LOUIS R. MILLER (State Bar No. 54141)
smiller@millerbarondess.com
JASON H. TOKORO (State Bar No. 252345)
jtokoro@millerbarondess.com
FARBOD S. MORIDANI (State Bar No. 251893)
fmoridani@millerbarondess.com
MILLER BARONDESS, LLP
2121 Avenue of the Stars, Suite 2600
Los Angeles, California 90067
Telephone: (310) 552-4400
Facsimile: (310) 552-8400

DAWYN R. HARRISON (State Bar No. 173855)
dawynharrison@counsel.lacounty.gov
WILLIAM BIRNIE (State Bar No. 268742)
wbirnie@counsel.lacounty.gov
EMILY GROSPE (State Bar No. 290182)
egrospe@counsel.lacounty.gov
Kenneth Hahn Hall of Administration
500 West Temple Street, Suite 648
Los Angeles, California 90012
Tel.: (213) 974-1811 / Fax: (213) 626-7446

Attorneys for Los Angeles County, the Department of Children and Family Services, Brandon Nichols, the Department of Mental Health, Lisa Wong

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

OCEAN S., et al.,

Plaintiffs,

v.

LOS ANGELES COUNTY, et al.,

Defendants.

CASE NO. 2:23-cv-06921-JAK-E

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LOS ANGELES COUNTY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Filed Concurrently with Notice of Motion and Motion to Dismiss; Request for Judicial Notice; and Declaration of Farbod Moridani

Judge: Hon. John A. Kronstadt
Crtrm.: 10B

Hearing Date: March 25, 2024
Hearing Time: 8:30 a.m.
Action Filed: August 22, 2023
First Am. Compl. Filed: Sep. 21, 2023
Trial Date: Not Set

TABLE OF CONTENTS

Page

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

TABLE OF AUTHORITIES

Page

FEDERAL CASES

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

STATE RULES

OTHER AUTHORITIES

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

I. INTRODUCTION

Plaintiffs in this action are a group of adults, ranging in age from 18 to 21, who voluntarily elected extended foster care. They purport to represent a class and three subclasses of transition age foster youth, all of whom have ongoing dependency proceedings where they are represented by counsel. Any concerns about their care can be raised before the juvenile court—the court that, by law, has "ultimate authority" over their welfare. Instead of raising issues there, or seeking legislative reform through the political process, Plaintiffs have filed this federal lawsuit, seeking to overhaul the foster care system in Los Angeles County (the "County") via sweeping injunctive relief.

This lawsuit presents serious jurisdictional defects that the County Defendants have addressed separately. (Dkt. No. 51.) But that is not the only problem. The First Amended Complaint ("FAC") also fails to state a plausible claim for relief.

The FAC is extremely long and just as thin. It is chock full of generalized criticisms, fact-free conclusions, and unwarranted inferences. The most essential and fundamental of its allegations are made "on information and belief," without any explanation as to the factual basis for them. It focuses more on impugning the integrity of those who devote their lives to caring for foster youth than on stating ***facts*** that establish violations of federal law. None of this is a proper basis for a federal lawsuit.

Five of the FAC's seven causes of action are alleged under 42 U.S.C. § 1983. None of them is adequately pled. The FAC does not plead any plausible violations of federal rights. It does not plead a custom, policy, or practice to deprive such rights. It does not plead that the County is deliberately indifferent to the welfare of foster youth. And it does not plead a direct causal link between any act or omission of the County and any concrete injury. It does not come close to pleading a plausible claim.

The FAC's other claims—for violation of the Americans with Disabilities Act ("ADA"), Rehabilitation Act ("RA"), and Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT")—are equally perfunctory, conclusory, and formulaic.

The FAC should be dismissed.

II. FACTUAL BACKGROUND

A. Plaintiffs' Claims

Plaintiffs are seven adults who voluntarily elected to remain in Extended Foster Care ("EFC") and purport to represent a class of "transition age youth." (¶¶ 1, 16-22.)[1] They lodge three core criticisms of the County foster care system: (i) inadequate case plans (¶¶ 7, 173-84); (ii) inadequate array of placements and processes on placement decisions (¶¶ 6, 127-72); and (iii) inadequate behavioral services (¶¶ 9-11, 205-75.)

B. Extended Foster Care

DCFS is charged with investigating child abuse and neglect, and providing interventions and supportive services to County families and children. If DCFS determines that a child has suffered, or is at risk of suffering, abuse or neglect, and no other measures can be taken to keep the child safe, a social worker will file a petition with the juvenile court. Cal. Welf. & Inst. Code ("WIC") §§ 300, 325. The child is then "within the jurisdiction of the juvenile court, which may adjudge that person to be a dependent child of the court." *Id.* § 300.

The Plaintiffs in this action are not children in foster care. They are all adults in EFC. (¶¶ 16-22.) That is an important distinction because "[e]xtended foster care isn't the same as regular foster care." (RJN Ex. 1.) EFC is a voluntary program that "allows nonminor dependents ['NMDs'] to remain under the juvenile court's dependency jurisdiction and receive financial assistance until age 21 if they comply with certain statutory requirements." *In re Leon E.*, 74 Cal. App. 5th 222, 225 (2022).

The statutory requirements for EFC include that candidates must be between 18 and 21 years of age and must be enrolled in education, work at least 80 hours a month, participate in a program to assist in gaining employment, or be unable to do so for medical reasons. WIC § 11403(a), (b). In addition, EFC participants sign contracts requiring them to communicate regularly with social workers, to develop and meet

[1] Unless otherwise stated, citations to (¶ _) herein are to the FAC (Dkt. No. 21).

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

goals outlined in a Transitional Independent Living Plan ("TILP"), and to meet with the juvenile court periodically to discuss progress. (RJN Ex. 2.) Adults in EFC have a right to dependency counsel, and any concerns regarding their care can be addressed by the juvenile court. *See* WIC § 16001.9(a)(33); (RJN Ex. 3.)

EFC participants retain the same statutory rights as minors. WIC § 16001.9(a). The core difference is that the EFC is voluntary and non-custodial:

> ***Nothing in this code*** … ***shall be construed to provide legal custody of a person who has attained 18 years of age to the county welfare or probation department*** or to otherwise abrogate any other rights that a person who has attained 18 years of age may have as an adult under California law. A nonminor dependent shall retain all of his or her legal decision making authority as an adult.

WIC § 303(d)(1) (emphasis added); *In re Jonathan C.M.*, 91 Cal. App. 5th 1039, 1046 (2023) ("Participation in the AB12 program is voluntary."); Cal. R. Ct. 5.900(b)(1) (placements via EFC are "voluntary" and made pursuant to "consensual agreement"). The purpose of extended foster care is not to care for youth long term but, rather, to provide young adults "help and support while they get on their feet." (RJN Ex. 4.)

C. <u>The County's Policies And Programs For Transition Age Youth</u>

<u>Case Plans:</u> The County's case plan policy requirements include "a written description of the programs and services that will help the child/NMD transition from foster care to successful adulthood, consistent with the child's best interests." (RJN Ex. 5 at 5.) EFC participants must also work on a TILP that plans for education, work, finances, community connections, and competency in general life skills. (*Id.* Ex. 6.)

<u>Placements</u>: County placement policies emphasize the importance of maintaining family ties where possible and providing long-term, stable placements for foster youth. (*See, e.g.*, *id.* Ex. 7.) DCFS provides numerous "family maintenance" services, such as counseling, emergency shelter care, and transportation, all meant to "reflect the family-centered principle that the best place for children to grow up is in a family and the most effective way to ensure children's safety, permanency, and well-

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

being is to provide services that engage, involve, strengthen, and support families." (*Id.* Ex. 8 at 2.) The FAC focuses on transitional housing placement ("THPP-NMD") and supervised independent living placement ("SILP") programs. (*Id.* Ex. 9 and 10.) THPP-NMD candidates must be approved, subject to provider discretion, via application and interview. (*Id.* Ex. 9 at 3, 7.) SILP allows NMDs to identify their own place to live independently, through a private lease or with a friend, relative, or parent. (*Id.* Ex. 10 at 3.) The placement is flexible and non-licensed and not intended for NMDs needing significant supportive services. (*Id.* at 5.) To participate, NMDs must pass a SILP readiness assessment and the placement must pass inspection. (*Id.* at 3.)

Services: County policies ensure the health, educational and other needs of youth are assessed and met, including referrals for special education or early intervention services, and specialized needs by those with disabilities or mental health concerns. (*Id.* Ex. 11, 12, 13, 14, 15, and 16.) County policies also address mechanisms for assessing allegations of sexual, physical, and emotional abuse, domestic violence, drug and alcohol use/abuse, exploitation, and medical neglect, among other areas of potential concern. (*Id.* Ex. 17, 18, 19, 20, 21, 22, and 23.) These policies require thorough investigations and spell out, step-by-step, the process a social worker must follow when responding to a report of abuse or neglect. (*See, e.g.*, Ex. 17 at 2–4.)

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To avoid dismissal, the plaintiff must allege enough facts to "'nudge[]'" his claims "'across the line from conceivable to plausible.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability," it must be dismissed because it fails to "'state a claim to relief that is plausible on its face.'" *Id.* at 678.

"Threadbare recitals of the elements of a cause of action … do not suffice." *Id.* at 678. Neither do "'an unadorned, the-defendant-unlawfully-harmed-me accusation,' bare 'labels and conclusions,' or 'naked assertion[s] devoid of further factual

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

enhancement.'" *Zuurveen by & through Zuurveen v. L.A. Cty. Dep't of Health Servs.*, 2022 WL 14966244, at *3 (C.D. Cal. Sept. 28, 2022) (quoting *Iqbal*, 556 U.S. at 678). "[U]nwarranted inferences" similarly "are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). So are "conclusions cast in the form of factual allegations." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). Courts do not accept "allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

"[R]eliance on 'information and belief'" does not magically "convert conclusory allegations into non-conclusory ones." *Theodosakis v. Clegg*, 2017 WL 1294529, at *16 (D. Ariz. Jan. 30, 2017). Rather, a "plaintiff who makes allegations on information and belief must state the factual basis for the belief." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). Failure to do so "'creates [an] inference that plaintiff likely lacks knowledge of underlying facts to support the assertion, and is instead engaging in speculation to an undue degree.'" *Martinez v. City of West Sacramento*, 2021 WL 2227830, at *7 (E.D. Cal. June 2, 2021). (*See, e.g.*, ¶¶ 93, 152, 154-55, 165, 167, 171, 181, 188, 190, 193, 199, 202-03, 205, 211, 226, 230, 244, 250, 258, 282.)

IV. ARGUMENT

A. The FAC Fails To Plead Municipal Liability Under Section 1983

1. Standard for Municipal Liability

Municipal liability under 42 U.S.C. § 1983 is significantly circumscribed. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). "[A] municipality may not be held liable for a § 1983 violation under a theory of respondeat superior for the actions of its subordinates." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016). Rather, to state a claim against a municipality, Plaintiffs must plead facts establishing that: "(1) the plaintiff was deprived of a constitutional [or statutory] right; (2) the defendant had a policy or custom; (3) the policy or custom amounted to deliberate indifference to the plaintiff's constitutional right; and (4) the policy or

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

custom was the moving force behind the constitutional violation." *Brown v. County of Mariposa*, 2019 WL 4956142, at *2 (E.D. Cal. Oct. 8, 2019) (*Mariposa*).

The FAC asserts five claims based on 42 U.S.C. § 1983, alleging violation of: (1) the Adoption Assistance and Child Welfare Act ("AACWA") (¶¶ 290-92); (2) Substantive Due Process (¶¶ 293-300); (3) Procedural Due Process (¶¶ 301-05); (4) the right to family association (¶¶ 346-50); and (5) EPSDT services (¶¶ 351-55).

2. The FAC Fails to Allege Deprivation of Federal Rights

(a) No Denial of Rights under AACWA

The FAC claims that the County has failed to provide case plans that comply with AACWA. (¶¶ 290-92 (citing 42 U.S.C. § 671(a)(16); 42 U.S.C. § 671(1)(A)-(B); and 42 U.S.C. § 675(5)(H), (I).) It alleges no facts to support such a claim.

Four of the seven named Plaintiffs say nothing about case plans at all. (*See* ¶¶ 34-45 (Erykah B.); ¶¶ 62-73 (Rosie S.); ¶¶ 74-86 (Jackson K.); ¶¶ 118-26 (Monaie T.).) The other three state a pure conclusion, without factual support, that they did not receive adequate planning. (*See* ¶ 93 (Ocean S. alleges "on information and belief, she received limited to no transition planning"); ¶ 113 (Junior R. stating conclusion that "DCFS failed to provide him with adequate transition planning support"); ¶ 57 (Onyx G. stating conclusion that "DCFS has failed to provide her with legally compliant case plans and transition plans").) Conclusory statements lacking factual support are not sufficient to state a claim. (*Supra* Section III.) No named Plaintiff alleges a plausible violation of AACWA. That is the end of the matter under section 1983.

The rest of the case plan allegations are generalized critiques untethered to a concrete injury experienced by any named Plaintiff. (¶¶ 173-84.) Allegations of systemic deficiencies cannot support a complaint in the absence of a named plaintiff with a claim. *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) ("[E]ven named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'").

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

(b) No Denial of Substantive Due Process

The FAC does not plead a cognizable violation of substantive due process.

"'[T]he Fourteenth Amendment's Due Process Clause … does not confer any affirmative right to governmental aid.'" *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). There are two exceptions. First, "there is the 'special relationship' exception—when a custodial relationship exists between the plaintiff and the State such that the State assumes some responsibility for the plaintiff's safety and well-being." *Id.* Second, "there is the 'state-created danger exception'—when 'the state affirmatively places the plaintiff in danger by acting with "deliberate indifference" to a "known and obvious danger."'" *Id.* Neither applies here.

The "special relationship" exception applies only to persons in custody. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 1000 (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).) Thus, when a minor is removed from the home involuntarily and placed somewhere they cannot leave, substantive due process kicks in and requires that "'basic human needs'" be guaranteed. *See id.*

Inversely, the special relationship exception does not apply to persons who are not in custody. *See id.*; *DeShaney*, 489 U.S. at 201 (substantive due process had "no applicability" to youth not in custody); *Zuurveen*, 2022 WL 14966244, at *6 ("[W]here a person is not in state custody, 'the due process clause does not generally confer affirmative rights to governmental aid, even where such aid may be necessary to secure life.'"); *Clark K. v. Guinn*, 2007 WL 1435428, at *15 (D. Nev. May 14, 2007) (drawing distinction between children "involuntarily within state custody and those voluntarily within state custody" and dismissing substantive due process claim on behalf of voluntary participants); *Occean v. Kearney*, 123 F. Supp. 2d 618, 622-23 (S.D. Fla. 2000) (special relationship between former foster child and child welfare agency ended when plaintiff turned 18, despite continued receipt of foster care benefits).

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

Adult foster youth "are in many ways differently situated from persons under age 18." *In re David B.*, 12 Cal. App. 5th 633, 650 (2017). Chief among them is that participation in EFC is ***voluntary*** and ***non-custodial***. WIC § 303(d)(1) ("Nothing in this code … shall be construed to provide legal custody" of foster youth); *In re Jonathan C.M.*, 91 Cal. App. 5th at 1046 ("AB12 program is voluntary.").

Plaintiffs are all voluntary participants in EFC. (¶¶ 16-22.) They are not in custody and can leave at any time, at their option, for any reason. *Murguia v. Langdon*, 61 F.4th 1096, 1110 (9th Cir. 2023) (meaning of "'custody' for the purposes of the special-relationship exception is a restriction on the plaintiff's liberty"). The "special relationship" exception thus does not apply.[2] The ordinary rule governs, meaning the due process clause affords no "'affirmative right to governmental aid.'" *Willden*, 678 F.3d at 998. Plaintiffs' substantive due process claim fails as a matter of law.

As for the "'state-created danger exception'" (678 F.3d at 998), it is unclear if Plaintiffs are relying on it. Even if they are, there is no basis for it. The doctrine only applies "where the state action 'affirmatively place[s] the plaintiff in a position of danger'" and "the plaintiff was *directly* harmed *by a third party*" (*id.* at 1002 (first emphasis added))—e.g., where a youth is involuntarily placed "in a home where there is a known danger of abuse." *Id.* at 1003.[3] There is no such allegation in the FAC.

Even if Plaintiffs were owed an affirmative duty under the Fourteenth Amendment (they are not), their substantive due process claim fails anyway because it does not invoke any cognizable rights. (*See* ¶ 295.) The Fourteenth Amendment, if it

[2] Plaintiffs' allegation that "Defendants have restrained Plaintiffs' personal liberty by taking them into State custody and extending their foster care past age eighteen by operation of law" (¶ 294) is thus both conclusory and wrong.

[3] Any contention that failure to provide housing, mental health, or other services itself constitutes a "state created danger" is also wrong. *See Shane v. County of San Diego*, --- F. Supp. 3d ---, 2023 WL 4055706, at *7 (S.D. Cal. June 16, 2023) (finding "no clear authority . . . establish[ing] that the state created danger doctrine encompasses passively failing to provide the correct level of medical care and monitoring as opposed to exposing children to affirmative dangers that they otherwise would not have faced").

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

applies, guarantees only "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb By & Through DeFehr v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992). The FAC goes far beyond that, claiming all manner of "rights" that either do not exist at all or that Plaintiffs do not allege are currently being (or imminently will be) violated.

Plaintiffs claim a substantive due process right to "a minimally adequate array of safe and stable placements," "emergency housing options for youth transitioning between placements," "placement stability," and "safe and stable placement capacity." (¶ 295.) None of this is guaranteed by the Fourteenth Amendment:

> Certainly, placing a child in-region, in a placement ideal for his service level and personal needs … would be good practice. Plaintiffs have failed to demonstrate, however, that failing to do so in most or all circumstances puts children at a risk of harm serious enough to amount to a deprivation of their substantive due process rights…. [C]hildren have no right to a stable environment or a right not to be moved from home to home, despite the significant literature which indicates a traumatic effect of such moves on young children. Even accepting the district court's—undoubtedly correct—finding that out-of-region placements and suboptimal placement settings can have negative effects on a child's psychological health, those negative effects are not constitutionally cognizable harms.

M. D. by Stukenberg v. Abbott, 907 F.3d 237, 268 (5th Cir. 2018) (cleaned up).

Courts in the Ninth Circuit agree. For example, in *Wyatt B. by McAllister v. Brown*, 2021 WL 4434011 (D. Or. Sept. 27, 2021), the District of Oregon ruled that substantive due process neither imposes obligations "[w]ith respect to the array of placement opportunities or the propriety of a particular type of placement" nor requires "the availability of an array of placement options." *Id.* at *8-9. The court recognized that "'the availability of foster homes, particularly those that provide the most "home-like," "least-restrictive" environments, is something uniquely out of the State's control'" because local governments simply "cannot force people to volunteer as foster parents." *Id.* at *8. "The failure to provide a sufficient array of foster homes, or to

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

provide homes in the least restrictive environment [i]s not, therefore, a violation of the plaintiffs' substantive due process rights." *Id.* (dismissing claims).

Wyatt B. also rejected any constitutional right to services to aid transition age youth in finding their own housing after foster care ends. *Id.* at *9 (rejecting purported "right to independent living services to prepare to exist [sic] foster care successfully" and "right to assistance to find lawful, suitable permanent housing that will not result in homelessness upon exit from foster care"). While these "would be a worthy goal for legislative action … they fall beyond the constitutional guarantees of the Fourteenth Amendment and must be dismissed." *Id.* The same result should be reached here.

Plaintiffs also allege that substantive due process prohibits the County from "licensing and contracting with placement providers that do not respect and uphold the rights of foster youth." (¶ 295.) Once again, no such right appears in the Fourteenth Amendment. *See Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002) (rejecting alleged claim that infant "suffered injuries of constitutional proportions because the [government] improperly licensed Tender Heart after failing to conduct an investigation into the facility"); *Tobin v. Washington*, 2007 WL 3275073, at *7 (W.D. Wash. Nov. 5, 2007) (rejecting claim based on "the decision to license and renew the license of the daycare which Plaintiffs contend was not in compliance with state regulations"), *aff'd*, 327 F. App'x 747, 748 (9th Cir. 2009) (even assuming "willful disregard for the safety of the children who might be placed in these facilities, no Supreme Court or Ninth Circuit precedent suggests that licensing activities of this nature may expose state actors to liability for constitutional torts."); *see also Morales v. City of Delano*, 2010 WL 2942645, at *9 (E.D. Cal. July 23, 2010) (defendant's "act in 'regulating' or 'selecting' … provider[s], is insufficient to impose a constitutional duty"); *Moore v. Richman*, 797 F. Supp. 2d 572, 581-82 (W.D. Pa. 2011) ("[T]he fact that the Named Defendants allegedly issued a license to the facility despite the purported non-conformity of the day care center to the promulgated state regulations … does not demonstrate a violation of federal law."); *Walding v. United States*, 2009

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

WL 701807, at *12 (W.D. Tex. Mar. 16, 2009) (improper licensure of facility "failed to establish the violation of a constitutional right").

That leaves Plaintiffs' claimed substantive due process "right" to receipt of "EPSDT services." (¶ 295.) While "beneficiaries have 'a constitutionally protected property interest in Medicaid benefits'" (*Olson v. Carter*, 2021 WL 3115126, at *4 (E.D. Cal. July 22, 2021)), that interest gives rise to *procedural* due process rights. *Id.* at *3. Substantive due process does not apply. The claim should be dismissed.

(c) No Denial of Procedural Due Process

Plaintiffs assert a procedural due process right to not be "denied admission to, or evicted from, programs like THPP-NMD and SILP" without "notice or hearing before a neutral arbiter." (¶ 302.) "A procedural due process claim has two elements: '(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.'" *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224-25 (9th Cir. 2021). If there is no cognizable property interest (element one), adequacy of process (element 2) is beside the point. *Clark K. v Willden*, 616 F. Supp. 2d 1038, 1041 (D. Nev. 2007) (*Clark*) ("Only if the Court finds a constitutionally protected interest must it ask whether the alleged deprivation was accompanied by appropriate due process."). The FAC does not plead either element.

Plaintiffs claim they are "entitled to due process when applying for" or "appealing the denial of" THPP-NMD or SILP benefits. (¶ 186.) That claim is based on the misperception that youth have a "protectable property interest in" being approved for such benefits. (*Id.*) They do not.

"Property interests … are not created by the Constitution." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). It is well settled that there is no constitutional right to housing assistance, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), absent exceptions that do not apply here. (*Supra* Section IV.A.2.(b).) A "protectable property interest" (¶ 186) must arise independently from some other source, such as state law. *Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1191 (9th Cir. 2015)

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

(property interests are "created 'and [their] dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits'" (quoting *Roth*, 408 U.S. at 577)). Such an interest is cognizable only if its source creates "a 'legitimate claim of entitlement.'" *Id.* A "desire for it" or "unilateral expectation of it" are not enough. *Roth*, 408 U.S. at 577.

THPP-NMD or SILP are state law benefits. But they are not entitlements. "Only if the governing statute ***compels a result*** 'upon compliance with certain criteria, ***none of which involve the exercise of discretion*** by the reviewing body,' does it create a constitutionally protected property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1091 (9th Cir. 2008) (emphasis added). If the implementing regulation "requires only that the ultimate decisionmaker 'use[]' or consider[]' … open-ended criteria; it does not *mandate* any outcome"; thus, there is no entitlement. *Id.*; *Valdez v. Rosenbaum*, 302 F.3d 1039, 1044 (9th Cir. 2002) (no due process absent "specific directive to the decisionmaker that mandates a particular outcome").

This is where the FAC fails. THPP-NMD and SILP are available only in the context of EFC (RJN Exs. 9, 10), where there is no entitlement to housing. By law, THPP-NMD providers have unfettered discretion to decide who they accept into their programs. (*Id.* Ex. 9.) Youth who are interested in such placements must apply and be interviewed. (*Id.* Ex. 9.) Criteria include the "participant's age, previous placement history, delinquency history, history of drug or alcohol abuse, current strengths, level of education, mental health history, medical history, prospects for successful participation in the program, and work experience." WIC § 16522.1(b)(1).

Before accepting a "new placement of a nonminor dependent in the THPP," the provider "shall … complete a Pre-Placement Appraisal in regard to the nonminor dependent." (RJN Ex. 27 § 86268.1(b).) That appraisal includes "(A) Confirmation that the nonminor dependent does not pose a threat to children in the THPP," "(E) Social factors, including likes, dislikes, interests and activities" (*id.* subd. (b)(1)), and

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

a determination as to "the ability of the THPP to meet the needs of the nonminor dependent" (*id.* subd. (b)(2)). The application process includes an interview, and agencies are entitled to require any additional information needed "to make an appropriate assessment." (RJN Ex. 28.) SILP is similarly discretionary, with admission conditioned on a "readiness assessment" to determine if the youth is ready to live independently, and the housing must be approved. (*Id.* Ex. 10.)

Transition-age youth simply are not ***entitled*** to "admission to" these programs. (¶ 302.) The FAC admits as much.[4] (*Id.* (admitting that "CDSS THPP-NMD Interim Licensing Standards and DCFS policies require Plaintiffs to apply and interview for admission to THPP-NMD").) Plaintiffs clearly would like that to change. That desire requires legislative reform. It does not support a due process claim seeking injunctive relief. This Court applies the law as it exists, and the law is clear there is no entitlement to be approved for these benefits. There is thus no property interest to which procedural due process might attach. *Shanks*, 540 F.3d at 1092 ("[a]bsent a substantive property interest in the outcome of procedure, [a plaintiff] is not constitutionally entitled to insist on compliance" with any particular procedure; "[t]o hold otherwise would immediately incorporate virtually every regulation into the Constitution" (quoting *Clemente v. United States*, 766 F.2d 1358, 1364 (9th Cir. 1985))).

Plaintiffs also demand to not be "evicted from" (¶ 302) THPP-NMD or SILP benefits they already are receiving. This claim requires a different analysis because "'[a] person receiving … benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process.'" *Nozzi*, 806 F.3d at 1191. But the result here is the same because the FAC fails to plead inadequate process.

[4] So does Plaintiffs' counsel. (RJN Ex. 1 at 2 (explaining on public-facing website that "You ***may be eligible for housing***, job training, free transportation vouchers, and all kinds of other things that can help you transition to independence" (emphasis added)).

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

A plaintiff asserting a due process violation based on deprivation of an *existing* benefit must surmount two hurdles. First, a due process violation "is not complete when the [alleged] deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). Interpreting this guidance, courts in the Ninth Circuit have ruled that a plaintiff asserting a due process violation "cannot plausibly claim that [the state's] procedures are unfair when he has not tried to avail himself of them." *Dual Diagnosis Assessment & Treatment Ctr., Inc. v. Hughes*, 2016 WL 11522965, at *5 (C.D. Cal. Sept. 27, 2016) (quoting *Mora v. City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008)); *see also Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) ("In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate.").

Second, the plaintiff must allege *how* the existing process is deficient and what additional processes are necessary to remedy that deficiency. *Rodriguez v. Vega*, 2015 WL 6872817, at *11 (E.D. Cal. Nov. 9, 2015) (procedural due process does not lie where the plaintiff "alleges no facts suggesting the appeals procedures were deficient in any way or created a risk of 'erroneous deprivation' of his benefits"); *Clark*, 616 F. Supp. 2d at 1042 (granting motion to dismiss where "Plaintiffs fail to provide or allege what additional process should be afforded Plaintiffs"); *Jonas v. Edson*, 2008 WL 2633013, at *1 (D. Or. July 1, 2008) (dismissal for failure to "allege in what respects the [existing] process was constitutionally deficient"); *King v. City & County of San Francisco*, 2022 WL 4629448, at *3 (N.D. Cal. Sept. 30, 2022) (dismissal for failure to "plausibly allege the inadequacy of remedies available to him under state law"); *Richter v. Ausmus*, 2020 WL 1429758, at *5 (N.D. Cal. Mar. 24, 2020) (plaintiff "must allege how defendants failed to provide her with adequate procedural protections").

The FAC does neither. It admits that a procedure exists for youth to be heard if there is to be a change to their THPP-NMD benefits. For example, prior to being discharged from a THPP-NMD, "a written notice must be given to the youth seven days

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

prior to discharge, with a copy sent to the county placing agency." (¶ 197 (citing Interim Licensing Standards 86268.4(c)(1)).) "The written notice must be based on a specific reason." (*Id.*) Additionally, "youth facing discharge may submit a complaint against the THPP-NMD program to CDSS's Community Care Licensing Division ('CCLD')." (¶ 199 (citing Interim Licensing Standards 86268.4(c)(1)(B).) Regarding SILP, youth are "entitled to request an administrative hearing with CDSS's State Hearings Division." (¶ 203.) They can also bring SILP disputes to the juvenile court and/or invoke DCFS' SILP grievance review process. (RJN Exs. 10, 24.)

None of the Plaintiffs alleges that they ever attempted to avail themselves of these procedures. None of the Plaintiffs alleges that they were not given notice before a modification to THPP-NMD or SILP benefits. None of the Plaintiffs alleges any ***facts*** explaining why the available procedures are inadequate. And none of the Plaintiffs explains how existing processes must be changed to comport with due process.

All the FAC offers are naked conclusions that the procedures are inadequate, coupled with "information and belief" assertions, devoid of any factual basis, that the procedures are not complied with. (*See, e.g.*, ¶ 91 ("In the context of various discharges, [Ocean S.] was not provided adequate notice or a meaningful opportunity to contest these decisions."); ¶ 199 ("On information and belief, … youth are not given notice of [the THPP-NMD complaint] procedure."); ¶ 203 ("[O]n information and belief, transition age foster youth lose their SILP funding without notice or explanation, and without being informed of the option to request an administrative hearing."). This is not enough. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) ("it is [plaintiff's] burden to demonstrate the inadequacy of the state-law procedures available to him"); *Kamal v. County of Los Angeles*, 2018 WL 4328467, at *17 (C.D. Cal. Sept. 6, 2018) (dismissing claim where "[s]ave for conclusory allegations of wrongdoing, Plaintiff has not pleaded a plausible violation of his procedural due process rights"); *Eberhard v. Town of Camp Verde*, 2006 WL 516582, at *6 (D. Ariz. Mar. 2, 2006) (dismissing claim where process was available and

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

plaintiffs "allege[d] nothing beyond a conclusory assertion that they did not receive adequate procedural due process"); *Neubronner*, 6 F.3d at 672 ("[A] plaintiff who makes allegations on information and belief must state the factual basis for the belief."); *see also Alvin*, 277 F.3d at 116 ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants."). The claim should be dismissed.

(d) No Violation of Right to Familial Association

Plaintiffs claim the County has violated their right to familial association under the First and Fourteenth Amendments "by failing to provide safe and stable placements appropriate for pregnant and parenting youth to reside with their children." (¶ 349.) There is no such constitutional right.

The Ninth Circuit has only recognized a claim for loss of familial association "where a state actor ***unlawfully interferes with*** the parent-child relationship." *Grae-El v. City of Seattle*, 2022 WL 16758473, at *5 (W.D. Wash. Nov. 8, 2022) (emphasis added). The "right to familial association is a ***negative right***—the right to be free from unwarranted or unjustified state interference in certain existing intimate relationships." *Jeremiah M. v. Crum*, 2023 WL 6316631, at *17 (D. Alaska Sept. 28, 2023) (emphasis added). Courts "have consistently been unwilling to place constitutional obligations on the state to build, rebuild, or preserve families." *Id.* (citing *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995)); *see also M.D. v. Perry*, 294 F.R.D. 7, 47 (S.D. Tex. 2013) (finding no "right to family integrity"); *Black v. Beame*, 419 F. Supp. 599, 607 (S.D.N.Y. 1976) ("There is no constitutional obligation … to affirmatively insure a given type of family life, and none may be created by inference and misdirection through the penumbral constitutional right to familial privacy."); *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 676-77 (S.D.N.Y. 1996) (rejecting challenge to state's allegedly "general failure to provide services that function to preserve the family unit").

In the foster care context, the only "familial association" guarantee is "'that parents will not be separated from their children without due process of law except in

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

emergencies.'" *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018); *Crum*, 2023 WL 6316631, at *18 (courts "center the inquiry on whether foster children are denied meaningful contact with their parents"). Three named Plaintiffs are parents—Rosie S. (¶ 62), Ocean S. (¶ 87), and Monaie T. (¶ 118). None of them alleges the County has denied custody or access to their children. They claim only that the County has failed to provide housing to maintain the family unit. (¶ 349.) There is no such right enshrined in the Constitution.[5] The claim should be dismissed.

(e) No Denial of Rights under the Medicaid Act

The FAC does not come close to pleading a violation of the EPSDT provisions of the Medicaid Act. (¶¶ 335-39.) The claim is a purely formulaic allegation that the County is "failing to provide or arrange for behavioral health services for the Medicaid Subclass that are necessary to correct or ameliorate their mental health conditions in violation of 42 U.S.C. §§ 1396a(a)(10)(A), 42 U.S.C. §§ 1396a(43)(C), 1396d(a)(4)(B) and 1396d(r)." (¶ 352.) That is not good enough.

Courts routinely dismiss these kinds of tacked-on Medicaid claims. *Olson*, 2021 WL 3115126, at *6 (dismissing claim where plaintiff failed to "allege what medical assistance described in [section 1396d(a)(10)(A)]" was necessary and had been denied); *Shaughnessy v. Wellcare Health Ins. Inc.*, 2017 WL 663230, at *3 (D. Haw. Feb. 16, 2017) (dismissing claim where plaintiff "neglects to support his claim with the necessary facts regarding the relevant state plan, the required care and services to be provided to Medicaid recipients under that state plan, and whether the services he claims he was denied are within the scope of the state plan"); *Troupe v. Barbour*, 2013 WL 12303126, at *4 (S.D. Miss. Aug. 23, 2013) (dismissing section 1396(a)(43)(C) claim where plaintiffs did not allege they requested screening or identify a necessary corrective treatment that had been denied).

[5] Although the FAC alleges that Ocean S.'s daughter was removed from her care (¶ 98), she does not say why, and there is no suggestion that the removal was wrongful or that she has been denied access to her daughter.

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

The FAC is silent as to what services, covered by Medicaid, Plaintiffs are entitled to, why they are entitled to them, why it was denied, and why such denial was improper.

3. No Policy or Custom Violating Federal Law

Even if Plaintiffs had alleged the violation of a cognizable federal right (they have not), their section 1983 claims still fail because the FAC does not identify a policy, custom, or practice of violating federal law.

To state a section 1983 claim against a municipality, a plaintiff must plead that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. Where a claim is based on formal policy, the specific content of the policy at issue must be identified. *Mariposa*, 2019 WL 4956142, at *3 (courts in the Ninth Circuit "'dismiss claims that fail to identify the specific content of the municipal entity's alleged policy or custom'").

Where the claim is based on custom or practice, the plaintiff must allege facts establishing governmental conduct so "'permanent and well settled as to'" have the "'force of law.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). To rise to that level, alleged violations must be "widespread" and "pervasive." *Hunter v. County of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011). Liability "may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Plaintiffs must allege "***specific facts*** that demonstrate … duration, frequency, and consistency to establish a custom." *Rodriguez v. County of San Bernardino*, 2023 WL 5337818, at *7 (C.D. Cal. Aug. 17, 2023) (emphasis added); *Jasmin v. Santa Monica Police Dep't*, 2017 WL 10575167, at *8 (C.D. Cal. Sept. 22, 2017) (same); *AE v. County of Tulare*, 2010 WL 1407857, at *12 (E.D. Cal. Apr. 7, 2010) (same); *Jensen v. County of Los Angeles*, 2017 WL 10574059, at *9 (C.D. Cal. July 13, 2017) ("Plaintiff offers no basis from which the Court may conclude that other similar incidents did, in fact, occur; or

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

that they were sufficiently serious or widespread such that Defendants should have known, or did know, that they occurred and warranted remedial action.").

Suffice it to say, "[s]imply invoking the phrase 'policy, custom or practice,' . . . does not satisfy the pleading requirements of a *Monell* claim." *Machul v. Browning*, 2014 WL 4590008, at *3 (C.D. Cal. Sept. 15, 2014).

The FAC runs afoul of these requirements. It is heavy on formulaic recitation of the phrase "policies and practices" (*see, e.g.*, ¶¶ 138, 231, 239-40, 286, 291, 295, 303, 349), and utterly devoid of ***facts***. With regard to policies, it does not identify, describe, quote, or refer to any County policies at all. *Mariposa*, 2019 WL 4956142, at *4 (formulaic recitation that policies violate law are subject to dismissal). As demonstrated above (*supra*, Section II.B), County policies are robust and compliant.[6]

As to custom or practice, the FAC offers no "specific facts" about the "duration, frequency, and consistency" of the deficiencies it alleges. *Rodriguez*, 2023 WL 5337818, at *7. For example, the FAC claims the County does "not have a minimally adequate array of safe and stable placements for all the transition age foster youth in their care." (¶ 137.) But, aside from "information and belief" that there are not enough placement options available, the FAC provides zero facts about how many youth in need of placements do not receive one or how often that happens.[7] (*See* ¶¶ 152-72.)

With respect to case plans, the FAC makes the conclusory allegation that the

[6] All DCFS policies are available online at https://policy.dcfs.lacounty.gov/.

[7] Plaintiffs point to a November 20, 2018 Board of Supervisors' motion which acknowledged the "need for youth in extended foster care and youth exiting foster care to have access to housing programs" (¶ 164) and requested information on available funding to increase the capacity of THPP-NMDs. This is entirely uncontroversial and reflects the County's ongoing efforts to make improvements. What it does not show is a pervasive practice of denying federal rights. *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 57 (1st Cir. 2014) (rejecting alleged foster care deficiencies because "[a] state is not required to 'choose between attacking every aspect of a problem or not attacking the problem at all'" (quoting *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982))); *Jonathan R. v. Justice*, 2023 WL 184960, at *7 (S.D. W. Va. Jan. 13, 2023) (same).)

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

County is "systematically failing to meet this obligation." (¶ 173.) There are no facts anywhere about what proportion of transition age youth are not receiving case plans, how often that happens, or for how long the issue has persisted. The same issue affects Plaintiffs' procedural due process claim. The FAC concludes that the County's "procedures deny transition age foster youth the right to due process in applying for and maintaining their placement benefit." (¶ 185.) But it offers no facts about the number of transition age youth who are denied adequate procedures, how often that happens, or for how long the purported problem has gone on.

Regarding behavioral health services, the FAC concludes that the County denies "vital behavioral health services such as intensive care coordination ('ICC'), therapeutic foster care, intensive home-based services ('IHBS'), peer support specialist's services, mobile crisis services, and other mental health services." (¶ 11.) For that, it points to a single datapoint from California's fiscal year 2021 State snapshot data, indicating that "39.81% of 3,900 eligible foster youth between the ages of 18-20 accessed Specialty Mental Health Services." (¶ 271.) But it does not even allege that the other 60.2% actually needed or wanted SMHS and were denied. That would be an "unwarranted inference[] … insufficient to defeat a motion to dismiss." *Adams*, 355 F.3d at 1183. It certainly does not plead service denial of a duration or consistency so "widespread" and "pervasive" that it has the "force of law."

There are no specific facts identifying "practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino*, 99 F.3d at 918. The FAC fails to state a claim.

4. No Deliberate Indifference

On top of pleading an underlying violation of federal rights and a policy or longstanding custom of doing so (*supra* Sections IV.A 2 & 3), a section 1983 complaint must also be tested against "rigorous standards of culpability." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 405 (1997). Plaintiffs must plead facts establishing that their injury was due to "***deliberate indifference***." *Mabe v. San Bernardino Cty.*,

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

Dept' of Pub. Soc. Servs., 237 F.3d 1101, 1110-11 (9th Cir. 2001) (emphasis added).

This standard, in the foster care context, is a "virtually unscalable peak." *Connor B. ex rel. Vigurs v. Patrick*, 985 F. Supp. 2d 129, 166 (D. Mass. 2013), *aff'd*, 774 F.3d 45 (1st Cir. 2014). The plaintiff must show: "(1) there was an objectively substantial risk of harm; (2) the Department was ***subjectively aware*** of facts from which an inference could be drawn that a substantial risk of serious harm existed; and (3) the Department either actually drew that inference or a reasonable official would have been compelled to draw that inference." *Momox-Caselis v. Donohue*, 987 F.3d 835, 845 (9th Cir. 2021) (emphasis added). In other words, ***that the County made "a deliberate choice … from among various alternatives,"*** knowing that choice would result in harm. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 483-84 (1986) (emphasis added) (requiring facts showing that violation was "officially sanctioned or ordered").

That is a tall order. "A showing of simple or even heightened negligence will not suffice." *Brown*, 520 U.S. at 407. Not even malpractice rises to the level of deliberate indifference. *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). The conduct complained of must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). This burden "is extremely high, requiring 'stunning' evidence of 'arbitrariness and caprice' that extends beyond '[m]ere violations of state law, even violations resulting from bad faith' to 'something more egregious and more extreme.'" *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010) (synthesizing Court of Appeals opinions).

The FAC does not meet this high standard. With respect to case plans, it alleges that "DCFS uses TILPS in lieu of case plans" and "when DCFS develops case plans, the plans are formulaic, merely checking boxes on the forms." (¶¶ 181-82.) Absent is any allegation that the County knows Plaintiffs are being denied adequate case plans or that it made the "deliberate choice" to keep it that way. *Pembaur*, 475 U.S. at 483-84.

Plaintiffs also fault the County for not providing adequate behavioral health services. (¶¶ 11, 259-75.) Here, too, Plaintiffs fail to plead that the County made a

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

"deliberate choice" to withhold otherwise available and medically necessary services from eligible youth. *Pembaur*, 475 U.S. at 483-84.

Plaintiffs' criticisms of the County's foster care placements are similarly deficient. For example, Plaintiffs contend that the County fails to provide a "minimally adequate array of safe and stable placements." (¶¶ 6, 127-72.) Even if true and actionable (both of which are disputed), the FAC provides no facts showing that the County has available additional or better placements and has made the deliberate choice not to make them available. In fact, it pleads the opposite. (*See* ¶¶ 164-66 (alleging that "capacity building challenges" had prevented anticipated placement increases).)

"[T]he availability of foster homes, particularly those that provide the most 'home-like,' 'least-restrictive' environments, is something uniquely out of the State's control." *Abbott*, 907 F.3d at 268. Participation in the foster family program is voluntary, and "DFPS cannot force people to volunteer." *Id.* The availability of placements also is "affected by the population size[] of the count[y] … , the volume of children being removed from their homes in a particular county or region, and the ratio of rural to urban communities." *Id.* In other words, "neither bolstering the administrative ranks nor obtaining the requisite number of foster homes will resolve the ongoing placement challenges." *Id.* (quoting *Connor B.*, 985 F. Supp. 2d at 144). There is nothing deliberate about placement challenges that every foster system faces.

The FAC does not plead deliberate indifference even as to the named Plaintiffs. For example, for all its bluster about the inadequacy of placements, it admits that six out of seven named Plaintiffs are currently residing in County-facilitated placements. (*See* ¶¶ 41, 52, 71, 85, 99, 125.) The seventh (Junior R.) was discharged for "marijuana use and the use of profanity" in one instance, the "cleanliness of his unit" in another, and admits to having turned down placements presented to him. (¶¶ 108-17.) The FAC does not allege any facts that shock the conscience.

5. No Causation

The FAC also fails to plead, as it must, that any custom or practice of the County

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

is the "moving force" behind the alleged violation of Plaintiffs' rights.

To state a claim under section 1983, a plaintiff must allege facts proving that a policy or practice "***directly caused*** a deprivation of federal rights." *Brown*, 520 U.S. at 415 (emphasis added). "To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008); *AE*, 2010 WL 1407857, at *13 ("To impose *Monell* liability, a plaintiff 'must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy. Plaintiff must, of course, prove that his injury was caused by city policy.'").

A complaint that does not "adequately explain how the alleged policies" or practices caused the alleged violation of federal rights cannot survive a motion to dismiss. *I.B. v. County of San Bernardino*, 2018 WL 6016290, at *10 (C.D. Cal. July 9, 2018); *Canas v. City of Sunnyvale*, 2011 WL 1743910, at *6 (N.D. Cal. Jan. 19, 2011) (dismissing complaint that did not "explain *how* the alleged policies or customs caused harm to Plaintiffs"); *Mong Kim Tran v. City of Garden Grove*, 2012 WL 405088, at *4 (C.D. Cal. Feb. 7, 2012) (same). Establishing a "'direct causal link between the [municipal] policy and the constitutional deprivation'" is a "'high threshold.'" *Abbott*, 907 F.3d at 253. Where plaintiffs merely "recite the elements of a *Monell* claim against the County, the Court finds that plaintiffs do not allege facts that, if true, would establish that the County had a policy or widespread custom that caused plaintiffs' injuries." *D.B. v. Brewer*, 2017 WL 2766437, at *16 (C.D. Cal. June 26, 2017). It is also not enough to allege "'collective inaction' that 'amounted to actionable deliberate indifference to the risk of harm.'" *AE*, 2010 WL 1407857, at *13.

The FAC fails to plead cause-in-fact or proximate cause. It makes generalized criticisms about foster care in the County and ends with conclusory allusions to "instability caused by DCFS," "trauma caused by Defendants" and Defendants "caused Plaintiffs' injuries." (*See, e.g.*, ¶¶ 58, 131, 298.) Nowhere does it explain what specific acts or omissions, by whom, directly caused specific injuries. Nowhere does it

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

undertake to draw a "direct causal link" between any County policy or custom and the violation of federal law. Indeed, in some instances, Plaintiffs admit they brought about themselves the very outcomes for which they now blame the County. (*See, e.g.*, ¶¶ 108-17 (Junior R. lost a placement for marijuana use and turned down offered alternatives).

This is not enough to plead causation. *X.R. v. County of Los Angeles*, 2020 WL 6162803, at *5 (C.D. Cal. July 20, 2020) (dismissing complaint alleging county foster system had "(1) inadequate staffing; (2) excessive caseloads; and (3) inadequate training" for failure to plead "whether they actually *caused* Plaintiffs' injuries"); *Chandler v. City of Barstow*, 2019 WL 926349, at *4 (C.D. Cal. Jan. 9, 2019) (plaintiff must plead "that [the injury] was caused by an existing, unconstitutional … policy, which policy can be attributed to a … policymaker").

Without alleging that any County policy or custom or practice directly caused the injuries alleged in this case, the FAC fails to state a claim under section 1983.

B. <u>The FAC Fails To State A Claim Under The ADA And RA</u>

The FAC's ADA and RA claims also fail. (¶¶ 306-45.) To plead a violation, "a plaintiff must show: (1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).[8]

First, Plaintiffs fail to allege a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). It is not enough to list diagnoses or personal challenges; they must plead "specific facts regarding how their impairments 'substantially limit[] one or more major life activities,' in order for

[8] The ADA and RA are "interpreted coextensively because 'there is no significant difference in the analysis of rights and obligations created by the two Acts.'" *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 737 (9th Cir. 2021).

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

the Court to determine if Plaintiffs have plausibly alleged that they are disabled within the meaning of the ADA." *I.B.*, 2018 WL 6016290, at *7. There is no such allegation.

Second, the ADA Subclass Plaintiffs do not plead any facts showing they have been excluded from the foster care system or refused any services available to non-disabled children. The ADA is concerned with "***discriminatory*** denial of services," and a claim "must be dismissed if it instead concerns the 'adequacy' of the services provided." *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1207 (D. Or. 2012) (emphasis added). The FAC does not show that disabled youth are treated differently than the rest of the named Plaintiffs or the class they purport to represent.

Third, the FAC fails to plead a policy or practice of discrimination. A claim alleging failure "to remedy systemic barriers … is more appropriately evaluated under the disparate impact framework." *Payan*, 11 F.4th at 739. Disparate impact requires a plaintiff to plead that a municipal "policy or practice has the 'effect of denying meaningful access to public services' to people with disabilities." *Id.* at 738. As explained, the FAC pleads no policy or practice at all—let alone one to violate the law.

Finally, as to the "integration mandate," a plaintiff must "show that the challenged state action creates a serious risk of institutionalization." *M.R. v Dreyfus*, 663 F.3d 1100, 1116 (9th Cir. 2011). None of the named Plaintiffs in this lawsuit claims to be at risk of being institutionalized due to discrimination.

The ADA Subclass claims fail for the same reason as the rest. They are a rehash of Plaintiffs' other generalized criticisms, with a tacked-on conclusion the County has failed to make reasonable modifications to avoid disproportionately harming children with disabilities. (¶¶ 221-58.) It is not enough to "allege[] in conclusory fashion" that a municipality's conduct "has a discriminatory effect on people with disabilities." *Eulitt v. City of San Diego*, 2021 WL 3779226, at *4 (S.D. Cal. July 29, 2021). That is all the FAC does. The claims should be dismissed.

V. CONCLUSION

For these reasons, the Court should dismiss the FAC for failure to state a claim.

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400

DATED: November 29, 2023 MILLER BARONDESS, LLP

By: _____

FARBOD S. MORIDANI
Attorneys for Los Angeles County, the Department of Children and Family Services, Brandon Nichols, the Department of Mental Health, Lisa Wong

MILLER BARONDESS, LLP
ATTORNEYS AT LAW
2121 AVENUE OF THE STARS, SUITE 2600 LOS ANGELES, CALIFORNIA 90067
TEL: (310) 552-4400 FAX: (310) 552-8400