

1 ROB BONTA
 Attorney General of California
 2 BENJAMIN G. DIEHL
 Supervising Deputy Attorney General
 3 ANDREW Z. EDELSTEIN
 Deputy Attorney General
 4 State Bar No. 218023
 300 South Spring Street, Suite 1702
 5 Los Angeles, CA 90013-1230
 Telephone: (213) 269-6307
 6 Fax: (916) 731-2125
 E-mail: Andrew.Edelstein@doj.ca.gov
 7 *Attorneys for Defendants California Department of
 Social Services and Director Kim Johnson*

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION

13 **OCEAN S., et al.,**

14 Plaintiffs,

15 v.

16 **LOS ANGELES COUNTY; LOS**
 17 **ANGELES COUNTY**
 18 **DEPARTMENT OF CHILDREN**
 19 **AND FAMILY SERVICES;**
 20 **BRANDON NICHOLS, Director of**
 21 **the Los Angeles County Department**
 22 **of Children and Family Services;**
 23 **LOS ANGELES DEPARTMENT OF**
 24 **MENTAL HEALTH; LISA WONG,**
 25 **Director of the Los Angeles County**
 26 **Department of Mental Health;**
 27 **CALIFORNIA DEPARTMENT OF**
 28 **HEALTH CARE SERVICES;**
MARK GHALY, Secretary of the
California Health and Human
Services Agency; CALIFORNIA
DEPARTMENT OF SOCIAL
SERVICES; and KIM JOHNSON,
Director of the California
Department of Social Services,
MICHELLE BAASS,

Defendants.

2:23-cv-06921-JAK-E

CALIFORNIA DEPARTMENT OF
SOCIAL SERVICES AND
DIRECTOR KIM JOHNSON'S
NOTICE OF MOTION AND
MOTION TO DISMISS;
MEMORANDUM OF POINTS &
AUTHORITIES

Date: March 25, 2024
 Time: 8:30 a.m.
 Courtroom: 10B
 Judge: Hon. John A. Kronstadt
 Trial Date: None set
 Action Filed: Aug. 22, 2023

1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on March 25, 2024, or as soon thereafter as
4 the matter may be heard, before the Honorable John A. Kronstadt, United States
5 District Judge, in the United States District Court, Central District of California,
6 Courtroom 10B, located at 350 West 1st Street, Los Angeles, California 90012, the
7 California Department of Social Services (the Department) and its Director Kim
8 Johnson (collectively CDSS), will and hereby do move for an order dismissing the
9 entire action, with prejudice, as to CDSS.

10 This Motion is brought pursuant to Rule 12(b)(6) on the grounds that
11 plaintiffs lack standing, fail to plead any claim against CDSS because plaintiffs do
12 not allege any duty or breach by CDSS and they do not allege injury and causation
13 traceable to CDSS and that may be remedied by CDSS nor do plaintiffs allege the
14 elements of their purported causes of action, such as a substantive or due process
15 right, or a violation of the Americans with Disabilities Act or Rehabilitation Act. In
16 addition, the Department is not a proper defendant under 42 U.S.C. § 1983 (and to
17 the extent these claims seek retrospective declaratory relief, neither is the Director)
18 and CDSS has immunity under the Eleventh Amendment.

19 The Motion is made following the conference of counsel pursuant to Local
20 Rule 7-3, which took place initially on November 14, 2023. This Motion is based
21 on this Notice, on judicially noticeable matters, on the Memorandum of Points and
22 Authorities in support thereof, on the papers and pleadings on file in this action, and
23 on such oral argument as may be presented at the hearing.

24
25
26
27
28

1 Dated: November 29, 2023

Respectfully submitted,

2 ROB BONTA
3 Attorney General of California
4 BENJAMIN G. DIEHL
5 Supervising Deputy Attorney General

/s/ Andrew Edelstein

6 ANDREW Z. EDELSTEIN
7 Deputy Attorneys General
8 *Attorneys for Defendants California*
9 *Department of Social Services and*
10 *Director Kim Johnson*

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Memorandum of Points and Authorities	4
Introduction.....	4
Legal Overview	7
Argument	8
I. All Section 1983 Claims Fail Against CDSS	8
A. The Section 1983 Claims Against Non-Persons Fail	8
B. Claim One, the AACWA Claim, Fails	9
1. Plaintiffs Lack Standing for the AACWA Claim	9
2. There Is No Basis for CDSS’ Liability under AACWA	10
C. Claim Two, The Substantive Due Process Claim, Fails.....	11
1. There Is No Substantive Right to a Placement Array.....	11
2. Plaintiffs Fail to Allege a Substantive Due Process Violation by CDSS	12
D. Claim Three, The Procedural Due Process Claim, Fails.....	13
1. SILP Decisions Are Reviewed at a Due Process Hearing	14
2. THPP-NMD Decisions Do Not Trigger Due Process Rights	14
3. Plaintiffs Alleged Facts Are Insufficient to Trigger Procedural Due Process.....	15
4. There Is a Sufficient State Remedy and Therefore No Procedural Due Process Violation.....	15
E. Claim Six, The Familial Association Claim, Fails	16
II. Claims Four and Five, The Rehab Act and ADA Claims, Fail	17
III. CDSS Maintains Sovereign Immunity Under the Eleventh Amendment.....	19
Conclusion	20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Iqbal
556 U.S. 662 (2005) 6, 7

Bell Atlantic Corp. v. Twombly
550 U.S. 554 (2007) 6

Board of Regents of State Colleges v. Roth
408 U.S. 564 (1972) 14

Brooks v. Sulphur Springs Valley Elec. Co-op.
951 F.2d 1050 (9th Cir. 1991)..... 19, 20

Castle Rock v. Gonzales
545 U.S. 748 (2005) 14

Cleveland Bd. of Educ. v. LaFleur
414 U.S. 632 (1974) 16

Culinary Studios, Inc. v. Newsom
517 F. Supp. 3d 1042 (E.D. Cal. 2021)..... 18

Dittman v. California
191 F.3d 1020 (9th Cir. 1999)..... 20

Does 1-5 v. Chandler
83 F.3d 1150 (9th Cir. 1996.)..... 17

Dura Pharms, Inc. v. Broudo
544 U.S. 336 (2005) 6

Ebner v. Fresh, Inc.
838 F.3d 958 (9th Cir. 2016)..... 6

Flores v. EMC Mortg. Co.
997 F. Supp. 2d 1088 (E.D. Cal. 2014)..... 18

Fuller v. Lopez
2020 WL 8834791 (D. Ariz. Dec. 1, 2020)..... 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Gaby v. Bd. of Trustees of Comm. Technical Colleges
348 F.3d 62, 63 (2d Cir.2003)..... 8

Garrett v. Governing Bd. of Oakland Unified Sch. Dist.
583 F. Supp. 3d 1267 (N.D. Cal. 2022)..... 16

Genevier v. U.S. Citizenship & Immigr. Servs.
144 F. App’x 586 (9th Cir. 2005)..... 20

Hartmann v. California Dep’t of Corr. & Rehab.
707 F.3d 1114 (9th Cir. 2013)..... 10

Herrejon v. Ocwen Loan Servicing, LLC
980 F. Supp. 2d 1186 (E.D. Cal. 2013)..... 19

In re M.R.
48 Cal. App. 5th 412 (2020)..... 10

Jenkins v. Washington
46 F. Supp. 3d 1110 (W.D. Wash. 2014)..... 8

Kaimowitz v. Bd. of Trustees
951 F.2d 765, 767 (7th Cir.1992)..... 8

Logan v. Zimmerman Brush Co.
455 U.S. 422 (1982) 14

Loving v. Virginia
388 U.S. 1 (1967) 16

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992) 6, 18

M. D. by Stukenberg v. Abbott
907 F.3d 237, 268 (5th Cir. 2018)..... 11, 12

Marisol A. by Forbes v. Giuliani
929 F. Supp. 662 (S.D.N.Y. 1996)..... 16

McLaughlin v. Bd. of Trustees
215 F.3d 1168, 1172 (10th Cir.2000)..... 8

TABLE OF AUTHORITIES
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Meyer v. Nebraska
262 U.S. 390 (1923) 16

Mills v. California
2020 WL 4928302 (C.D. Cal. June 29, 2020)..... 19

Morgan v. Gonzales
495 F.3d 1084 (9th Cir. 2007)..... 11

Roberts v. United States Jaycees
468 U.S. 609 (1984) 17

Sanchez v. Johnson
416 F.3d 1051 (9th Cir. 2005)..... 17

Santosky v. Kramer
455 U.S. 745 (1982) 16

Sebastian Brown Prods., LLC v. Muzooka, Inc.
143 F. Supp. 3d 1026 (N.D. Cal. 2015)..... 19

Sherrell v. Bank of Am., N.A.
2011 WL 6749765 (E.D. Cal. Dec. 22, 2011)..... 19

Simon v. E. Kent. Welfare Rights Org.
426 U.S. 26 (1976) 9

Sossamon v. Texas
563 U.S. 277 (2011) 20

Valadez-Lopez v. Chertoff
656 F.3d 851 (9th Cir. 2011)..... 7

Vinson v. Thomas
288 F.3d 1145 (9th Cir. 2002)..... 17

Weinreich v. Los Angeles County Metropolitan Transp. Authority
114 F.3d 976 (9th Cir. 1997)..... 18

Witherbee v. Dow
2022 WL 2964382 (C.D. Cal. June 15, 2022)..... 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Wyatt B. by McAllister v. Brown
2021 WL 4434011 (D. Or. Sept. 27, 2021)..... 11

Zinermon v. Burch
494 U.S. 113 (1990) 16

STATUTES

29 U.S.C.
§ 794 18
§ 794(a)..... 17

42 U.S.C.
§ 670, *et seq.* 9
§ 671 9
§ 671(a)(16) 9
§ 1983 *passim*
§ 12132 17

Adoption Assistance and Child Welfare Act of 1980 *passim*

Americans with Disabilities Act..... 6, 17

California Health & Saf. Code § 1502(a)(12) 12, 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	Page
California Welf. & Inst. Code	
§ 303(d).....	4
§ 366(a).....	7
§ 366.3	7
§ 366.21	7
§ 366.22	7
§ 366.25	7
§ 391	8
§ 10800	7
§ 11400(v).....	4
§ 11400(r)(1).....	12, 15
§ 11400(u).....	4
§ 16001	12
§ 16500	7, 13
§ 16501	7
§ 16501(a)(2)	7
§ 16501.1(e).....	7
§ 16501.1(f)	7
Rehabilitation Act § 504.....	6, 17, 18
CONSTITUTIONAL PROVISIONS	
First Amendment	16
Eleventh Amendment	19, 20
Fourteenth Amendment	11, 16
COURT RULES	
California Rules of Court	
Rule 5.708(b).....	8
Rule 5.708(f).....	8
Fed. R. Civ. P. 12(b)(6)	6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

22 Cal. Code Reg.
§ 86018 12, 15
§ 86028 12, 15
§ 86068.1(B)(a) 15
§ 86068.1(c)..... 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES
INTRODUCTION

The California Department of Social Services (the Department) and its Director Kim Johnson (the Director) (the Director and the Department are collectively CDSS) are dedicated to the wellbeing of all youth in foster care, including transition age foster youth,¹ like the plaintiffs in this case. However, because the six claims plaintiffs seek to bring against CDSS do not fall within the bounds of the law, their claims against CDSS must be dismissed.

Plaintiffs bring four causes of action under 42 U.S.C. § 1983 (“Section 1983”). To begin, the Section 1983 claims fail against the Department because it is not a “person” and Section 1983 claims can only be brought against people. The claims also fail against the Director to the extent they seek retrospective declaratory relief.

Beyond that, each Section 1983 claim fails for additional independent reasons. Plaintiffs bring their first cause of action under Section 1983 for violation of the case plan requirement in the Adoption Assistance and Child Welfare Act of 1980 (the “AACWA”). This claim fails because (1) no plaintiff meaningfully alleges a lack of a case plan and therefore plaintiffs lack standing for this claim, and (2) case plans are within the responsibility of the County of Los Angeles (the “County”) and the Juvenile Court, and plaintiffs fail to assert any basis for liability as to CDSS.

Plaintiffs bring their second cause of action under Section 1983 for violation of the substantive due process clause of the Constitution. The predicate of this claim is that defendants allegedly violate plaintiffs’ substantive Constitutional right

¹ Plaintiffs’ First Amended Complaint broadly defines transition age foster youth as foster youth aged sixteen to twenty-one. Although the putative class is alleged to include all transition age foster youth who are or will be in extended foster care, all named plaintiffs are aged 18 and older and in extended foster care and are therefore all nonminor dependents under California law. Welf. & Inst. Code § 11400(v). Nonminor dependents retain all rights as adults and are subject to the care and supervision of the county child welfare services agency and jurisdiction of the juvenile court only if they consent to it via a mutual agreement. Welf. & Inst. Code §§ 303(d), 11400(u).

1 to a minimally adequate array of safe and stable placement options. This cause of
2 action fails to state a claim because: (1) under settled law, there is no substantive
3 due process right to an array of placement options; and (2) placement options (like
4 case plans) are within the domain of the County and plaintiffs fail to assert a valid
5 basis to hold CDSS liable for an alleged shortcoming in placement options.

6 Plaintiffs bring their third cause of action under Section 1983 for violation of
7 the procedural due process clause of the Constitution. The first basis of this claim
8 is that a delay or denial of approval or suspension or termination of payment in
9 Supervised Independent Living Placements (SILP) merits notice and a due process
10 hearing. Fatal to this basis for plaintiffs' claim, the First Amended Complaint
11 (FAC) acknowledges that CDSS provides those due process rights to nonminor
12 dependents. FAC, ¶¶ 195, 203. The second basis for this claim is that the
13 admission and removal processes for the Transitional Housing Placement Program
14 for nonminor dependents (THPP-NMD) lacks a notice provision and hearing right.
15 This second basis fails too, as: (1) plaintiffs have no vested property right in any
16 THPP-NMD placement (admission is discretionary and THPP-NMDs are run by
17 independent third parties with their own admissions criteria); (2) plaintiffs fail to
18 plead any details about any wrongful rejection or ejection (*e.g.*, that a plaintiff met
19 all the criteria of a specific THPP-NMD placement, but was wrongfully denied
20 admission on a specific date); and (3) state law provides an adequate remedy—the
21 County must find another placement and the Juvenile Court reviews the continuing
22 necessity for, and appropriateness of, the placement.

23 Plaintiffs' final claim under Section 1983 is their sixth cause of action, for the
24 violation of the right to familial association. To begin, there is no such right, as
25 relevant to the allegations in the FAC. Even if there were, this claim fails for the
26 same reasons as the other Section 1983 claims. That is, this claim is based on a
27 lack of an array of placement options, but CDSS is not responsible for placements
28

1 or for the array of placements and plaintiffs have not alleged a basis to sue CDSS
2 for this alleged shortcoming.

3 Plaintiffs' final set of causes of action against CDSS are their fourth, brought
4 under Section 504 of the Rehabilitation Act, and their fifth, brought under the
5 Americans with Disabilities Act ("ADA"). Both of these claims fail because they
6 do not allege any conduct by CDSS, or any other basis to hold it liable.

7 **LEGAL STANDARD**

8 To survive a motion to dismiss for failure to state a claim pursuant to Fed. R.
9 Civ. P. 12(b)(6), a complaint must contain more than a "formulaic recitation of the
10 elements of a cause of action," it must contain factual allegations sufficient to "raise
11 a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
12 U.S. 554, 555 (2007). The court need not accept legal conclusions as
13 true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2005). The complaint must contain
14 sufficient factual matter, accepted as true, to plausibly – not merely possibly –
15 allow the reasonable inference that the defendant is liable for the misconduct
16 alleged. *Id.* at 678-679. A complaint also "must provide the defendant with 'fair
17 notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura*
18 *Pharms, Inc. v. Broudo*, 544 U.S. 336, 346 (2005); *Lujan v. Defenders of Wildlife*,
19 504 U.S. 555, 559 (1992) (a plaintiff must allege a causal connection between
20 injury and conduct traceable to the defendant, and that the injury can be redressed
21 by a favorable decision).

22 "Determining whether a complaint states a plausible claim for relief is 'a
23 context-specific task that requires the reviewing court to draw on its judicial
24 experience and common sense.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir.
25 2016) (quoting *Iqbal*, 556 U.S. at 679). Where a complaint pleads facts that are
26 merely consistent with a defendant's liability, it stops short of the line between
27 "possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678.
28

1 Where “the facts alleged do not permit the court to infer more than the mere
2 possibility of misconduct,” a motion to dismiss should be granted. *Id.*, at 679

3 **LEGAL OVERVIEW**

4 For good reason, the FAC makes no specific allegations of wrongdoing by
5 CDSS other than mere legal conclusions that must be ignored. *Valadez-Lopez v.*
6 *Chertoff*, 656 F.3d 851 (9th Cir. 2011) (a complaint must aver “sufficient factual
7 matter” to state a claim for relief, and “naked” assertions devoid of “further factual
8 enhancement” do not suffice).

9 That good reason is that child welfare services, including foster care provided
10 to nonminor dependents, are administered solely by counties. Welf. & Inst. Code §
11 10800 (“[T]he administration of public social services in each of the several
12 counties of the state is . . . a county function and responsibility and therefore rests
13 upon the boards of supervisors in the respective counties.”); Welf. & Inst. Code §
14 16500 (“All counties shall establish and maintain specialized organizational entities
15 within the county welfare department which shall have sole responsibility for the
16 operation of the child welfare services program.”). The county child welfare
17 agency, not CDSS, is responsible for choosing the foster care placement,
18 monitoring the dependent child’s well-being, and developing and overseeing the
19 implementation of the case plan. *See* Welf. & Inst. Code § 16501. Likewise case
20 plans are prepared by the county agency in charge of administering the foster care
21 program, who must update the plan at least every six months. Welf. & Inst. Code
22 §§ 16501(a)(2), 16501.1(e).

23 The Juvenile Court oversees this process through statutorily required periodic
24 reviews of each foster child’s status, including the extent of the county child
25 welfare agency’s compliance with the case plan and the necessity and
26 appropriateness of the foster child’s placement. Welf. & Inst. Code §§ 366(a),
27 366.21, 366.22, 366.3, 366.25, 16501.1(f). For transition age foster youth, in
28 particular, the Juvenile Court also oversees the county child welfare agency’s

1 compliance with necessary transition-planning requirements. Welf. & Inst. Code §
2 391. During periodic reviews, the Juvenile Court must consider the case plan or
3 transitional independent living case plan, as appropriate. Cal. Rules of Court, Rules
4 5.708(b) & (f); 5.903(e).

5 ARGUMENT

6 I. ALL SECTION 1983 CLAIMS FAIL AGAINST CDSS

7 Plaintiffs’ first (AACWA), second (substantive due process), third (procedural
8 due process), and sixth (family association) causes of action are brought under
9 Section 1983.

10 A. The Section 1983 Claims Against Non-Persons Fail

11 Only “persons” are proper defendants to Section 1983 claims. “The relevant
12 authority makes clear that a state is not a “person” for § 1983 purposes regardless of
13 the nature of relief sought.” *Jenkins v. Washington*, 46 F. Supp. 3d 1110, 1115
14 (W.D. Wash. 2014) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71
15 (1989); *see, e.g., Gaby v. Bd. of Trustees of Comm. Technical Colleges*, 348 F.3d
16 62, 63 (2d Cir.2003) (claim for or prospective injunctive relief barred against state
17 entity because it was not a “person” under § 1983); *McLaughlin v. Bd. of*
18 *Trustees*, 215 F.3d 1168, 1172 (10th Cir.2000) (same); *Kaimowitz v. Bd. of*
19 *Trustees*, 951 F.2d 765, 767 (7th Cir.1992) (claim seeking, *inter alia*, declaratory
20 relief against state entity barred because defendant was not a “person”
21 under § 1983)).

22 Furthermore, notwithstanding any exceptions for suits against the Director, in
23 her official capacity, for prospective injunctive relief, there is no exception for
24 declaratory relief for past violations. Accordingly, to the extent these claims seek
25 declaratory relief for such alleged violations (FAC, p. 98), such claims are barred
26 against the Director.

1 Therefore, the Section 1983 claims against the Department must be dismissed.
2 These claims also fail as to CDSS for numerous additional reasons, discussed
3 below.

4 **B. Claim One, the AACWA Claim, Fails**

5 Plaintiffs allege that “Defendants” violate the AACWA by failing to provide
6 legally compliant case plans and a case review system that include a legally
7 compliant transition plan. FAC, ¶ 291. Plaintiffs base this claim on 42 U.S.C. §
8 670, *et seq.* and, in particular, 42 U.S.C. § 671(a)(16). *See* FAC, ¶¶ 290-292. 42
9 U.S.C. § 671 (“Section 671”) provides that:

10 In order for a State to be eligible for payments under this part, it shall
11 have a plan approved by the Secretary which ... (16) provides for the
12 development of a case plan (as defined in section 675(1) of this title and
13 in accordance with the requirements of section 675a of this title) for each
14 child receiving foster care maintenance payments under the State plan
15 and provides for a case review system which meets the requirements
16 described in sections 675(5) and 675a of this title with respect to each
17 such child.

18 42 U.S.C. § 671.

19 **1. Plaintiffs Lack Standing for the AACWA Claim**

20 Plaintiffs do not meaningfully allege that any named plaintiff lacked a case
21 plan or case review. *See* FAC, ¶¶ 34-126. While plaintiffs assert threadbare legal
22 conclusions as to the case plans of some plaintiffs (*see, e.g., id.*, ¶¶ 57, 93, 100),
23 these allegations must be ignored. *See supra* (Legal Standard).

24 Having failed to allege the named plaintiffs were subject to the alleged
25 policies they challenge in this claim, plaintiffs lack standing as to this claim. *See,*
26 *e.g., Simon v. E. Kent. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (“[E]ven
27 named plaintiffs who represent a class ‘must allege and show that they personally
28

1 have been injured, not that injury has been suffered by other, unidentified members
2 of the class to which they belong and which they purport to represent.”).

3 **2. There Is No Basis for CDSS’ Liability under AACWA**

4 Not only do plaintiffs omit any allegations about themselves in this claim
5 (FAC, ¶¶ 173-184 (no allegations about plaintiffs)), they fail to allege any
6 meaningful factual content as to CDSS (*id.*). The totality of plaintiffs’ allegations
7 as to CDSS related to this claim are that “CDSS, as the single state agency charged
8 with complying with case planning and transition planning provisions of the
9 AACWA, has failed to monitor and ensure DCFS is meeting its legal obligations.”
10 FAC, ¶184.

11 This naked legal conclusion is not enough, particularly as the development and
12 review of case plans are the responsibility of the county child welfare agency in
13 conjunction with the Juvenile Court. Plaintiffs do not assert that it is CDSS’s
14 responsibility, nor can they. Instead, the County has responsibility for case plans
15 and the Juvenile Court reviews them. “The statutory scheme actually indicates that
16 the duty to fashion an appropriate case plan is the responsibility and prerogative of
17 the child welfare agency, with the court playing a limited oversight role.” *In re*
18 *M.R.*, 48 Cal. App. 5th 412, 426 n.3 (2020); *see also supra* (Legal Overview).

19 To plead liability against a government official in his or her official capacity,
20 there are specific requirements (such as alleging an ability and responsibility to end
21 the alleged violation), yet plaintiffs plead nothing but an unadorned legal
22 conclusion (FAC, ¶184). *See Hartmann v. California Dep’t of Corr. & Rehab.*, 707
23 F.3d 1114, 1127 (9th Cir. 2013) (describing pleadings required to create liability of
24 official within the entity who can appropriately respond to injunctive relief).

25 In sum, plaintiffs do not have standing for this claim; the allegations asserted
26 are not the responsibility of CDSS but are the responsibility of the county child
27 welfare agencies and overseen by the Juvenile Court. Plaintiffs failed to allege facts
28

1 sufficient to state a claim against CDSS related to this claim. The AACWA claim
2 fails for each of these independent reasons.

3 **C. Claim Two, The Substantive Due Process Claim, Fails**

4 The FAC alleges that “Defendants” violated plaintiffs’ substantive due process
5 rights. The Fourteenth Amendment typically “does not impose a duty on
6 government officers to protect individuals from third parties.” *Morgan v. Gonzales*,
7 495 F.3d 1084, 1093 (9th Cir. 2007). Moreover, there is no substantive right to an
8 array of placement options. Even if plaintiffs did state a claim for violation of their
9 substantive due process rights, plaintiffs fail to allege any deficiency by CDSS
10 regarding those rights.

11 **1. There Is No Substantive Right to a Placement Array**

12 Plaintiffs allege a violation of their substantive due process right under the
13 Fourteenth Amendment because “Defendants” have failed “to develop a minimally
14 adequate array of safe and stable placements” (FAC, ¶ 6); this allegation, however,
15 does not trigger a substantive due process right. One lower court within the Ninth
16 Circuit recently held that the “right to substantive due process does not ...extend to
17 placement in an optimal or least-restrictive setting, or to the availability of
18 an array of placement options.” *Wyatt B. by McAllister v. Brown*, 2021 WL
19 4434011, at *9 (D. Or. Sept. 27, 2021). The court noted that “such placements
20 would undoubtedly be better for all concerned, but are not guaranteed under the
21 Fourteenth Amendment.” *Id.* (“plaintiffs’ first claim must be dismissed to the extent
22 that it seeks to vindicate a substantive due process right ... to an array of
23 community-based placements”).

24 *Wyatt B.* relied on a relatively recent Fifth Circuit case, *M. D. by Stukenberg v.*
25 *Abbott* (hereafter *Abbott*), 907 F.3d 237, 268 (5th Cir. 2018). There, the Court of
26 Appeals reasoned that an “inadequate placement array does not unacceptably
27 increase the risk that a child will be exposed to serious physical or psychological
28

1 harm.” *Id.* The circuit court held that a small array of placements is not a basis for
2 a substantive due process claim. *Id.*

3 Here, plaintiffs allege “Defendants” are violating the Fourteenth
4 Amendment’s substantive due process rights by failing to develop a minimally
5 adequate array of safe and stable placements. This allegation is largely based on the
6 contention that the total number of placements in a THPP-NMD is far smaller than
7 the number of foster youth for whom a THPP-NMD placement would be a safe and
8 stable placement. FAC, ¶154. However, THPP-NMD providers are privately
9 operated entities. Health & Saf. Code §1502(a)(12); Welf. & Inst. Code §
10 11400(r)(1); 22 Cal. Code Reg. § 86018. Further, they have capacity limitations
11 based on standards such as available rooms and staffing. 22 Cal. Code Reg. §
12 86028. When a nonminor dependent applies to a particular THPP-NMD program,
13 the licensee must assess whether the licensee can meet that applicant’s needs based
14 on the level of care offered by the licensee and the licensee likely has multiple
15 applicants for limited number of openings. 22 Cal. Code Reg. § 86068.1(c). CDSS
16 is not involved in placement decisions and, as recognized by *Abbott, supra*, CDSS
17 cannot force more private entities to become licensed THPP-NMD providers. For
18 these reasons, even though there may be a right to a safe and stable placement, no
19 foster child is guaranteed a specific type of placement or a placement with a
20 specific provider, including placement in a THPP-NMD; therefore, there is no
21 substantive due process right to have a sufficient array of those third party
22 providers, under the settled law above. Accordingly, this claim fails.

23 **2. Plaintiffs Fail to Allege a Substantive Due Process Violation** 24 **by CDSS**

25 Even if a substantive due process right were triggered (and it was not), CDSS
26 does not have a duty to establish and ensure a “minimally adequate array of safe
27 and stable placements.” FAC, ¶6. Placements are the responsibility of the County,
28 not CDSS. Welf. & Inst. C. § 16001 (“County placement agencies shall, on a

1 regular basis, conduct an evaluation of the county's placement resources and
2 programs in relation to the needs of children and nonminor dependents placed in
3 out-of-home care. County placement agencies shall examine the adequacy of
4 existing placement resources and programs and identify the type of additional
5 placement resources and programs needed”).

6 The alleged deficiency is, even according to plaintiffs, caused by the County,
7 not CDSS. (FAC, ¶¶ 152-172). Indeed, it is the County that remains solely
8 responsible for administering the child welfare services program, including foster
9 care. See Welf. & Inst. Code § 16500 (“All counties shall establish and maintain
10 specialized organizational entities within the county welfare department which shall
11 have sole responsibility for the operation of the child welfare services program.”)
12 Plaintiffs concede as much. FAC, ¶24 (“DCFS is the agency responsible for
13 administering foster care services in Los Angeles County, for providing placements
14 for youth in the foster care system, and for ensuring the safety and well-being of
15 children under court supervision”).

16 As with their AAWCA claim, plaintiffs have failed to allege any shortcoming
17 by CDSS or that CDSS or its Director can fix this alleged shortcoming, as required
18 to state a claim. *Supra*, p. 10. Accordingly, plaintiffs’ substantive due process
19 claim fails as to CDSS, for this reason and the other independent reasons set forth
20 above.

21 **D. Claim Three, The Procedural Due Process Claim, Fails**

22 The crux of this claim is that “Defendants” deprived “Plaintiffs of their
23 property without providing adequate procedural safeguards by failing to provide
24 sufficient notice or hearing before a neutral arbiter before a youth is denied
25 admission to, or evicted from THPP-NMD and SILP” programs and because of
26 “opaque and arbitrary placement application processes”. FAC, ¶¶ 8, 302.

27
28

1 **1. SILP Decisions Are Reviewed at a Due Process Hearing**

2 Plaintiffs do not allege that CDSS has failed to provide due process in relation
3 to adverse SILP decisions. Instead, the FAC acknowledges that the law and CDSS
4 policies provide for due process challenges in the CDSS’s State Hearing Division.
5 FAC, ¶¶ 195, 203. Although the FAC asserts that on “information and belief” the
6 County failed to advise of these rights (FAC, ¶¶ 195, 203) there are no facts
7 asserted, just this unadorned legal conclusion. So, these allegations are to be
8 ignored and, in any event, do not relate to CDSS. If there could be some basis to
9 hold CDSS liable regarding a procedural due process violation for SILP decisions,
10 the FAC does not put CDSS on notice of it.

11 **2. THPP-NMD Decisions Do Not Trigger Due Process Rights**

12 The procedural component of the Due Process Clause does not protect
13 everything that might be described as a “benefit”. The Supreme Court has held that
14 a person seeking a benefit provided by the government has a property interest in the
15 benefit for purposes of procedural due process only if the person has “a legitimate
16 claim of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S.
17 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must
18 have more than an abstract need or desire for it. He must have more than a
19 unilateral expectation of it. He must, instead, have a legitimate claim of entitlement
20 to it.”). *Roth* 408 U.S. at 577.

21 If the decision maker has the discretion to grant or deny the benefit, then the
22 alleged benefit is *not* a protected property interest under the Due Process Clause.
23 *Castle Rock v. Gonzales* 545 U.S. 748, 756 (2005). State and local law determine
24 whether such discretion exists. *Id.* at 757. “The hallmark of property, the Court has
25 emphasized, is an individual entitlement grounded in state law, which cannot be
26 removed except ‘for cause.’” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430
27 (1982).

28

1 Plaintiffs do not (and cannot) allege a property right in a THPP-NMD
 2 placement generally, much less in any specific THPP-NMD. The totality of
 3 allegations purporting to establish a property right in a THPP-NMD placement are
 4 set forth in one wholly conclusory paragraph. FAC, ¶ 186. That alone is enough to
 5 dismiss this claim. *See supra* (Legal Standard).

6 Moreover, no putative-resident has a vested property right in any THPP-NMD
 7 placement. These placements are in privately operated facilities. Health & Saf.
 8 Code §1502(a)(12); Welf. & Inst. Code §11400(r)(1), 22 Cal. Code Reg. § 86018.
 9 There are required admissions criteria. 22 Cal. Code Reg. § 86068.1(B)(a).
 10 Further, they have capacity limitations based on standards such as available rooms
 11 and staffing. 22 Cal. Code Reg. § 86028. When a nonminor dependent applies to a
 12 particular THPP-NMD program, the licensee must assess whether the licensee can
 13 meet that applicant's needs based on the level of care offered by the licensee and
 14 the licensee likely has multiple applicants for limited number of openings. Nor is
 15 there any showing of a lack of discretion on the part of the provider. This, too, is
 16 enough to dismiss this claim.

17 **3. Plaintiffs Alleged Facts Are Insufficient to Trigger** 18 **Procedural Due Process**

19 Even if there were a triggered-procedural due process right (and there is not),
 20 the FAC does not identify any THPP-NMD to which plaintiffs are entitled to
 21 admission, nor any admissions criteria, let alone a plaintiff who is qualified
 22 applicant and a provider with space. *See supra* (Legal Standard). Therefore, this
 23 claim fails due to plaintiffs' failure to plead a specific detail with sufficient factual
 24 support. *See Legal Standard supra*.

25 **4. There Is a Sufficient State Remedy and Therefore No** 26 **Procedural Due Process Violation**

27 A denial or removal from one THPP-NMD alone is not enough to trigger a
 28 due process right. "The constitutional violation actionable under § 1983 is not
 complete when the deprivation occurs; it is not complete unless and until the State

1 fails to provide due process. Therefore, to determine whether a constitutional
2 violation has occurred, it is necessary to ask what process the State provided, and
3 whether it was constitutionally adequate. This inquiry would examine the
4 procedural safeguards built into the statutory or administrative procedure of
5 effecting the deprivation, and any remedies for erroneous deprivations provided by
6 statute or tort law.” *Zinerman v. Burch*, 494 U.S. 113, 125–26, (1990); *Garrett v.*
7 *Governing Bd. of Oakland Unified Sch. Dist.*, 583 F. Supp. 3d 1267, 1279 (N.D.
8 Cal. 2022) (“the Court therefore finds that Plaintiffs have not stated a cognizable
9 procedural due process claim because adequate state remedies are still available”).

10 Here, plaintiffs do not appear to be arguing that placement in any specific
11 THPP-NMD is a vested right—they identify none. If the County and Juvenile
12 Court determine that placement in a THPP-NMD is proper, but a specific THPP-
13 NMD denies admission or removes a nonminor dependent, the remedy is for the
14 County to find another placement. That is a responsibility of the County, not
15 CDSS. *See supra* (Legal Overview).

16 **E. Claim Six, The Familial Association Claim, Fails**

17 The basis of this claim is that the County allegedly fails to provide parenting
18 nonminor dependents with a sufficient array of housing options where they can
19 remain with their children. FAC, ¶¶ 205-214.

20 The First and Fourteenth Amendments do protect rights regarding family life.
21 *See e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (right to parent-child
22 relationship); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (right to
23 make family decisions regarding work and childbearing); *Loving v. Virginia*, 388
24 U.S. 1 (1967) (right to interracial marriages); *Meyer v. Nebraska*, 262 U.S. 390, 399
25 (1923) (right “to marry, establish a home and bring up children”). However, and
26 fatal to plaintiffs’ claim, there is no constitutional right that imposes an affirmative
27 duty to nurture familial relationships. *See Marisol A. by Forbes v. Giuliani*, 929 F.
28 Supp. 662, 675 (S.D.N.Y. 1996) (“[C]ourts . . . have been loathe to impose a

1 constitutional obligation on the state to ensure a particular type of family life.”).
2 Instead, these Amendments act as negative prohibitions on the government,
3 providing a “constitutional shelter” “against undue intrusion by the State.” *Roberts*
4 *v. United States Jaycees*, 468 U.S. 609 (1984).

5 Even if there were such a right triggered by the allegations (and there is not),
6 this claim fails for the same reasons as the claims above. CDSS is not responsible
7 for placements or for the array of placements. *See* (Legal Overview). Plaintiffs
8 have not alleged an ability for CDSS to remedy the problem. *See supra* p. 10.
9 (citing cases). And the actual facts alleged, mere placement denials (FAC, ¶ 213,
10 214), are not enough to trigger Constitutional rights. *See supra* pp. 14-15. Thus,
11 plaintiffs do not allege sufficient facts to establish that CDSS violated this alleged
12 right.

13 **II. CLAIMS FOUR AND FIVE, THE REHAB ACT AND ADA CLAIMS, FAIL**

14 Title II of the ADA and Section 504 of the Rehabilitation Act prohibit denial
15 of public services by reason of a disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).
16 Because there is no significant difference in the analysis of rights and obligations
17 created under Section 504 and Title II of the ADA, courts “construe the two
18 provisions as co-extensive” and they are typically analyzed together. *Sanchez v.*
19 *Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005); *Vinson v. Thomas*, 288 F.3d 1145,
20 1152, n.7 (9th Cir. 2002).

21 To prove a public program or service violates Title II of the ADA, a plaintiff
22 must show that: (1) he or she is a qualified individual with a disability; (2) he or she
23 was either excluded from participation in or denied the benefits of a public entity’s
24 services, programs or activities, or was otherwise discriminated against by the
25 public entity; and (3) the exclusion, denial of benefits, or discrimination was by
26 reason of his or her disability. *See* 42 U.S.C. § 12132; *Does 1-5 v. Chandler*, 83
27 F.3d 1150, 1154-1155 (9th Cir. 1996.)
28

1 To prove a Section 504 claim, a plaintiff must show: (1) he or she is an
2 individual with a disability; (2) he or she is otherwise qualified to receive the
3 benefit; (3) he or she was denied the benefits of the program solely by reason of his
4 or her disability; and (4) the program receives federal financial assistance. *See* 29
5 U.S.C. § 794; *Weinreich v. Los Angeles County Metropolitan Transp. Authority*,
6 114 F.3d 976, 978 (9th Cir. 1997).

7 Plaintiffs fail to allege CDSS discriminated against them based on disability.
8 CDSS is not responsible for providing plaintiffs with direct services. As explained
9 above, that responsibility falls on the local and county agencies and is overseen by
10 the Juvenile Court. *Supra* (Legal Overview).

11 Because the FAC does not allege any acts or inactions by CDSS or any basis
12 to hold CDSS liable for the acts or inactions of other defendants, CDSS must be
13 dismissed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992) (a plaintiff
14 must allege a causal connection between injury and conduct traceable to the
15 defendant, and that the injury can be redressed by a favorable decision); *Witherbee*
16 *v. Dow*, 2022 WL 2964382, at *3 (C.D. Cal. June 15, 2022) (complaint must allege
17 facts that “link any of the individual Defendants’ conduct to the alleged []
18 violations”); *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal.
19 2014) (dismissing complaint that lacked “facts of defendants’ specific wrongdoing
20 to provide fair notice as to what each defendant is to defend”); *Fuller v. Lopez*,
21 2020 WL 8834791, at *5 (D. Ariz. Dec. 1, 2020) (dismissing complaint where
22 plaintiff “does not connect these Defendants’ specific conduct to a specific harm he
23 allegedly suffered”).

24 Plaintiffs cannot overcome their deficient pleading by lumping all defendants
25 together, as they try to do. *See generally* FAC (referring to “defendants” loosely
26 throughout). A “plaintiff who sues multiple defendants must allege the basis of
27 [its] claim against each defendant” separately. *Culinary Studios, Inc. v. Newsom*,
28 517 F. Supp. 3d 1042, 1074 (E.D. Cal. 2021). Plaintiffs must provide “specific

1 facts regarding what alleged actions taken by specific individuals resulted in a
2 violation of the[ir] rights.” *Mills v. California*, 2020 WL 4928302, at *4 (C.D. Cal.
3 June 29, 2020). A complaint that “lumps defendants . . . together and fails to
4 distinguish adequately claims and alleged wrongs among defendants” is subject to
5 dismissal. *Herrejon v. Ocwen Loan Servicing, LLC*, 980 F. Supp. 2d 1186, 1197
6 (E.D. Cal. 2013); *see also Sherrell v. Bank of Am., N.A.*, 2011 WL 6749765, at *4
7 (E.D. Cal. Dec. 22, 2011) (“Specific identification of the parties to the activities
8 alleged by [a plaintiff] is required . . . to enable the defendant to plead
9 intelligently.”); *Sebastian Brown Prods., LLC v. Muzooka, Inc.*, 143 F. Supp. 3d
10 1026, 1037 (N.D. Cal. 2015) (“A plaintiff ‘must identify what action each
11 Defendant took that caused Plaintiffs’ harm, without resort to generalized
12 allegations against Defendants as a whole.’”).

13 Lastly, the few conclusory allegations about CDSS have no factual specificity
14 and in any event are facially reasonable. *See* FAC, ¶ 225 (licensing standards allow
15 providers to review medical history); *Id.*, ¶ 246 (licensing standards allow providers
16 to remove people for health and safety reasons); *Id.*, ¶ 246 (licensing standards
17 allow providers to remove people when provider can no longer meet their need).
18 Plaintiffs do not cite the alleged standards nor do they “connect the dots” from
19 these obviously reasonable standards to the alleged harms at issue in the FAC. As
20 with the rest of the FAC against CDSS, plaintiffs’ allegations fall short of stating a
21 claim.

22 **III. CDSS MAINTAINS SOVEREIGN IMMUNITY UNDER THE ELEVENTH** 23 **AMENDMENT**

24 Finally, the CDSS is immune to suits in federal court and should be dismissed
25 from this case. “The Eleventh Amendment prohibits federal courts from hearing
26 suits brought against an unconsenting state.” *Brooks v. Sulphur Springs Valley*
27 *Elec. Co-op.*, 951 F.2d 1050, 1053 (9th Cir. 1991) (citations omitted). “The
28 Eleventh Amendment’s jurisdictional bar covers suits naming state agencies and

1 departments as defendants, and applies whether the relief sought is legal or
2 equitable in nature.” *Id.*

3 It is equally settled that this immunity applies to the CDSS. *Genevier v. U.S.*
4 *Citizenship & Immigr. Servs.*, 144 F. App’x 586, 587 (9th Cir. 2005) (“The district
5 court properly dismissed [] claims against CDSS because, as an arm of the state, it
6 is entitled to Eleventh Amendment immunity.”) (citing *Brooks*, 951 F.2d at
7 1053). Moreover, CDSS is also immune from any Section 1983 claim. *See*
8 *Dittman v. California*, 191 F.3d 1020, 1025–26 (9th Cir. 1999). “California has not
9 waived its Eleventh Amendment immunity with respect to claims brought under §
10 1983 in federal court.” *Id.* Nor has California waived its immunity through its
11 receipt of federal funding. *See Sossamon v. Texas*, 563 U.S. 277, 293, (2011)
12 (“States, in accepting federal funding, do not consent to waive their sovereign
13 immunity to private suits.”)

14 **CONCLUSION**

15 For all the foregoing reasons, CDSS respectfully requests that the Court grant
16 its motion to dismiss with prejudice.

17 Dated: November 29, 2023

Respectfully submitted,

18
19 ROB BONTA
Attorney General of California
20 BENJAMIN G. DIEHL
Supervising Deputy Attorney General

21 */s/ Andrew Edelstein*

22 ANDREW Z. EDELSTEIN
Deputy Attorney General
23 *Attorneys for Defendants California*
24 *Department of Social Services and*
Director Kim Johnson

25 LA2023603313

26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for California Department of Social Services and Director Kim Johnson, certifies that this brief contains 5,372 words, which:

X complies with the word limit of L.R. 11-6.1.

___ complies with the word limit set by court order.

Dated: November 29, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
BENJAMIN G. DIEHL
Supervising Deputy Attorney General

/s/ Andrew Edelstein

ANDREW Z. EDELSTEIN
Deputy Attorney General
*Attorneys for Defendants California
Department of Social Services and
Director Kim Johnson*

CERTIFICATE OF SERVICE

Case Name: **Ocean S., et al. v. LA COUNTY** No. **2:23-cv-06921-JAK-E**
(CHHS)

I hereby certify that on November 14, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES AND DIRECTOR KIM JOHNSON'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS & AUTHORITIES

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 29, 2023, at Los Angeles, California.

Alyssa Barragan

Declarant

/s/ Alyssa Barragan

Signature

LA2023603313
66378832.docx