGAL STANDARDS

A claim must be dismissed when it "fail[s] to state a claim upon which relief can be granted." FRCP 12(b)(6). The facts alleged in the complaint must amount to a claim for relief "that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting *Bell Atl.*

[1] In deciding a motion to dismiss, "courts may take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (alterations, citation, and quotation omitted).

[2] On a motion to dismiss, a court may take judicial notice of matters of public record outside the pleadings. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

Corp. v. Twombly, 550 U.S. 544 (2007)). A claim is plausible on its face only if it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The complaint must be dismissed if the factual allegations allow only "a sheer possibility that the defendant has acted unlawfully." *Id*. When a court considers a motion to dismiss, the court construes all allegations of the complaint in the plaintiff's favor. *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987).

To assess the adequacy of a complaint, a court must begin by identifying those pleadings that are no more than legal conclusions, and thus are not entitled to the assumption of truth. *Ashcroft*, 556 U.S. at 678-79 (holding that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"); *Chapman v. Pier 1 Imports*, 631 F.3d 939, 955 n. 9 (9th Cir. 2011) (explaining "allegation that the barriers at the Store 'denied him full and equal enjoyment' is precisely the 'formulaic recitation' of the elements of a claim that the Supreme Court has deemed insufficient" and that to "sufficiently allege standing, [a plaintiff] must do more than offer 'labels and conclusions' that parrot the language of the ADA").

Further, while all factual allegations in a pleading subject to a motion to dismiss for failure to state a claim are generally assumed to be true, the Court need not consider facts that are contradicted by information that is judicially noticeable under F.R.E. 201(b) or by documents whose contents are cited in the complaint but which are not physically attached to the pleading. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Such consideration does not convert the motion to dismiss into a motion for summary judgment. *Id*.

Finally, a party should be made to provide "a more definite statement of a pleading" where the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." FRCP 12(e).

ARGUMENT

I. This Court should abstain from exercising jurisdiction under *O'Shea v. Littleton*.

Plaintiffs' requested relief invites this Court to replace Oregon's democratically elected state government with out-of-state advocates and consultants, and to substitute a paid private entity's decisions for the judgments of Oregon's sworn judicial officers. If authorized by the federal court, this intrusion would violate a basic principle of federalism. The United States Supreme Court has rejected similar intrusions for half a century, and this Court should do the same.

A. Principles of comity and federalism require abstention from ongoing oversight of state proceedings.

The Supreme Court has "repeatedly recognized a 'longstanding public policy against federal court interference with state court proceedings' based on principles of federalism and comity." *Miles v. Wesley*, 801 F.3d 1060, 1063 (9th Cir. 2015) (quoting *Younger v. Harris*, 401 U.S. 37, 43 (1971)). In *O'Shea v. Littleton*, the Supreme Court held that those principles apply with full force to system-wide state court proceedings, rather than simply an ongoing proceeding that directly affects the plaintiffs. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) . The *O'Shea* plaintiffs alleged that state criminal defendants who were racial minorities were treated differently than white defendants. The Court first noted that the plaintiffs were not challenging the constitutionality of the state laws underlying the state proceedings, but rather seeking "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of" the state proceedings. *Id*. at 500. Such an order "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance [in federal court]." *Id*. The Court concluded that this type of monitoring amounts to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent." *Id*. Accordingly, the abstention analysis hinges on the relief sought: "*O'Shea compels* abstention where the plaintiff seeks an 'ongoing federal audit' of the state judiciary, whether in criminal proceedings or in other

respects." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 790 (9th Cir. 2014) (quoting *O'Shea*, 414 U.S. at 499) (emphasis added).

B. The relief requested squarely conflicts with *O'Shea*.

There can be no doubt that the relief sought here demands exactly the type of intrusive action that *O'Shea* prohibits. Just as in *O'Shea*, plaintiffs do not challenge the constitutionality of the Oregon law under which juvenile courts operate, but rather seek an injunction "aimed at controlling, preventing, or mandating the occurrence of specific events that might take place" within the province of Oregon's juvenile courts. *O'Shea*, 414 U.S. at 500. As explained below, the relief requested in the complaint squarely contradicts the Supreme Court's edict.

1. The relief that the complaint seeks for the general class would require ongoing oversight of Oregon's juvenile courts.

The complaint calls for federal court oversight of numerous matters that are within the jurisdiction of the juvenile court. For example, the complaint seeks an injunction that would require DHS to create "an individualized written case plan for treatment, services, and supports," which contains "a plan for reunification with the child's parents, for adoption, or for another permanent, family-like setting" for each member of the general class. (Compl. ¶ 331.a.iii.) This "case plan" is not intended for submission to the juvenile court. Rather, this requested relief bypasses the state juvenile court in favor of the federal court-appointed monitor's evaluation of the "case plan" for adequacy, and the adequacy of DHS's steps to effectuate the plan. This would be separate and independent from the juvenile court's simultaneous, ongoing review (and modification as appropriate) of the permanency, treatment, and case plans that DHS prepares and effectuates, under the supervision of the juvenile court, pursuant to the CWA and various provisions of Oregon law. Similarly, the requested injunction would mandate DHS to "contract with an appropriate outside entity to conduct a needs assessment of the state's provision of foster care placement and services . . . to determine the full range and number of appropriate foster care placements and services for all children." (*Id.* ¶ 331.a.i.) This assessment requires an "outside entity"—in addition to the requested monitor and the federal court's supervision of

compliance—to assess and evaluate the propriety of placements already ordered by the juvenile court as well as those the juvenile court has yet to make.

But this is *precisely* the role of the juvenile court. Under Oregon law, the juvenile court exercises complete authority to review placement decisions affecting children in DHS custody. ORS 419B.349, 449(1). Moreover, the juvenile court must regularly review and approve a child's plan for reunification, for adoption, or other permanency, as well as order, review, and modify plans for treatment, services, and supports, and finally, evaluate DHS's efforts to effectuate those plans. ORS 419B.440-443, 449. The only way to implement the complaint's requested relief would require the federal court to do exactly what *O'Shea* prohibits: "exercise control" over the events occurring in juvenile court.

2. The relief that the complaint seeks for the subclasses would similarly require ongoing oversight of Oregon's juvenile courts.

The requested relief for the purported "ADA subclass" and "SGM subclass" similarly addresses issues squarely within the juvenile court's authority. For the purported "ADA subclass," the complaint demands that children with mental health disabilities be placed in the most integrative setting possible, namely, family foster homes with supportive services and appropriate community-based therapeutic services, all to be judged by the federal monitor. (Compl. ¶ 331.b.) This again, falls within the role of the judges of the juvenile court. Moreover, the juvenile court can determine the type of treatment that a child receives, evaluate DHS's plan to provide the treatment, and monitor progress as well as any revisions to the plan. ORS 419B.346. Finally, the court may direct DHS to conduct a mental health exam and provide mental health treatment and services. ORS 419B.352. In that event, DHS *must* consult with the court to determine the appropriate placement for a child needing mental health treatment and services, with the court having the final say in the event of a disagreement. (*Id*.) Similarly, the relief requested for the purported "SGM subclass" requires placement of LGBTQ youth in specific family settings with specific types of families and specific services provided. (*See id.* ¶ 331.d.) Such decisions are precisely within the juvenile court's authority to oversee placement decisions and plans for services.

The jurisdiction of Oregon juvenile courts also encompasses the relief that the complaint seeks for the purported "aging-out subclass." The contemplated injunction would require DHS to make a specific type of placement decision relating to these class members, and to engage in transition planning, facilitating their transition to adulthood, also under federal monitor supervision and review. Once again, the juvenile court reviews and exercises oversight on all placements, including for children who are 14 and over. Moreover, the law specifically charges the juvenile court with overseeing "the comprehensive plan for the ward's transition to successful adulthood," including evaluating whether the plan is "adequate to ensure the ward's transition to successful adulthood" and whether DHS has "offered appropriate services pursuant to the plan." ORS 419B.476(3).

At its core, the complaint demands that this Court ignore and directly override the system that the Oregon legislature created—and that state court judges enforce—in favor of a federal overlay with requirements chosen by a national non-profit corporation and enforced by an un-elected, unsworn monitor. In practice, this means that, as the child's plan is being reviewed, modified, and approved by the juvenile court, the monitor will be simultaneously reviewing, modifying, and approving the plan for compliance with the requirements listed in the complaint. The juvenile court will make decisions relating to the placement of a child, the provision of treatment and services, and planning for the child's permanency, which could very well conflict with subjective preference or interpretations of the national monitor, who will be following criteria in the complaint rather than those set forth in Oregon law. This kind of "interference . . . by means of continuous or piecemeal interruptions of the state proceedings . . . [disrupts] the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *O'Shea,* 414 U.S. at 500 (internal citations omitted).

C. Courts, including those in the Ninth Circuit, abstain in these circumstances.

The Ninth Circuit, as well as several other circuit courts, has repeatedly recognized that the type of intrusive relief that the complaint seeks—particularly in the uniquely sensitive area of child welfare—contradicts *O'Shea* and must be rejected.

1. The Ninth Circuit and its district courts have abstained in cases seeking relief like that which the complaint here seeks.

In a challenge to aspects of the California foster system, the Ninth Circuit considered a request for a reduction in caseloads for juvenile court judges and court-appointed attorneys. *E.T. v. Cantil–Sakauye*, 682 F.3d 1121 (9th Cir. 2012). The plaintiffs contended that the overworked courts and attorneys prevented abused and neglected children from receiving due process, their right to counsel, or a thorough consideration of their cases. The Ninth Circuit abstained under *O'Shea*, recognizing that "potential remediation might involve examination of the administration of a substantial number of individual cases." *Id*. at 1124. Any such oversight of the state juvenile court "would inevitably set up the precise basis for *future intervention* condemned in *O'Shea*." *Id*. (quoting *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992)). Specifically, "Defendants' compliance with [plaintiff's requested remedy] and its effect in individual cases could be subject to further challenges in federal district court." *Id*. at 1125.

So too, here. Plaintiffs seek specific requirements for placement decisions, direct services, permanency plans, medical treatment plans, and transition plans, all of which would be subject to the federally appointed monitor's review and this court's continuing jurisdiction. Each and every aspect of this relief is part of the juvenile court's ongoing decision process; meaning that, contrary to Supreme Court and Ninth Circuit precedent, this Court would be in the position of directly overseeing Oregon juvenile court decisions.

In a markedly similar case, a California district court abstained from intervening in the state foster system under the principles of *Younger* and *O'Shea*. *Laurie Q. v. Contra Costa Cnty*., 304 F. Supp. 2d 1185, 1203 (N.D. Cal. 2004). The plaintiffs, special needs foster children, alleged that the county failed "to adequately provide for their welfare through the proper management of their case plans." *Id*. at 1204. The court acknowledged that, even though a separate administrative panel held some authority over children's cases, the California juvenile courts exercise continuing jurisdiction over the children, holding periodic hearings, monitoring compliance with case plans, and retaining "ultimate authority" over case plans. *Id*. at 1203. As a result, any injunction involving case plans would place the federal court in the position of "final

arbiter, approving or disapproving of the Juvenile Court's review of plaintiffs' case plans under [California law]." *Id.* at 1204. As a result, the California district court abstained from considering the general class claims seeking injunctive relief.

The same logic applies here. Oregon courts retain the same broad and continuing authority over case plans. Indeed, Oregon juvenile courts do not share that authority with an administrative panel and appear to be even more involved in medical treatment and placement decisions of children with special needs. *Compare* Cal. Welf. & Inst. Code § 362 (West) with ORS 419B.346, 352. Because there is no practical way to effectuate the complaint's requested relief without engaging in ongoing oversight of the juvenile court's decisions, this Court must abstain from entering the province of the juvenile court. *See Belinda K. v. Cnty. of Alameda*, No. 10-CV-05797-LHK, 2012 WL 1535232, at *5 (N.D. Cal. Apr. 30, 2012), *aff'd sub nom. J.H. ex rel. Kirk v. Baldovinosre*, 583 F. App'x 833 (9th Cir. 2014) (any injunction to provide additional resources to the underfunded juvenile courts would "require an ongoing audit of court administration and would violate the principles set forth in *O'Shea*").

2. Several other circuits have also abstained in cases seeking relief like that which the complaint here seeks.

In addition to the Ninth Circuit, several other circuits have declined to interfere with state foster systems and juvenile court proceedings under *O'Shea*. In a similar challenge to Florida's foster care system, the Eleventh Circuit was compelled to abstain as the requested relief—which included enjoining inadequate or unsafe child placements—touched matters directly within the review of state juvenile courts. *31 Foster Children v. Bush*, 329 F.3d 1255, 1281 (11th Cir. 2003). The court recognized that, like Oregon, Florida vests final authority in placement decisions and case plans in the state juvenile courts. *Id*. at 1277. Granting plaintiffs' requested relief would place "decisions that are now in the hands of the state courts under the direction of the federal district court." *Id*. at 1278. In that event, "the federal and state courts could well differ, issuing conflicting orders about what is best for a particular plaintiff, such as whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an

adoptive family." *Id*. Such relief would, "[t]o say the least," amount to "federal court oversight of state court operations." *Id*. at 1279 (internal quote and citation omitted).

There is no meaningful difference in either the relief sought here or the function of Oregon and Florida courts. This situation presents precisely the same affront to federalism. If this Court grants the requested relief, a federal court-appointed monitor may approve a plan that the Oregon juvenile court does not, and vice versa. As multiple courts have recognized, *O'Shea* mandates abstention in these circumstances. *See J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999) (abstaining where the requested relief would give the federal district court an oversight role over the entire state program for children with disabilities and would give it control over decisions then in the hands of the New Mexico Children's Court, such as whether to return a child to his parents or whether to modify a treatment plan).

In the handful of foster care cases where district courts have accepted adjudication of the claims instead of abstaining under *O'Shea*, the relief sought did not fall within the scope of those states' juvenile court mandates. For example, in *Tinsley v. McKay*, Arizona foster children plaintiffs sought relief that would essentially require the state agency to *comply* with juvenile court orders. 156 F. Supp. 3d 1024, 1036 (D. Ariz. 2015). The district court recognized that the relief sought did not intrude upon "the juvenile courts' power over placements, visitation, and health services" and that juvenile courts "are not involved in adjudicating and remedying the types of claims raised here." *Id*. at 1043. Because "the relief Plaintiffs seek is not aimed at a core competency of the juvenile court," abstention was not warranted. *Id*. at n. 19. Here, however, the complaint seeks relief relating to the oversight of case plans, placements, services, and treatment, the quintessential "core competency" of Oregon juvenile courts. *See also Connor B. ex rel. Vigurs v. Patric*k, 771 F. Supp. 2d 142, 154 (D. Mass. 2011) (unlike Oregon law, Massachusetts juvenile courts "play a minimal role in exercising the state's care and protection policy. The real locus of decision making is within [the state agency]") (internal quote and citation omitted).

Finally, federal courts have repeatedly applied *O'Shea* abstention in sensitive areas of state interest (like child welfare), finding abstention especially appropriate for "institutional

reform injunctions" that raise "sensitive federalism concerns." *See E.T.*, 682 F.3d at 1124 (citing *Horne v. Flores*, 557 U.S. 433 (2009)). Appointing a federal court monitor to oversee the treatment of Oregon foster children in compliance with a federal court's decrees would rob juvenile courts of their authority in an area that has deep importance for the state of Oregon—the welfare of its children. Accordingly, *O'Shea* mandates that this Court abstain from considering the complaint's requested relief.

II. The complaint fails to state a claim for violation of the Due Process Clause.

Even without the basis for federal abstention, the complaint fails on its merits as well. The complaint accurately articulates the standard for a substantive due process claim, but fails to confront its limitations: the claims for relief far exceed the limited protection that substantive due process guarantees. The State endeavors, as a matter of sound social policy, to provide Oregon's foster children with many of the conditions and improvements that the complaint seeks. DHS and Governor Brown have already committed to addressing many of the issues set out in the complaint. But the question whether good social policy compels a particular action is a wholly different question from whether the State is constitutionally required to take that action and be subject to ongoing federal court supervision. That is not the law. This Court should therefore dismiss the claims that exceed the bounds of the Due Process Clause.

A. The Fourteenth Amendment requires the State to provide for foster children's basic needs.

The Ninth Circuit has circumscribed the contours of what substantive due process requires the State to provide for foster children. More specifically, the Fourteenth Amendment requires that the State provide for foster children's "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety[.]" *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) (quoting *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 196 (1989)). Those "basic human needs" require "minimally adequate care and treatment appropriate to the age and circumstances of the child." *Id.*; *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 842 (9th Cir. 2010). To satisfy that duty, the State must provide children in its custody "personal security and reasonably safe living conditions" free from an unreasonable

risk of both physical and psychological harm. *Hernandez v. Texas Dep't of Protective & Regulatory Serv.*, 380 F.3d 872, 880 (5th Cir. 2004); *Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (citing *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)). The Fourteenth Amendment does not entitle foster children "to receive optimal treatment and services, nor does it afford them the right to be free from any and all psychological harm at the hands of the State." *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 251 (5th Cir. 2018).

As described below, much of what the complaint alleges goes far beyond the narrow substantive due process entitlement to "basic human needs" and therefore fails to state a claim.

B. The complaint fails to state a claim for violation of substantive due process.

The complaint alleges a range of substantive due process rights, including the right to:

- Freedom from the foreseeable risk of physical, mental, and emotional harms (Compl. ¶ 200.a.);
- Necessary care to ensure physical, mental, intellectual, and emotional well-being in the least restrictive environment (*id*. ¶ 200.b.);
- Not be maintained in custody longer than is necessary to accomplish the purpose of custody (*id*. ¶ 200.d., ¶ 306.f.);
- Reasonable efforts to obtain a permanent home within a reasonable period of time (*id*. ¶ 200.e.);
- Services necessary to prevent unreasonable risk of harm (*id*. ¶ 306.c.);
- Conditions and duration of foster care that is reasonably related to the purpose of government custody (*id*. ¶ 306.d.);
- Services in the most integrated setting (*id*. ¶ 307.a.ii.);
- Access to an array of community-based placements and services to ensure access to the least restrictive alternative (*id*. ¶ 307.a.iv.);
- Independent living services to prepare to exit foster care successfully (*id*. ¶ 307.c.i.);

- Assistance to find lawful, suitable permanent housing that will not result in homelessness (*id.* ¶ 307.c.ii.); and
- Connection with an adult resource who will maintain a stable, long-term relationship with the child after she/he/they ages out of the system (*id.* ¶ 307.c.iii.).

Those allegations may reflect practices and care that will improve foster children's well-being, but they do not reflect the limited and circumscribed requirements of the Fourteenth Amendment. *M.D.*, 907 F.3d at 272 (observing that while the plaintiffs' allegations may reflect the "best practices" of the child-welfare community, the allegations go "far beyond what [is] minimally required to comport with the Constitution's" prohibition on deprivation of substantive due process rights) (quoting *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974)). Each of the complaint's allegations must be measured against the "minimally adequate care" standard requiring the state to provide for foster children's "basic human needs." *Id.*

That standard has led multiple courts to reject claims similar to those in the complaint here. For instance, several courts have concluded that substantive due process does not guarantee placement stability or the least possible time in custody. *Clark K. v. Guinn*, No. 2:06-CV-1068 RCJ-RJJ, 2007 WL 1435428 (D. Nev. May 14, 2007) (rejecting substantive due process claim to "not be retained in custody longer than is necessary" or to "to be placed in the least restrictive placement based on the foster child's needs"); *Eric L. By and Through Schierberl v. Bird*, 848 F. Supp. 303, 307 (D.N.H. 1994) (rejecting substantive due process claim to placement stability); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 504-08 (D.N.J. 2000) (rejecting substantive due process claim to "not remain in state custody unnecessarily" or "to be housed in the least restrictive, most appropriate and family-like placement while in state custody"); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 853 (7th Cir. 1990) (rejecting substantive due process claim to "a stable foster-home environment").

Likewise, and consistent with the "basic needs" standard, at least one circuit has rejected a substantive due process claim based on placing children out of state or in facilities that are not

"necessarily appropriate for their service level of needs." *M.D.*, 907 F.3d at 268. In reaching that conclusion, the court observed that although placing foster children in-region and in a placement that is ideal for their service levels and personal needs is desirable, the failure to do so does not, without more, amount to a due process violation. *Id*. Even where those out-of-region placements may have negative effects on children's mental health, "those negative effects are not constitutionally cognizable harms." *Id*.

Even in the best of circumstances, the State cannot eliminate all risk of psychological or emotional harm to children who have come into its custody due to parental neglect and abuse, and the Constitution does not require that it do so. To be sure, "egregious intrusions on a child's emotional well-being—such as, for example, persistent threats of bodily harm or aggressive verbal bullying—are constitutionally cognizable." *Id* at 251. But "[i]ncidental psychological injury that is the natural, if unfortunate, consequence of being a ward of the state does not give rise to the level of a substantive due process violation." *Id*. The same is true of the complaint's allegations that foster children should be protected from mental and emotional harm and to ensure their emotional well-being. (Compl. ¶¶ 200.a., b.) The complaint falls well short of alleging any kind of "persistent threats of bodily harm" or "aggressive verbal bullying." At most, it alleges that many of the plaintiffs have suffered trauma from being raised by abusive or neglectful parents, and that being taken into protective custody intensified that trauma. (*E.g*., *id*. ¶¶ 60, 67-68, 75, 81-82, 111.)

Several of the complaint's claims for relief pursuant to the Fourteenth Amendment appear to draw from sources other than the Fourteenth Amendment. For instance, the complaint alleges an obligation on the State's part to make reasonable efforts to obtain an appropriate permanent home. (*Id*. ¶ 200.3.) But the genesis of that obligation is Oregon's Juvenile Code, *see generally* ORS 419B.476, and federal statutory law, not the Due Process Clause. Plaintiffs cannot transform another source of law into a substantive due process claim. *DeShaney*, 489 U.S. at 202 ("A State may, through its courts and legislatures, impose such affirmative duties of care . . . as it wishes. But not 'all common-law duties . . . were . . . constitutionalized by the Fourteenth Amendment.'") (quoting *Daniels v. Williams*, 474 U.S. 327, 335 (1986)).

For the foregoing reasons, the Court should dismiss the due process claim to the extent that it seeks redress for rights not protected by the limited purview of substantive due process.

C. In the alternative, this Court should order that the complaint be made more definite and certain.

Alternatively, this Court should require plaintiffs to make their complaint more definite and certain pursuant to FRCP 12(e) so that the State may fairly respond to it. Fundamental to stating a substantive due process claim is pleading the liberty interest that the plaintiff alleges that the defendant has harmed. Although the complaint describes the named plaintiffs' individual circumstances (*see* Compl. ¶¶ 45-199), and, in a separate section, describes the litany of interests that plaintiffs believe the Due Process Clause protects (*see id*. ¶¶ 200, 306-307), it does not specifically link any of their individual circumstances with a specific deprivation of a substantive due process right. General descriptions of plaintiffs' circumstances and a list of purported substantive due process rights, without connecting the two, fall short of the required pleading standard. *Ashcroft*, 556 U.S. at 677-78 (to survive a motion to dismiss, plaintiffs must allege facts that show a "plausible entitlement to relief"). Each of the sections describing the plaintiffs' histories and ending with boilerplate allegations that the State has violated the child's "due process and federal statutory rights" similarly fall short of the requisite pleading standard: it is plaintiffs' obligation to particularly allege which actions violate due process, and they have failed to do so. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996) (one must be able to "determine from the complaint who is being sued, for what relief, and on what theory, with enough detail to guide discovery"); *see also Sameer v. Right Moves 4 U*, No. 1:17-CV-886 AWI-EPG, 2018 WL 1875536, at *3 (E.D. Cal. Apr. 19, 2018) (granting motion to dismiss because "[m]any of Plaintiff's claims appear duplicative, and though Plaintiff includes almost 300 paragraphs of factual allegations, it is near impossible to connect these facts to the elements of Plaintiff's claims"); *Washington v. California Dep't of Corr. & Rehab.*, No. CV 19-169-VAP (KK), 2019 WL 1206487, at *5 (C.D. Cal. Mar. 14, 2019) ("Unclear pleadings, like the Complaint, that 'leave it to the Court to figure out what the full array of Plaintiff's claims is and

upon what federal law, and upon what facts, each claim is based,' are subject to dismissal.") (internal citation omitted).

For these reasons, in the alternative to dismissing the due process claim, the Court should order plaintiffs to specifically plead allegations for each plaintiff showing what state actions purportedly violate which substantive due process rights.

III. There is no private right of action to dictate the contents of a case plan under the Child Welfare Act.

Congress did not create a private right of action under the CWA for foster children to sue in federal court to enforce the contents of their case plans; rather, the statute requires the states to conduct that review. The second claim for relief asserts a privately enforceable right to sue in federal court to demand (1) a written case plan; (2) the creation and implementation of a case plan that "ensures that the child receives safe and proper care"; (3) the creation and implementation of a case plan that further "ensures provision of services to parents, children, and foster parents to facilitate reunification, or . . . the permanent placement of the child and implementation of that plan"; and (4) a case review system. (Compl. ¶ 309.)

As described below, the Ninth Circuit (on one side of a circuit split) recognizes a private right of action to enforce the existence of case plans and state review of that plan ((1) and (4) above). But the complaint does not allege that the State has failed to provide a written case plan for any named plaintiff or failed to provide for review of those case plans. And there is no federal private right of action to enforce the contents or successful implementation of that plan ((2) and (3) above). Instead, Congress entrusted that review to the states, ensuring that the states retain control over the critical domestic area of welfare of children in their care. The second claim for relief should thus be dismissed.

A. The complaint does not plead that plaintiffs have been denied a written case plan or case review system.

Although the Ninth Circuit has held that the CWA provides a privately actionable right to a written case plan and review of that plan, the factual allegations fail to state a claim to enforce that right. *Henry A. v. Willden*, 678 F.3d 991, 1006-08 (9th Cir. 2012); (Compl. ¶¶ 309.a., d.) The complaint does not allege that the State denied plaintiffs case plans; to the contrary, the

complaint expressly acknowledges the existence of case plans for the named plaintiffs. (*See, e.g.*, *id.*, ¶¶ 54, 56, 76, 117, 131, 188, 198 (mentioning named plaintiffs' case plans).) The complaint is equally devoid of a single allegation relating to a lack of review system for the case plans. (*See generally* Compl.) Thus, as to the rights that plaintiffs can privately enforce, a right to a case plan and review of that plan, the allegations do not support any deprivation of that right.

B. There is no private right of action under the CWA to particular contents of or implementation of the case plan.

The gravamen of plaintiffs' CWA claim appears to be grounded in provisions in the CWA that are not privately enforceable. The complaint asserts a federal right to the existence and implementation of a case plan that "ensures that the child receives safe and proper care" and "ensures provision of services to parents, children, and foster parents to facilitate reunification or . . . the permanent placement of the child." (Compl. ¶¶ 309.b., c.) Although these goals are on the forefront of any caseworker's mind, plaintiffs do not have a right under the CWA to sue over them in federal court.

To find a private right of action exists to enforce provisions of a federal statute, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (emphasis in original) (internal citation omitted). "Accordingly, it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of [§ 1983]." *Id*. at 283. To determine whether a federal statute creates such a "right," courts should be "guided" by three factors: (1) whether the provision was "intended to benefit the plaintiff"; (2) whether the asserted right is not "so vague and amorphous" that its enforcement would strain judicial competence"; and (3) whether the statute unambiguously mandates an obligation on the States. *Id*. (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)). In a statute enacted pursuant to Congressional authority under the Spending Clause (such as the CWA), courts must be particularly mindful that Congress "speaks with a clear voice," and "manifests an unambiguous intent" so that the state is on notice of the risk of suit. *Gonzaga*, 536 U.S. at 280 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1

(1981)); *see also Suter v. Artist M.*, 503 U.S. 347, 358 (1992) (recognizing that the CWA is to be read "in the light shed by *Pennhurst*").

Under the analysis set forth in *Blessing*, the CWA does not unambiguously confer the rights to the creation and implementation of a case plan that guarantees "safety," "proper care," and "services." Although the Ninth Circuit has already decided that the creation and review of the case plans under the CWA meets the first *Blessing* factor in that the case plans are intended to benefit foster children, the second and third *Blessing* considerations—requiring that the statute contain language in mandatory terms that are neither "vague" nor "amorphous"—weigh heavily against fashioning a new right of action. *See Henry A.*, 678 F.3d 991 at 1007; *Blessing*, 520 U.S. at 340. The sections of the CWA that plaintiffs claim support the private right of action do not confer such a right at all, let alone unambiguously.

1. The CWA does not contain the words that plaintiffs use to assert a new right of action.

Plaintiffs rely on 42 U.S.C. § 671(a)(16) and 675(1)(B) as the source for a new private right of action to case plans guaranteeing "safety," "proper care," and "services," but neither section confers such a right. Section 671(a)(16) requires only "the development of a case plan" as defined in section 675. 42 U.S.C. § 671(a)(16). The State certainly expects and desires that foster care case plans work towards proper care and services, as a matter of sound practice and social policy. But by its plain language, section 671(a)(16) cannot create a right to case plans to ensure proper care and services because it only provides for the "development of a case plan" as defined in section 675(1).

Nor does section 675(1) unambiguously confer a right to the creation and implementation of a case plan that "ensures" safety, proper care, or services. Section 675(1)(B) does say the that the case plan should include "a plan for assuring that the child receives safe and proper care and that services are provided to facilitate return of the child, including a discussion of the appropriateness of those services." 42 U.S.C. § 675(1)(B). However, it does not, as the complaint alleges, contain language "ensuring" any particular contents, nor does the section speak to "implementation" of the plan at all. Rather, the statute uses the word "assure," which

means to "give confidence to." BLACK'S LAW DICTIONARY, 10th ed., p. 150 (2004). The use of this term in this context makes sense, given that the purpose of the case plan's inclusion in the overall state plan is to assure the federal agency that the state will comply with the CWA's provisions and therefore qualify for federal funding. 42 U.S.C. § 671(a) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which [contains a list of requirements]."). The CWA's repeated requirements for the State to document the efforts that the State has undertaken to achieve its goals, rather than report on the success of those goals, buttresses this conclusion. *See, e.g.*, §§ 675(E), (F)(v), F(vi) (requiring documentation of the state's efforts rather than any metric of success). And it is consistent with the statute's mechanism of giving the states authority over the implementation and review of the plans affecting children in their care.

More importantly, neither section requires "implementation" of a case plan at all. The statute contemplates the *creation* of a case plan, and *review* by the state of that case plan. *See* 42 U.S.C. § 671(a)(16) (providing for "a case review system"). The CWA is silent on *implementation*, underscoring the fact that Congress did not intend to make either the specific contents or success level of a case plan reviewable by federal court. At least one court has already rejected the invitation to read such a right into the case plan provisions: "While it is of course to be expected that a plan will be implemented, nothing in the statutory language specifically requires implementation or achievement of all of the particulars of the plan, much less successful achievement of outcomes." *Barricelli v. City of New York*, No. 15 CV 5273-LTS-HBP, 2016 WL 4750178, at *6 (S.D.N.Y. Sept. 12, 2016).

2. The statute provides no guidance as to how a federal court should analyze the new private right of action.

Even if the requirements of creating and "implementing" a plan that "ensures" its success could be inferred from the actual words in the statute, the statute is ambiguous in how to evaluate them. The statute provides no guidance whatsoever as to what "safe and proper care" is, or what services are "appropriate." *See* 42 U.S.C. § 675(1)(B). Indeed, the Supreme Court has already concluded that similarly vague language in the CWA is unenforceable. In *Suter v. Artist M.*, the

Court considered whether 42 U.S.C. § 671(a)(15), requiring that "reasonable efforts shall be made" to achieve permanency for the child, created a private right of action . 503 U.S. 347 (1992).[3] With "[n]o further statutory guidance . . . as to how 'reasonable efforts' are to be measured," the Court concluded that the phrase would "obviously vary with the circumstances of each individual case," providing insufficient guidance for federal court enforcement. *Id*. at 360. The logic in *Suter* applies with equal force to section 675(1)(B). There is "no further statutory guidance" as to how to interpret the terms "proper care" or "appropriateness" of services, terms which would "obviously vary" in each child's case. Because the statute does not contain language supporting plaintiffs' desired causes of action—and, even if it did, lacks unambiguous guidance as to how to enforce them—this Court should not read new rights of action into the CWA.[4]

IV. The complaint fails to state a claim for relief under the ADA and Rehabilitation Act.

The ADA and the Rehabilitation Act (the "disability statutes") share the same elements. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018), *cert. den. sub nom. City of Newport Beach, Cal. v. Vos*, No. 18-672, 2019 WL 2166407 (U.S. May 20, 2019) ("We, like the district court, analyze the Parents' ADA and Rehabilitation Act claims together because the statutes provide identical remedies, procedures and rights."). Accordingly, defendants analyze the two claims together and, as to both, the complaint fails to state a claim.

[3] Although Congress superseded by statute a different portion of holding in *Suter*, it explicitly left this holding in place, and, as a result "remains instructive" as to the construction of the CWA. *Barricelli v. City of New York*, No. 15 CV 5273-LTS-HBP, 2016 WL 4750178, at *4 (S.D.N.Y. Sept. 12, 2016).

[4] Unlike the Ninth Circuit, multiple courts have concluded that 42 U.S.C. § 671(a)(16) does not confer a private right of action at all. *See, e.g., T.F. by Keller v. Hennepin Cnty*., No. CV 17-1826 (PAM/BRT), 2018 WL 940621, at *6 (D. Minn. Feb. 16, 2018); *M.B. by Eggemeyer v. Corsi*, No. 2:17-CV-04102-NKL, 2018 WL 327767, at *164 (W.D. Mo. Jan. 8, 2018); *Olivia Y. ex rel. Johnson v. Barbour*, 351 F. Supp. 2d 543, 565 (S.D. Miss. 2004); *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 712 (2003); *31 Foster Children*, 329 F.3d 1255, 1271-74 (11th Cir. 2003); *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 544 (D. Neb. 2007); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 490 n. 3 (D.N.J. 2000) (specifically rejecting the notion that the CWA created a right to "safe and proper care").

To state a claim for relief under the disability statutes, plaintiffs must allege that (1) they are individuals with disabilities; (2) they are otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) they were either excluded from participation in or denied the benefits of the public entity's services, programs or activities or were otherwise discriminated against by the public entity; (4) and such exclusion, denial of benefits or discrimination was by reason of their disabilities. *See id.* (listing elements).

The complaint alleges discrimination on two theories. First, the complaint alleges that plaintiffs were excluded from participating in the foster care program by reason of various mental health issues. (Compl. ¶¶ 314-316.) Under this theory, the complaint asserts that a "reasonable" accommodation of their disabilities would be "additional mental health services" in "community-based therapeutic foster homes." (*Id*. ¶¶ 317, 319, Prayer ¶ 331.b.iii).)

Second, the complaint alleges that the state violated what is known as the integration mandate: the ADA regulation prohibiting states from conditioning government services on institutionalization. *See* 28 C.F.R. 35.130(d) (requiring that the state administer its "services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities"). Under this theory, the complaint alleges that the state violated the disability statutes by placing some foster children in residential facilities instead of "community-based placements." (Compl. ¶¶ 38.b., 327.) Under both theories, plaintiffs fail to state a claim for relief.

A. Plaintiffs' requested mental health treatment is not a reasonable accommodation required by the disability statutes.

The complaint fails to state a claim under the disability statutes because it does not allege that plaintiffs were denied access to existing government services. Rather, the complaint alleges only that the state should provide them with "additional" or "different" services. The disability statutes provide that the disabled may not be "excluded from" participation in government programs "by reason of" the disability. 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 12132 (ADA). Where a government policy is facially neutral, plaintiffs must show that, looking at the program in its entirety, plaintiffs were denied "meaningful access" to the relevant public

services. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013). In that event, a reasonable accommodation may be required. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). But "the ADA prohibits discrimination *because of* disability, not inadequate treatment for disability." *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1022 (9th Cir. 2010) (emphasis added). Thus, disabled individuals are not entitled to additional services, such as treatment, that are not offered to non-disabled individuals. *See Alexander*, 469 U.S. at 303 (holding that Rehabilitation Act did not require that state Medicaid program permit disabled individuals more days of inpatient treatment than non-disabled individuals); *see also* ADA Title II Technical Assistance Manual ("[T]he ADA generally does not require a State or local government entity to provide additional services for individuals with disabilities that are not provided for individuals without disabilities.") https://www.ada.gov/taman2.html.

Here, the complaint seeks mental health treatment that is not mandated by the disability statutes. In particular, the complaint seeks "additional mental health services" in the form of placement in "therapeutic family foster homes"; *i.e.* long-term foster homes with parents trained to provide therapeutic services. (Compl. ¶¶ 298, 319.) Again, while these kinds of homes may be desirable for a number of policy reasons, that is a question separate from whether the disability statutes require it. They do not. *Charlie H.*, 83 F. Supp. 2d at 501 (dismissing similar claims seeking placement in therapeutic foster homes because the ADA does not require the state provide "special services or affirmative assistance to the disabled"). Thus, because the disability statutes did not require the state to provide the type of "additional mental health services" the complaint seeks, the claims should be dismissed.

B. The State did not violate the disability statutes' integration mandate by placing foster children in residential facilities and foster homes.

Plaintiffs' theory based on the integration mandate similarly fails. One form of discrimination under the disability statutes is conditioning the provision of government services on institutionalization. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999) (holding that state program violated ADA where "[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life

they could enjoy given reasonable accommodations"); *see also* 28 C.F.R. 35.130(d) (requiring that state administer its "services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities"). But the disability statutes do not require that the State "provide a certain level of benefits to individuals with disabilities[,]" only that the State not discriminate against the disabled "with regard to the services [it] in fact provide[s]." *Olmstead*, 527 U.S. at 603 n. 14. Thus, a plaintiff asserting an integration mandate violation, like a plaintiff seeking a reasonable accommodation, is only entitled to receive existing services on a non-discriminatory basis. *Rodriguez v. City of New York*, 197 F.3d 611, 619 (2d Cir. 1999) ("*Olmstead* reaffirms that the ADA does not mandate the provision of new benefits.").

As the Ninth Circuit has explained, states have "'leeway' in administering services for the disabled." *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005). If resource limitations require that a given program provide both residential and community-based care, the state does not violate the disability statutes if it administers the program with "an even hand" and transitions individuals to community-based care "once space open[s] up." *Id.* at 620.

Here, the complaint alleges that the State failed to provide "an array of community-based placements and services to ensure access to the least restrictive environment." (Compl. ¶ 202.) But the complaint alleges that is true for *all* foster children in Oregon, not just disabled children. (*Id*. ¶ 261.) Thus, the complaint challenges the "level of benefits" provided by the foster care program generally, a claim the disability statutes do not recognize. *See M.K. ex rel. Mrs. K. v. Sergi*, 554 F. Supp. 2d 175, 198 (D. Conn. 2008) (rejecting ADA integration claim based on disabled child's placement in residential foster care facilities); *Charlie H.*, 83 F. Supp. 2d at 501 (rejecting ADA discrimination claims based on foster care program's failure to provide therapeutic foster homes).

The integration mandate claims also fail because the complaint does not allege that plaintiffs have been institutionalized or otherwise kept out of an integrated environment. In the disability statutes, "integrated" means enabling interactions with non-disabled individuals. 28 C.F.R. § 35.130, Part 35, App. B (most integrated setting appropriate refers to settings that enables individuals with disabilities to interact with nondisabled persons). None of the plaintiffs

allege that they have been segregated from non-disabled individuals. (*E.g.*, Compl. ¶ 20 (foster home); ¶¶ 88, 109, 139, 178, 181 ("residential" facilities and "shelters"); ¶ 124 (describing one facility as "a campus-like setting where children are housed in cottages").) Thus, the complaint fails to adequately allege a violation of the integration mandate.

CONCLUSION

For the foregoing reasons, this Court should abstain from considering this case under *O'Shea*. If this Court declines to abstain, it should nevertheless dismiss the claims for relief because they are legally deficient.

DATED this 25th day of July, 2019.

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CERTIFICATE OF COMPLIANCE WITH L.R. 7-2(b)(2)

I certify that this brief complies with the applicable word-count limitation under L.R. 7-2(b), because it contains 10,171 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and any certificates of counsel.

DATED this 25th day of July, 2019.

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